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The Digest

Annotated British, Commonwealth and European Cases

41

1997 2nd reissue

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Settlements

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Abbreviations

1 ABBREVIATIONS OF REPORTS

A complete list of abbreviations used in citing Reports is to be found in Volume 1(1) pages xiii-xxxv. Additions or alterations to this list will be noted in future Supplements.

2 GENERAL ABBREVIATIONS

AG	Aktiengesellschaft
A-G	Attorney-General
Act	Actiengesellschaft
Affd	Affirmed
Affg	Affirming
Akt	Aktiengesellschaft; Aktiebolaget; Aktieselskabet
Alta	Alberta
Anon	Anonymous
Apld	Applied
Apprvd	Approved
Art	Article
Ass Tax Case	Assessed Tax Case
Aus	Australia
BC	Borough Council
BC	British Columbia
CA	Court of Appeal
CBC	Canadian Broadcasting Corporation
CC	County Council
CCA	Court of Criminal Appeal
CCR	County Court Rules
CCR	Court of Crown Cases Reserved
CLP Act	Common Law Procedure Act
COR	Crown Office Rules
CSUC	Consolidated Statutes of Upper Canada
Ca sa	Capias ad satisfaciendum
Can	Canada
Ch Div	Chancery Division
Cl/cll	Clause/clauses
Co	Company
Comrs	Commissioners
Consd	Considered
Consist Ct	Consistory Court
Cont	Continued
Corpn	Corporation
Ct	Court
Ct of Bkpcy	Court of Bankruptcy
Ct of Ch	Court of Chancery
Ct of Eq	Court of Equity
Ct of R	Court of Review
Ct of Sess	Court of Session
Cty	County
Cty Ct	County Court
DC	Divisional Court
DPP	Director of Public Prosecutions
Dept	Department
Distd	Distinguished
Div Ct	Divisional Court
ECJ	European Court of Justice
E Af	East Africa
Eccl Comrs	Ecclesiastical Commissioners
Eccl Ct	Ecclesiastical Court
EEC	European Economic Community
Ex Ch	Exchequer Chamber
Ex p	Ex parte
Exch	Exchequer
Exch Ct	Exchequer Court
Expld	Explained
Extd	Extended
Fam Div	Family Division
Fi fa	Fieri facias
Folld	Followed
Govt	Government
HC of A	High Court of Australia
HL	House of Lords
HSI	Halsbury's Statutory Instruments
I of M	Isle of Man
IR Comrs	Inland Revenue Commissioners
Inc	Incorporated
Ir	Ireland
JJ	Justices
Jud Act	Judicature Act
KB Div	King's Bench Division
LB	Local Board
LC	Lord Chancellor
LCC	London County Council
LG	Local Government
LG Board	Local Government Board
LJ	Lord Justice

LJJ	Lord Justices
Lieut-Gov	Lieutenant-Governor
London BC	London Borough Council
Ltd/Ltda/Ltee	Limited/Limitada/Limitee
Mags	Magistrates
Man	Manitoba
Mentd	Mentioned
NB	New Brunswick
NF	Not Followed
NI	Northern Ireland
NP/np	Nisi Prius
NS	Nova Scotia
NSW	New South Wales
NWP	North-West Provinces
NWT	North-West Territories
NZ	New Zealand
Ont	Ontario
Ord	Order
Overd	Overruled
PC	Privy Council
PEI	Prince Edward Island
QB Div	Queen's Bench Division
Qd	Queensland
Qu	Quaere
Que	Quebec
R/r	Rule
RAF	Royal Air Force
RC	Rural Council
RDC	Rural District Council
RM	Rural Municipality
RSA	Rural Sanitary Authority
RSC	Revised Statutes of Canada
RSC	Rules of the Supreme Court
Refd	Referred
Reg	Regulation
Restg	Restoring
Revsd	Reversed
Revsg	Reversing
Rs/rr	Rules
Ry Co	Rail Co or Railway Co or Railway Company
s	Section
SA	Société Anonyme
S Af	South Africa
S Aus	South Australia
SC	Same Case
SC (Name of colony following)	Supreme Court of a Colony
SE	Settled Estates
SS	Steamship
Sask	Saskatchewan
Sched/Sch	Schedule
Sci fa	Scire facias
Sects/ss	Sections
Soc	Society
Soc Anon	Société Anonyme
TC	Town Council
Tas	Tasmania
UC	Urban Council
UDC	Urban District Council
UK	United Kingdom
US/USA	United States of America
VAT	Value Added Tax
V-C	Vice-Chancellor
Vic	Victoria
W Af	West Africa
W Aus	West Australia
W Indies	West Indies
YT	Yukon Territory

Meaning of terms used in classifying annotating cases

The different expressions used to describe the effect of the annotating cases have the following meanings, and the classification of the annotating cases has been done strictly in accordance with these meanings. The annotating cases are grouped according to the points in the case which they annotate; within these groups they are listed chronologically. The terms used in classifying the annotating cases are as follows:—

"Applied" (Apld) This expression is used to denote the fact that the principle of law enunciated in the annotated case has been applied to a new set of facts and circumstances in the annotating case.

"Approved" (Apprvd) This expression is used to denote the fact that the annotated case has been considered to be good law in the annotating case where the latter is in a higher court than the former.

"Considered" (Consd) This expression is used where the remarks in the annotating case are devoid of adverse criticism and merely denote the giving of more or less careful consideration to the annotated case.

"Distinguished" (Distd) This expression is used where the earlier case is not necessarily doubted, but where some essential difference (either on the facts or in law) between it and the annotated case is pointed out.

"Doubted" (Dbtd) This expression is used where the court in the annotating case without definitely going to the length of saying that the annotated case is wrong, adduces reasons which seem to show that it is not accurate.

"Explained" (Expld) This expression is used where the earlier case is not necessarily doubted, but the decision arrived at is justified or accounted for by calling attention to some point of fact or of law which is usually, but not necessarily, one not obvious on the face of the report.

"Extended" (Extd) Compare `"Applied" supra.

"Followed" (Folld) This expression is used to denote that the same principles of law are applied in the two cases. It does not necessarily imply that the facts are substantially identical in the two cases.

"Not Followed" (NF) Compare "Followed" supra, to which it is the adverse.

"Overruled" (Overd) This expression is used where the annotating case is on substantially identical facts with the annotated case and in a higher court and the rule in the latter case is held to be wrong.

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1 NATURE AND VALIDITY OF SETTLEMENTS

1 In general

i KINDS OF SETTLEMENTS

1 Definition

LAW See Halsbury's Laws (4th edn) vol 42 para 601 et seq

CROSS REFERENCE See no 1000 et seq post (under Settled Land Acts)

Scottish, Irish and Commonwealth Cases

1 Bankruptcy — Company acting as trustee under family trust — Whether direction by creditor to transfer part of moneys from loan account to benefit of trust amounting to a settlement

The respondent was the trustee of the "Beauty Point Trust" in respect of which members of the bankrupt's family were the principal beneficiaries. The trust was created on 29 May 1978 and shortly thereafter it purchased the bankrupt's home with moneys lent in part by the bankrupt. At 19 June 1981 the bankrupt was owed some $229,000 by the trust. On that date the bankrupt wrote to the respondent stating: "I hereby acknowledge that I have unconditionally gifted to you the sum of $180,000 which will be satisfied by you debiting my loan account in your books of account by an amount of $180,000."

The applicant sought a declaration that the forgiveness of the debt to the extent of $180,000 was void pursuant to s 120 of the Bankruptcy Act 1966 (Cth). The respondent contended, on two grounds, that s 120 has no application: first that there was an immediate consumption or alienation of the gift so that there was not the permanent benefit required for a "settlement"; and secondly (in the alternative), that the letter was not effective to dispose of the debt of $180,000 and that therefore there was no settlement. It was accepted that the consequences of the second contention was that the $180,000 would be recoverable by the respondent in an action at law: *Held* in declaring that the transaction effected by the respondent in response to the bankrupt's letter was void against the applicant:—

(i) The assignment or forgiveness of a debt is a "disposition of property" and thus a "settlement" within that definition in s 120(8). By such a transaction the donor divests himself of a right of property, namely his chose in action for the recovery of the debt.

(ii) (*a*) The forgiveness by the bankrupt of the obligation to repay the sum of $180,000 is a transaction which meets any test of permanent benefit which may be required by the authorities for a "settlement". The effect of the transaction was to increase the net assets of the trust in exactly the same way as if that sum, or property of that value, had been transferred to the respondent to be held upon the trusts. The respondent was bound to hold the additional equity on behalf of the beneficiaries, it was a permanent addition to the assets of the trust as intended by the donor; it was a transaction in the nature of a settlement.

(*b*) The definitions of "settlement" in previous legislation as including a "conveyance or transfer of property", although stated in non-exhaustive terms, suggest permanency of subject-matter and would appear to have influenced the approach of the courts to the question whether a disposition intended for immediate alienation or consumption may be a "settlement". No longer does the definition of settlement in s 120(8) have that connotation of permanent benefit.

(iii) On the basis accepted by the parties, that the transaction is characterized correctly as an assignment by the bankrupt to the respondent to part of a legal chose in action, it was an effective assignment in equity. The letter contained a clear expression of intention to make an immediate and irrevocable transfer of the interest by way of gift and was effective to achieve its purpose.

(iv) If instead of an assignment, the letter operated in lieu as a forgiveness, or release, *pro tanto*, of the debt, then whether or not a legal right may be released voluntarily in equity by writing not under seal, the facts give rise to a promissory estoppel precluding the bankrupt from reneging on his promise and exercising his legal rights to sue for the $180,000.

Re Ward, Ex p Official Trustee in Bankruptcy v Dabmas Pty Ltd [1984] 55 ALR 395 (AUS)

2 Bankruptcy — Bill of sale — Whether a settlement — Whether valuable consideration

About August 1986, the assignor borrowed money from a bank on the security of a guarantee given by his parents, the respondents. The guarantee was signed on 30 July 1986 on the basis that some security for the guarantee would be given. The assignor executed a bill of sale on 24 August 1986 in favour of the respondents to cover his contingent liability to them, but it was not dated, stamped or registered until December 1986. The bank advanced the money on 5 September 1986. On 6 March 1987 the assignor executed a deed of assignment in favour of the applicant trustee, pursuant to a resolution at a meeting of creditors passed on that day. The trustee sought to set aside the bill of sale on two alternative bases: (*a*) that it was a preference given to the respondents within six months of the commencement of bankruptcy, pursuant to s 122 of the Bankruptcy Act 1966 (Cth) (the Act); and (*b*) that it was a settlement of property made within two years of the commencement of bankruptcy, pursuant to s 120 of the Act, the respondents not being "an encumbrancer in good faith and for valuable consideration": *Held* dismissing the application: (i) Section 7 of the Bills of Sale and Other Instruments Act 1955–81 (Qld) achieves the result that when executed a bill of sale is only potentially effective (against persons other than

grantor and grantee), but when registered it is taken to be effective from the date of execution.

(ii) The parol evidence rule does not apply to the date of an instrument: the date shown on an agreement may be contradicted.

(iii) Section 4A of the Stamp Act 1894 (Qld), which provides, *inter alia*, that an instrument chargeable with stamp duty shall not be available for any purpose whatever unless it is duly stamped, has no effect on a stamped bill of sale.

(iv) The granting of a bill of sale was a "settlement of property" within the terms of s 120 of the Bankruptcy Act 1966 (Cth).

(v) The trustee was not bound by the statement of the consideration; the court will go behind the written agreement in order to ascertain the reality of the transaction.

(vi) An act done before the giving of a promise to confer a benefit is valid consideration for that promise if the act was done at the promisor's request, the parties understood that the act was to be remunerated by conferment of the benefit, and the conferment of a benefit would have been enforceable if it had been promised in advance.

(vii) *Semble*: the trustee could not be allowed to upset the transaction merely because the selection of the precise form of security was briefly deferred.

Re Douglas, Ex p Starkey [1987] 75 ALR 97 (AUS)

3 Bankruptcy — Avoidance of antecedent transaction — Whether a settlement — Whether valuable consideration

On 4 April 1973 inspectors were appointed pursuant to s 170(1) of the Companies Act 1961 (NSW) to investigate the affairs of a large number of companies in which Mr Alexander Barton and Mr Thomas Barton (a bankrupt) were interested. Two of the companies were Cordec Corporation Pty Ltd (Cordec) and Hawkesbury Developments Pty Ltd (Hawkesbury).

Between 14 and 17 April 1973 meetings were held by the Bartons. It was then agreed that the residential home owned by Cordec should be sold to the appellant for $120,000 and that the shares in Hawkesbury be sold to the appellant for $50,000. A deed of loan was then executed by the bankrupt as lender and the appellant as borrower whereby the bankrupt lent the appellant $170,000. Interest on the loan was well below commercial rates and the principal was repayable in 20 years. The appellant was to care for Mrs Barton senior and Mr Alexander Barton's mother-in-law, both of whom were elderly and both of whom were to reside in the residential home.

The respondent applied to the Federal Court to avoid, pursuant to ss 120 and 121 of the Bankruptcy Act 1966, the payment of the $170,000. *McGregor J* declared that the payment of $170,000 was "a settlement of property" within the meaning of s 120(1) and was not made for "valuable consideration" within the meaning of s 120(1)(*a*). His Honour declared the payment void as against the respondent. The appellant appealed: *Held* (i) The appeal would be dismissed.

(ii) The deed amounted to a "settlement of property":—

Per *Lockhart J*: For there to be a settlement of property within the meaning of s 120 there must be a settlement in the ordinary sense of the word, a transaction in the nature of a settlement, though it may be effected by any disposition. The retention of the property in some sense must be contemplated and not its immediate dispersion.

(iii) As to what constitutes valuable consideration—

Per *Sweeney J*: Section 120(1) requires the Official Receiver to show that the appellant had not provided consideration which had a real and substantial value, amounting to a *quid pro quo* in a commercial sense for the loan which was made to him.

Per *Fisher J*: The consideration for the loan need not be adequate or sufficient, but it is not proper to consider each term upon which the loan was made separately and divorced from other terms.

Per *Lockhart J*: To constitute a purchase for valuable consideration it is not necessary that either money or physical property should be given, but a nominal, trivial, colourable or fictitious consideration would not suffice. The phrase connotes a purchaser in the ordinary commercial sense who gives consideration which is real and substantial.

Barton v Official Receiver [1984] 58 ALR 328 (AUS)

4 Bankruptcy — Avoidance of antecedent transaction — Whether a settlement — Intended retention of property by donee — Disposition

The bankrupts had previously traded as motor vehicle dealers and wholesalers. The respondent company also carried on business as a motor dealer, O Motors. In May 1988 the male bankrupt visited O Motors and proposed a transaction to a director of O Motors, B, whereby three motor vehicles and a motor boat would be purchased by O Motors for $1 million and soon after repurchased by the bankrupts' business for $1,040,000, the apparent purpose being to create a loss for the bankrupts which would be of advantage to them in their taxation arrangements. This transaction was carried through on 15 May 1988. A few days later the male bankrupt and B engaged in a second similar transaction, this time involving the purchase and resale of the entire stock of the bankrupts' businesses by the respondent. On this second occasion, however, the required statutory and other paperwork for the passing and repassing of title in the stock was not completed, and no adequate survey of the bankrupts' stock had been undertaken by B. The respondent gave the bankrupts three cheques totalling $10 million, and on 18 May 1988 the respondent received $10,250,000 from one of the bankrupts' businesses. The bankrupts were made bankrupt on 26 August 1988. The Trustee in Bankruptcy sought declarations that the transactions were void and that the net amount received by the respondent ($290,000) constituted a voluntary settlement of property under s 120 of the Bankruptcy Act 1966 (Cth) (the Act) which should vest in the trustee, or alternatively an order that the transactions were a sham and an equitable fraud on the bankrupts' creditors for which an account must be made to the trustee. The respondent argued that the transactions were not settlements but sales and purchases made for valuable consideration and in good faith: *Held* (i) A "settlement" of property for the purposes of s 120 of the Act is a disposition of property contemplating its retention in some form by the donee rather than immediate consumption or dissipation by the donee.

(ii) The definition of a settlement in the Act as including "any disposition of property" had not widened the

meaning of a settlement in previous law, or disposed of the requirement that the properties settled be intended or contemplated to be retained and enjoyed by the donee for some indefinite period.

(iii) There was no evidence that the male bankrupt intended or contemplated that the net payments received by the respondent would be retained in any way or form and, consequently, s 120 of the Act did not apply.

(iv) In order to determine whether a transaction is a sham, the court must ascertain the true intentions of the parties by direct evidence or inference from the whole of the circumstances. Ulterior purposes, artificiality, complexity and the exchange of cheques may be relevant. The test was that the parties must have a common intention that the transaction be mistaken for something else; that the acts or documents are not to create the legal rights or obligations they give the appearance of creating. However, evidence of artificiality or ulterior purpose may be consistent with an intention to be bound by the apparent obligations even if delivery and redelivery were never to be effected.

(v) The present transactions were not genuine contracts for the sale and repurchase of goods. Their true nature was short term advances by the respondent to be repaid virtually instanter by the return of moneys with a substantial premium.

(vi) However, the evidence did not establish any relationship between the transactions and the position of actual or prospective creditors of the bankrupts such that the respondent could in equity be called to account for the benefit it has obtained. In the absence of an intention to defraud creditors, an improvident benefit conferred under a sham transaction will not of itself give rise to a right of recovery.

Re La Rosa and another, Ex p Norgard v Rocom Pty Ltd [1990] 93 ALR 571 (AUS)

5 Bankruptcy — Avoidance of antecedent transaction — Whether a settlement — Foreign immovable property

Prior to 17 April 1990 Mr and Mrs Doyle were co-owners of a residential unit in Hamburg, Germany. On 17 April 1990 a document described as a deed of gift was declared before a Hamburg notary, by which Mr Doyle transferred his share in the property to Mrs Doyle and she accepted the gift. Mr Doyle died on 29 July 1990 and an order for the administration of his estate in bankruptcy was made on 13 September 1991 pursuant to the Bankruptcy Act 1966 (Cth) (the Act).

The trustee of the estate sought declarations and relief in *personam*, submitting that the transfer of the property, being a settlement of property not for valuable consideration and within the requisite period, was void as against the trustee by virtue of s 120 of the Act: *Held* dismissing the application:

(i) The expression "settlement of property" in s 120 of the Act must be limited to exclude settlements of foreign immovables made under foreign law. The expression does not have the universality it would if the universal definition of "property" in s 5 of the Act were read into it without qualification. The grounds for the limitation include the following:

(*a*) The definition of "property" only applies "unless the contrary intention appears".

(*b*) It is an entrenched rule of construction that the rules of private international law must be taken into account, including the rule that it is for the *lex situs* to determine the effectiveness of any conveyance.

(*c*) The terms of s 120 are consistent with the idea that the section should be subject to some territorial limitations.

(*d*) The imposition of s 120 upon a transfer of land in a foreign country involves the incongruity of applying a set of disqualifying conditions different from those that might apply if the bankrupt were the subject of a sequestration order in the foreign country.

(ii) The power of the court under s 30 of the Act to decide all questions coming within the "cognizance" of the court does not exclude the rule that a local court will not try an action involving foreign immovables. "Cognizance" relevantly means "the right of dealing with any matter judicially; jurisdiction". Nor is the jurisdiction of the court expanded by the Jurisdiction of Courts (Foreign Land) Act 1989 (NSW).

(iii) *Quaere*: whether a sequestration order in Australia has any effect on foreign immovable property, whether owned by the bankrupt or a third party.

Re Doyle (dec'd), Ex p Brien v Doyle [1993] 112 ALR 653 (AUS)

6 Bankruptcy — Settlement of property — Payments by bankrupt and others to wife of bankrupt

Peter John Kastropil became a bankrupt upon his own petition on 28 November 1986. The applicant (the official trustee) sought declarations and consequential orders related to the following payments:

(*a*) payments made by a bank to a joint account in the name of the bankrupt and his wife (the respondent to these proceedings) pursuant to a loan to pay for the cost of building a house on land registered in the wife's name alone;

(*b*) four payments made by the bankrupt to accounts held either solely in the name of the wife or in their joint names;

(*c*) one payment of $20,000 made by the bankrupt to the joint housing loan account in the name of he and his wife.

The official trustee claimed that each payment was a "settlement" within the meaning of s 120 of the Bankruptcy Act 1966 (Cth): *Held*

(i) Before a disposition of property, including money, can be considered a "settlement", a retention of the property in some sense must be contemplated and not its immediate dissipation or consumption. The legislative and judicial history of s 120 of the Act and other equivalent sections considered.

(ii) In considering whether a particular payment constitutes a settlement, the terms "permanency" and "retention" are used in a relative way and judgments of degree may be involved. However, it is broadly possible to say that expenditure of an income kind such as housekeeping allowances, school fees, entertainment or living expenses would be difficult to characterise as settlements.

(iii) In respect of payment (*a*) above, the mere entry by the bankrupt into the joint and several loan transaction and the subsequent advance by the bank for the benefit of his wife did not constitute a settlement.

(iv) In respect of payment (*b*) above in the absence of evidence of the purpose for which each of the four payments were made, it was not possible to conclude that these payments satisfied the permanency test required for a settlement.

(v) In respect of payment (*c*) above, the whole sum of $20,000 paid into the joint loan account could be treated as a settlement.

Re Kastropil, Ex p Official Trustee in Bankruptcy [1989] 109 ALR 568 (AUS)

2 Duration

CROSS REFERENCES See PERPETUITIES vol 37(1) (reissue) no 302 et seq (rule against perpetuities), no 768 et seq (rule prohibiting limitations to issue of unborn persons)

3 Marriage settlements

LAW See Halsbury's Laws (4th edn) vol 42 para 602

7 Loss of settlement — Implication of provisions

The trustees of a missing marriage settlement took out a summons asking the court for directions how to deal with the settled funds. A memorandum by the settlor, then deceased, stated that the settlement had been in the possession of one of the trustees; that he (the settlor) understood that during the war it was destroyed in London by enemy action; and that it provided for equal division of the amount between surviving children of the marriage or their offspring. At the date of the summons the settlor's widow was alive. Defendants to the summons were a daughter of the marriage and a granddaughter—the child of a deceased son: *Held* the court could make an order on the footing that the trusts of the settlement were in a particular form, namely, on trust to pay the income of the settled funds to the widow for life and, subject to her life interest, to hold the settled funds on trust for the daughter—should she survive the widow—and the granddaughter in equal shares, and, as to the daughter's equal half share, should she not survive the widow, on trust for her children in equal shares.

Re Knapp's Settlement, Cowan v Knapp [1952] 1 All ER 458n; [1952] 1 TLR 467; 96 Sol Jo 150

4 Post-nuptial settlements

LAW See Halsbury's Laws (4th edn) vol 42 para 604

CROSS REFERENCES See DEEDS vol 17(1) (2nd reissue) nos 2318 et seq (construction: several instruments), 2872 et seq (proof of consideration: natural love and affection); FAMILY ARRANGEMENTS, UNDUE INFLUENCE AND VOIDABLE CONVEYANCES vol 25 (2nd reissue) no 1671 et seq (post-nuptial settlements generally), no 2117 et seq (marriage consideration); TRUSTS vol 48 (reissue) no 1381 et seq (voluntary conveyances; whether resulting trust arises), no 3577 (whether trustees can be compelled to sue)

8 Whether voluntary — General rule

I agree there are cases where a father contracting for an infant child shall bind the child especially if the child claim anything under the settlement, but then it must be before marriage and in consideration of the marriage for the court will not suffer her to claim benefit one way and not be bound the other, but this being after marriage is voluntary and being the next day after the marriage does not differ the case, for whether two days or six, or six years it is the same thing. No recital of the father will bind the property of the daughter but there must be some proof of the father's intention to do it (*Lord Hardwicke C*).

Seamer v Bingham, Strode v Strode (1743) 3 Atk 54; 26 ER 834

9 Whether voluntary — General rule

A husband who had £1,733 stock devised to him after marriage vests it in trustees for the benefit of himself for life, of his wife for life, and afterwards for the benefit of his children. The settlement is void both as to creditors before and after the marriage and the trust estate was decreed to be sold and applied to the payment of the husband's debts.

Taylor v Jones (1743) 2 Atk 600; 20 ER 758

ANNOTATIONS **Dbtd** Dundas v Dutens (1790) 2 Cox Eq Cas 235 **Consd** Legard v Johnson (1797) 3 Ves 352

10 Whether voluntary — Settlement pursuant to ante-nuptial agreement

A settlement made after marriage on the wife and children, pursuant to articles entered into previous to the marriage, though not exactly agreeing with them, not voluntary nor fraudulent against bond creditors.

Brunsden v Stratton (1719) Prec Ch 520; 2 Eq Cas Abr 52, 260; 24 ER 223

11 Whether voluntary — Settlement pursuant to ante-nuptial agreement

A mortgage term being made the subject of a settlement after marriage with a second wife, but recited to be in pursuance of articles previous to the marriage, the settlor having children by the deceased wife under the uses of which plaintiff claimed; was afterwards conveyed by the settlor and his wife, by fine and settlement, to uses, for the benefit of the children, by the first marriage, who, and their representatives, have been in possession thirty years, plaintiff's bill dismissed, as the court will presume

that the former settlement was known to be voluntary, or the children by the second wife to have had a compensation for their claims.

Townshend v Townshend (1783) 1 Bro CC 550; 1 Cox Eq Cas 28; ER 1292

12 Whether voluntary — Settlement pursuant to ante-nuptial agreement

Settlement after marriage of the wife's property, reciting a parol agreement before marriage to such settlement. The creditors of the husband cannot set aside such settlement.

Dundas v Dutens (1790) 1 Ves 196; 2 Cox Eq Cas 235; 30 ER 298, LC

ANNOTATIONS **Consd** Randall v Morgan (1805) 12 Ves 67 **Dbtd** Warden v Jones (1857) 23 Beav 487; Goldicutt v Townsend (1860) 28 Beav 445

13 Whether voluntary — Settlement pursuant to ante-nuptial agreement — Burden of proof

A post-nuptial settlement made by a husband in favour of his wife and children contained a recital that it was made in accordance with an ante-nuptial agreement. The wife obtained a decree for a divorce on the ground of her husband's cruelty and adultery. The husband afterwards advertised part of the real estate included in the settlement for sale by auction: *Held* the burden of proof that the settlement was a voluntary one was upon the husband, and granted an injunction to restrain him from selling, dealing with, or incumbering the settled property.

Watts v Watts (1876) 24 WR 489; on appeal, 24 WR 623, CA

14 Whether voluntary — Settlement pursuant to ante-nuptial agreement — Necessity for proof that agreement actually made

A recital in a post-nuptial deed of settlement that the settlement is made in pursuance of a parol ante-nuptial agreement was a memorandum in writing sufficient to satisfy Statute of Frauds (repealed), but it does not dispense with the necessity of proving that the recited ante-nuptial agreement was actually made.

Re Gillespie, Ex p Knapman, The Trustee v Gillespie (1913) 20 Mans 311

15 Whether voluntary — Settlement in consideration of portion

The settlement in 1694, being in consideration of a portion paid at the time, though made after marriage, cannot be impeached by subsequent creditors.

Stileman v Ashdown (1742) 2 Atk 477; 26 ER 688, LC

ANNOTATION **Distd** Taylor v Jones (1743) 2 Atk 600

16 Whether voluntary — Agreement by husband to settle wife's property on herself

An agreement made by A, the husband, after marriage, to settle half his wife B's fortune on herself, is not a voluntary agreement, but amounts to a purchase of the wife's equity, and cannot be waived by the wife to the prejudice of her children.

Fenner v Taylor (1831) 2 LJ Ch 99

17 Whether voluntary — Settlement in confirmation of ante-nuptial settlement by wife

EB, a single woman, transferred certain stock, her property, into the joint names of herself and two trustees; and on the day of the transfer, she and the trustees, without reference to any marriage on her part, executed an indenture, by which it was declared that the trustees should hold the property in trust, to pay the dividends to EB for her life, for her sole and separate use, independent of any husband whom she might marry; and, after her death, upon such trusts as EB should by will, notwithstanding her coverture, appoint; and, in default of such appointment, in trust for EB, her executors, administrators, and assigns. EB afterwards married, and by a deed, reciting the settlement, and executed by her husband and herself, she, by the direction of her husband, assigned the dividends of the stock in trust, for the punctual payment of an annuity granted by the husband: *Held* whether or not under the deed of settlement the wife had power, as against her husband, to make this assignment, the joining the husband in the deed of assignment was a confirmation of the deed of settlement, and consequently that the assignment by the wife was valid.

Maber v Hobbs (1836) 2 Y&C Ex 317; 6 LJ Ex Eq 12

18 Whether voluntary — Settlement of after-acquired property

Anderson v Abbott (1857) 23 Beav 457; 29 LTOS 223; 3 Jur NS 833; 5 WR 381; 53 ER 180

19 Whether voluntary — Settlement of after-acquired property — Containing assignment of insurance policy by husband

A post-nuptial settlement made in order to avoid proceedings for contempt being taken against the husband, who had married a ward of court without leave, contained a covenant to settle the wife's after-acquired property and a covenant by the husband to pay the premiums on a policy of assurance which he had assigned to the trustees of the settlement: *Held* there was sufficient consideration for the covenant to settle the wife's property, and it was capable of being enforced by the court.

Stephens v Green, Green v Knight [1895] 2 Ch 148; 64 LJ Ch 546; 72 LT 574; 43 WR 465; 39 Sol Jo 448; 12 R 252, CA

20 Whether voluntary — Settlement in consideration of mortgage — Deeds not referring to one another

A being indebted to plaintiff but not insolvent, applied to his mother for a loan of £190. She consented to advance the money on condition that A would settle a certain freehold estate on his children. Two deeds were accordingly executed; by one of which A mortgaged certain other estates to his mother to secure the repayment of £400; and by the other he settled the first-mentioned estate on himself for life, and after his death on his children and their issue. Neither deed contained any reference to the other. A afterwards became insolvent: *Held* the settlement was made for valuable consideration, and was within the proviso contained in 13 Eliz c 5 s 6; and it was not material whether the whole of the £400 secured by the mortgage was actually due from A.

Thompson v Webster (1859) 4 De G&J 600; 28 LJ Ch 700; 33 LTOS 340; 5 Jur NS 921; 7 WR 648; 45 ER 233, LJJ; affd (1861) 4 LT 750, HL

ANNOTATIONS **Consd** Bayspoole v Collins (1871) 40 LJ Ch 289; Hance v Harding (1887) 4 TLR 185; Re Tetley, Ex p Jeffrey (1896) 66 LJQB 111

21 Whether voluntary — Settlement securing separate provision for wife during coverture — Effect of subsequent bankruptcy of husband

A post-nuptial settlement, in so far as it secured a separate provision for the wife during coverture: *Held* to have been voluntary and gratuitous, and to have been revoked and superseded by the husband's subsequent bankruptcy.

Dunlop v Johnston (1867) LR 1 So&Div 109, HL

22 Whether voluntary — Part of money settled provided by wife's brother — Part by husband

A settlor's brother-in-law provided a sum of £4,000, upon the understanding that the settlor would settle it, and also a sum of £990 Madras stock, the property of the settlor, upon the wife of the settlor for life, for her separate use, and after her death upon the settlor for life, or until bankruptcy or alienation, and then upon the children of the marriage. A settlement to the above effect was executed in July 1862, and in the following October the wife of the settlor died.

In 1866 the settlor executed a bond which operated as a determination of his interest under the settlement. In 1867 he became a bankrupt, and in 1868 he died: *Held* notwithstanding that the £990 stock was the property of the settlor, regard being had to the much larger sum which was brought into settlement, the settlement was valid.

Hammonds v Barrett (1869) 21 LT 321; 17 WR 1078

ANNOTATION **Consd** Mackintosh v Pogose [1895] 1 Ch 505

23 What stipulations may be inserted — Provision against attachment for debt

The *legitim* of the wife is the property of her husband and subject to his debts. A provision without consideration in a post-nuptial contract that the income of the *legitim* "should be alimentary and is nowise attachable for debt": *Held* insufficient to exclude the claim of the husband's creditors, he having become bankrupt.

A stipulation of this kind in a post-nuptial contract is neither valid nor permissible (*Lord Cairns C*).

Learmouth v Miller (1875) LR 2 Sc&Div 438, HL

ANNOTATION **Consd** Mackintosh v Pogose [1895] 1 Ch 505

24 Estoppel — Father allowing son to settle interest not possessed

Father, supposing his son tenant in fee, stands by and lets his son make a settlement, which he had not power of doing according to his real title; yet shall make good the settlement.

Teasdale v Teasdale (1726) Cas temp King 59; 25 ER 222, LC

ANNOTATION **Consd** Olliver v King (1856) 8 De GM&G 110

Scottish, Irish and Commonwealth Cases

25 Whether voluntary

A post-nuptial settlement was in fact made, in consideration of the wife's separate estate, which had been given by her to the husband, who lent a portion, and applied the residue to his own purposes. The settlement did not state the money to be the separate estate of the wife. It appeared *aliunde* to be so: *Held* the consideration was sufficient and the settlement not voluntary.

Butler v Butler (1851) 4 Ir Jur 133 (IR)

26 Whether voluntary

Re Lynch, Lynch v Lynch (1879) 4 LR Ir 210 (IR)

5 Protective settlements

LAW See Halsbury's Laws (4th edn) vol 42 para 607

CROSS REFERENCES See BANKRUPTCY vol 4(2) (2nd reissue) nos 5872, 5873 (interest subject to discretionary trust), no 6030 (trustees title indefeasible)

6 Other settlements

LAW See Halsbury's Laws (4th edn) vol 42 para 605 et seq

27 Settlement on children — Trusts not exhaustive — Whether absolute gift or resulting trust

A taxpayer made two irrevocable settlements in identical form in favour of each of his two children. Clause 2 of each settlement contained the trusts for the particular child's benefit. The trusts were not exhaustive and the principal beneficiary under each settlement had no right to capital. Clause 3, which was expressly made subject "to all the trusts hereinbefore declared", required the trust fund and the income from that fund to be held in trust, in equal shares if more than one, "for the Settlor's children other than the principal beneficiary and so that each such other child's share shall be held on the same trusts and subject to the same powers and provisions" as those set out in cl 2. Further clauses provided that the taxpayer and his wife were to receive no benefit from the settlement in any way whatsoever. The inspector of taxes raised assessments on the taxpayer in respect of the income arising under the settlements for three successive years of assessment, in reliance on the Income and Corporation Taxes Act 1970 s 457, on the grounds that under each settlement there was a resulting trust in favour of the taxpayer as settlor. The taxpayer appealed, submitting that s 457 did not apply because under each settlement the principal beneficiary had an absolute gift onto which were engrafted trusts which failed, with the result that the absolute gift took effect so far as the trusts failed, to the exclusion of a resulting trust for the taxpayer. The special commissioners confirmed the assessments and, on further appeal by the taxpayer, the issue was whether they were correct in holding that there was under each of the settlements a possible resulting trust in favour of the taxpayer, or whether the rule in *Lassence v Tierney* (no 445 post), on which the taxpayer sought to rely, applied to cl 3: *Held* the language of the first part of cl 3 was unambiguously that of an absolute gift, an outright disposition of the whole of both capital and income of the trust fund, and the inconsistent referential trusts relating to "each such other child's share" which followed were reconcilable with it by application of the rule in *Lassence v Tierney*.

It followed that there was no resulting trust of capital or income of the trust fund in favour of the taxpayer and accordingly he was not liable to tax on the income under the trust under s 457. The appeal would be allowed.

Watson v Holland (Inspector of Taxes) [1985] 2 All ER 290; [1984] STC 372

28 Discretionary settlement — Entitlement to interest under settlement — Interest under power of appointment

Under the Family Law Reform Act 1969 s 1 a person attains full age on attaining the age of 18 instead of attaining the age of 21. Section 1 does not affect the Trustee Act 1925 s 31 in its application to any interest under an instrument made before 1 January 1970: Sch 3 para 5(1).

A taxpayer was a trustee of a discretionary settlement created in 1959 in favour of the settlor's grandchildren. The settlement conferred on the trustees a special power of appointment which, by deed of revocation and new appointment in 1975, they exercised in favour of the grandchildren, thereafter holding the trust fund in trust for them contingently upon their attaining the age of 21. When the eldest grandchild attained the age of 21, the trustee sought to hold over the chargeable gain arising on the grandchild's entitlement under the Capital Gains Tax Act 1979 s 147A and it fell to be determined whether the grandchild's interest in the fund was an interest under the settlement or an interest under the appointment: *Held* the common sense approach to the problem pointed to the appointment as being the relevant instrument. Although it was true that without the settlement the appointment could not have been made and to that extent the grandchild's interest was one under the settlement, of the two instruments it was the appointment under which the beneficiary's interest arose and to which it directly owed its existence.

Begg-McBrearty (Inspector of Taxes) v Stilwell (1996) Times, 15 March

ii VALIDITY AND AVOIDANCE OF SETTLEMENTS

1 Execution

LAW See Halsbury's Laws (4th edn) vol 42 para 614 et seq

CROSS REFERENCE See DEEDS vol 17(1) (2nd reissue) no 1546 (no execution by one party)

29 Execution necessary

Hore v Dix (1660) 1 Sid 25; 82 ER 948

30 Execution by some parties only — Binding upon executing parties

Where a deed of marriage settlement is drawn up, as between the intended husband and wife, and their respective fathers; and the father of the wife secures to the father of the husband, a sum of money, as the portion of the wife, according to a provision of the deed; but neither he nor his daughter execute the

deed, and it is executed only by the intended husband and his father; it is binding upon and as between the parties who execute, and creates efficient rights for the objects of the settlement.

On points, in which the two deeds are inconsistent, the deed last registered is personally binding on the parties who execute; and the lands and property comprised in the deed first registered, are also bound, after satisfying the trusts of the first by the contracts and trusts of the deed last registered.

M'Neill v Cahill (1820) 2 Bli 228; 4 ER 311, HL

31 Execution by some parties only — Relief of other parties

Where, after a marriage, proposals were made by the lady's father for a settlement to be made by him upon the husband and wife and the issue of the marriage, upon the husband's making a similar settlement, and the father accordingly executed the settlement, but the wife having died in the meantime, leaving an infant daughter, the husband refused to execute the settlement; it was held that the father was entitled to be relieved from the covenants contained in the settlement, and to have the instrument delivered up to be cancelled.

Woodcock v Monckton (1844) 1 Coll 273; 3 LTOS 261; 63 ER 416

32 Execution by some parties only — Relief of other parties

In contemplation of marriage, an intended wife and her father executed the engrossment of a settlement of (*inter alia*), funds to be provided by the father, and the present and after acquired property of the intended wife. The engrossment was given into the custody of the solicitors of the intended husband; it was not executed by him or the trustees. The engagement was broken off by agreement. After the lapse of three and a half years the court declared the engrossment void as a settlement and directed it to be given up.

Even if a marriage did take place between the parties, it would take place under such different circumstances that it would be, strictly speaking, not the same marriage (*Pearson J*).

Bond v Walford (1886) 32 Ch D 238; 55 LJ Ch 667; 54 LT 672; 2 TLR 469

2 Enforceability

LAW See Halsbury's Laws (4th edn) vol 42 para 615

33 Provision construed as declaration of trust pending transfer

Re Ralli's Will Trusts, Calvocoressi v Rodocanachi no 623 post

34 Requisites for valid declaration of trust

Paul v Constance [1977] 1 All ER 195; [1977] 1 WLR 527, CA

35 Irrevocable unless power of revocation reserved

Paul v Paul no 2890 post

36 Irrevocable unless power of revocation reserved

By a voluntary settlement made in 1868 a settlor settled any property to which she might become entitled upon the death of her father and gave to the trustees of the settlement full power to receive and give receipts for the same or any part thereof in her name. Her father died in 1869 and during the years 1871–74 his executors transferred the share of the settlor under her father's will to the trustees of the voluntary settlement. In 1935 the settlor requested the trustees to transfer the funds representing the above mentioned property to her as her absolute property: *Held* the original trustees had received the settlor's share under a valid authority unrevoked, and it became impressed with the trusts contained in the settlement.

Re Bowden, Hulbert v Bowden [1936] Ch 71; [1935] All ER 933; 105 LJ Ch 23; 154 LT 157; 79 Sol Jo 625

ANNOTATIONS **Apld** Re Adlard's Settlement Trust, Re Campbell's Settlement Trust, Re Fulton's Settlement Trust, Taylor v Adlard [1953] 2 All ER 1437 **Consd** Re Ralli's Will Trusts, Calvocoressi v Rodocanachi [1963] 3 All ER 940

37 Effect of transfer to trustees — Whether funds recoverable

By a settlement, dated 14 June 1918, and made between the settlor, of the first part, his daughter A, who had attained the age of twenty-one and was then unmarried, of the second part, and trustees, of the third part, the settlor settled the sum of £3,500 war loan (referred to hereafter as "the trust fund") on trust to pay the income to A during her life, and, subject thereto, on trust for her children or issue as she should by deed or will appoint, and in default of appointment, on trust for all her children who should attain the age of twenty-one, in equal shares. If there should be no child of A who should attain a vested interest, the trust fund was to be held on trust for the statutory next of kin of A who would have been entitled thereto if she had died possessed thereof intestate and a spinster. By the deed of settlement A covenanted with the trustees to assign to them all her after-acquired property, to be held by them on the trusts of the settlement. On the same date, *viz*, 14 June 1918, by means of settlements in identical terms *mutatis mutandis* with that in favour of A the settlor settled the same sum on each of his daughters, C and F, who were also over twenty-one and

unmarried at the time. The daughters had no separate advice when they entered into the covenants. Subsequent to 14 June 1918, all three married. A and C each had children. F, who was now a widow, had no children. The settlor died on 23 December 1944, and his wife died on 25 August 1951. On their mother's death A, C, and F, and another daughter became entitled absolutely, in equal shares, to the following funds: (i) £8,000 under an appointment, dated 1 June 1934, and made by the settlor in exercise of a power contained in his marriage settlement; (ii) £16,000 under an appointment of the same date, made by the mother in exercise of a similar power; (iii) £40,000 under a voluntary settlement, dated 5 May 1943, and made by the settlor; and (iv) £10,000 under an appointment made by the mother by her will, dated 17 December 1947, in exercise of a power contained in the settlor's will, dated 4 June 1934. Each of the daughters expressed her desire to receive her share of the funds for herself, but believed at the time that she had no power to do so, and in January 1952, their respective shares were transferred to the trustees of their settlements. A, C, and F now sought to recover their shares from the trustees: *Held* assuming that A, C, and F could have arrested the funds and retained them in breach of their covenants contained in the settlements of 14 June 1918, they were not now entitled, either at law or in equity, to recover them from the trustees, who had duly received them by reason of the obligations imposed by the covenants and now held them, and were bound to continue to hold them, in accordance with the tenor and true meaning of the settlements from which their obligations were derived.

Re Adlard's Settlement Trust, Re Campbell's Settlement Trust, Re Fulton's Settlement Trust, Taylor v Adlard [1954] Ch 29; [1953] 2 All ER 1437; [1953] 3 WLR 914; 97 Sol Jo 814

38 No distinction between voluntary settlement and one executed for valuable consideration

There are no doubt various circumstances which may be connected with a voluntary deed which will induce this court either to set the deed aside, or to refuse to execute the trusts contained in it. There are also statutory enactments which may defeat a voluntary deed which would be otherwise valid; but assuming a voluntary deed to be complete, *bonâ fide*, valid, and to be unaffected by any statutory disability I know of no distinction between such a deed and one executed for valuable consideration. The estates and limitations created in such a deed have the same operation and effect as in a deed executed for value, and must be construed in the same manner, and it carries with it all the same incidents and rights attached to the property conveyed as are carried by a deed executed for value, and the grantee, in this respect, stands exactly in the same situation as if he had paid value for the property conveyed (*Romilly MR*).

Dickinson v Burrell, Stourton v Burrell (1866) LR 1 Eq 337; 35 Beav 257; 35 LJ Ch 371; 13 LT 660; 12 Jur NS 199; 14 WR 412; 55 ER 894

39 Once fully constituted settlement binds settlor

P executed a voluntary settlement, by which he assigned certain personal property, including four debts which were due to him on the security of bills of sale, to trustees, with power to sue for the debts, upon trust to sell and convert into money the trust premises and execute and do such assurances and things as should be expedient and to apply the proceeds for the benefit of his wife and other relatives. But he made no express assignment of the securities for the debts, nor did he give them up to the trustees. The settlor afterwards received payment of these four debts and died intestate. In an action for the administration of the estate and of the trusts of the settlement: *Held* the debts were completely assigned by the voluntary settlement and the trustees were entitled to prove as creditors against the estate of intestate in respect of the debts received by him. *Quaere*: Whether the trustees might have sued the intestate at law for the amount received by him.

Re Patrick, Bills v Tatham [1891] 1 Ch 82; 60 LJ Ch 111; 63 LT 752; 39 WR 113; 7 TLR 124; 32 Sol Jo 798, CA

40 Trustees cannot sue on behalf of volunteers

Re Pryce, Neville v Pryce no 955 post

41 Trustees cannot sue on behalf of volunteers

Re Kay's Settlement, Broadbent v Macnab no 396 post

42 Trustees cannot sue on behalf of volunteers

Re Cook's Settlement Trusts, Royal Exchange Assurance v Cook (1965) See GIFTS vol 25 (2nd reissue) no 4801

43 Trustees cannot sue on behalf of volunteers

Beswick v Beswick [1967] 2 All ER 1197; [1968] AC 58; [1967] 3 WLR 932; 111 Sol Jo 540, HL

ANNOTATIONS **NF** (dictum Lord Reid) Pepper (Inspector of Taxes) v Hart and related appeals [1993] 1 All ER 42 **Apld** (dictum Lord Reid) Associated Newspapers Ltd v Wilson; Associated British Ports v Palmer and others [1995] 2 All ER 100

3 Void trusts

LAW See Halsbury's Laws (4th edn) vol 42 para 617

4 Settlements for the protection of the settlor

A In general

LAW See Halsbury's Laws (4th edn) vol 42 para 618

CROSS REFERENCES See no 971 et seq post (failure of consideration as ground for avoidance); BANKRUPTCY vol 4(2) (2nd reissue) no 5843 et seq, vol 5(2) (2nd reissue) 13463 et seq (bankruptcy as ground for avoidance); FAMILY ARRANGEMENTS, UNDUE INFLUENCE AND VOIDABLE CONVEYANCES vol 25 (2nd reissue) no 1735 et seq (avoidance of fraudulent and voidable conveyances); MISREPRESENTATION vol 34 (reissue) nos 3279, 3280 (fraud as ground for avoidance)

44 Grounds for avoidance — By person claiming under subsequent settlement — Unreasonableness of settlement

If a person upon his marriage make an extravagant or unreasonable settlement, yet if no fraud or incapacity appear, it shall not be avoided by persons claiming under a subsequent marriage settlement.

Hobson v Staneer (1723) 9 Mod Rep 80; 88 ER 328

45 Grounds for avoidance — Fraud

Ex p Mayor (1816) 1 Sm&G 246n; Mont 292; 65 ER 106

46 Grounds for avoidance — Fraud

Lampert v Lampert (1789) 1 Ves 20; 30 ER 210

47 Grounds for avoidance — Fraud

Plaintiff alleged in his bill that his father married A in 1797. Three weeks before the marriage his mother A had borne a son B, but the fact of his having been born before wedlock was carefully concealed, and he was brought up as a legitimate son and heir apparent to his father's title and estates, to which he eventually succeeded. B married C in 1823, before his father's death, and he died in 1842, leaving D his eldest son and heir. In 1866 plaintiff, who was the eldest son born after the marriage of his father to A, discovered the fact of B's illegitimacy, and also that that fact was known to B, and also to the father of C upon the negotiation for the marriage of B and C. He prayed a declaration of his title, and an account of rents and profits against D: *Held* the bill sufficiently alleged a concealed fraud, which plaintiff could not with reasonable diligence have known sooner; C must be taken to have had notice of B's illegitimacy through the communication thereof to her father upon the negotiation for a settlement on her marriage with B; and her son D, claiming through the same marriage settlement, was equally affected with the same notice.

Vane v Vane (1873) 8 Ch App 383; 42 LJ Ch 299; 28 LT 320; 21 WR 252, LJJ

48 Grounds for avoidance — Bankruptcy — Avoidance as to part

Property was settled on J by his father, until he should take the benefit of Insolvent Debtors' Act, and then the trustees were, during his life, to apply it in such manner and to such persons, for the board, lodging and subsistence of J and his family, as the trustees should think proper; and after his decease, upon trust for such persons as J should appoint, and in default of appointment, in trust for his children. J took the benefit of Insolvent Debtors' Act. He had three children, but his wife was dead: *Held* his children, who were all infants, became entitled to three-fourths and the assignees to one-fourth of the life interest of J.

Rippon v Norton (1839) 2 Beav 63; 48 ER 1102

49 Grounds for avoidance — Resettlement — No intention to vary existing limitations

A, a tenant in tail, subject to an existing life estate, borrowed money on mortgage, and the tenant for life joined in order to bar the entail, and he covenanted to pay the interest during his life. By the same deed, the equity of redemption was resettled on A for life, with remainder to his issue in tail, with limitations over. The court, ten years afterwards, set aside the resettlement of the equity of redemption, on the ground that there was no proof of any contract to vary the existing limitations.

Meadows v Meadows (1853) 16 Beav 401; 51 ER 833

ANNOTATION **Follld** Gibbon v Mitchell and others [1990] 3 All ER 338

50 Condition for settlement of wife's property in particular manner — Different settlements on foot of former covenant

Estates are settled on A and B on their marriage, in strict settlement, provided that if the wife should, when requested by her husband, refuse to settle her estates in a particular manner, the settlement of the other estate should be void. The husband and wife join in a different settlement of her estate, proceeding, however, on the foot of the former covenant as if it had been performed; this is no avoidance of the settlement.

Mathews v Jones & Howell (1794) 2 Anst 506; 145 ER 949

ANNOTATION **Consd** Spackman v Timbrell (1837) 6 LJ Ch 147

51 Who should be parties — Remainderman expectant on estate tail

Anon (1709) 2 Eq Cas Abr 166; 22 ER 141

52 Necessity for reconveyance
Where a settlement is made void by non-performance of a condition, yet a reconveyance held necessary.
Hunt v Hunt (1714) Prec Ch 387; Gilb Ch 43; 24 ER 172

Scottish, Irish and Commonwealth Cases

53 Grounds for avoidance — Absence of power of revocation in deed
The settlor may wish to protect himself from his own improvidence or against importunities of relatives and in such a case the absence of a power of revocation in the deed is not a ground for setting it aside.
Fonseca v Jones (1911) 21 Man LR 168 (CAN)

54 Grounds for avoidance — Divorce of wife
Wood v Wood (1875) 14 BLR App 6 (IND)

55 Grounds for avoidance — New and extended term obtained by settlor to certain uses — Settlor with limited interest
If a man has a limited interest in a term and settles it to a certain use, and then gets a new and extended term substituted for it, he cannot, by so doing, avoid the previous settlement.
Mill v Hill (1852) 3 HL Cas 828 (IR)

56 Grounds for avoidance — Incapacity for business and inexperience of settlor — Effect of settlement not understood
Where at the time of the execution of a voluntary settlement the settlor is not in a fit state of health to transact business, and is inexperienced in legal business, the solicitor who prepared the deed is a complete stranger, and the deed contains unusual clauses going beyond what is necessary for giving effect to the wishes expressed by the settlor, the clearest evidence is required that the settlor at the time of signing the deed fully understood it, and for such evidence the court looks to the solicitor who prepared the deed, and if such evidence is not forthcoming the deed cannot be upheld. The mere formal reading over of the deed is not enough.
Anderson v Anderson (1903) 23 NZLR 101 (NZ)

B Voluntary settlements

a In general

LAW See Halsbury's Laws (4th edn) vol 42 para 618

57 Power of court to order reconveyance
Where a suit is instituted to set aside a voluntary settlement of real and personal estate, and the right to the relief asked is not contested, the court will order a reconveyance of the property the subject of the settlement, and direct payment of the costs out of the property so settled.
Thompson v Milligan (1868) LT 809

58 Costs — Power of court to order payment out of property settled
Thompson v Milligan no 57 ante

59 Costs — Right of trustee — Right of appeal
Dutton v Thompson no 89 post

Scottish, Irish and Commonwealth Cases

60 Power of court to order reconveyance
Farrell v Cameron (1881) 29 Gr 313 (CAN)

b Who may avoid

CROSS REFERENCES See no 87 et seq post (settlor); BANKRUPTCY vol 5(2) (2nd reissue) no 13463 et seq (trustee in bankruptcy of settlor); FAMILY ARRANGEMENTS, UNDUE INFLUENCE & VOIDABLE CONVEYANCES vol 25 (2nd reissue) no 1227 et seq (creditors), no 2092 et seq (subsequent purchasers)

61 Second husband — Settlement by woman in favour of issue of first marriage
C having two sons by her first husband, made a settlement previous to her second marriage, and without the privity of the intended husband, whereby she limited the estate to herself for life; remainder as to one moiety to C, her youngest son, in tail; and for want of issue of his body, to R, her eldest son, in tail; and as to the remainder of the other moiety to R, in tail; and for want of issue of his body, to C in tail, with remainder as to both moieties, to her own right heirs. The second marriage took effect, and the estate, lying in Ireland, the husband made claims, and sued out decrees from the commissioners under the acts of settlement and explanation, for some parts of this estate, to himself and his wife, and her heirs, and for other parts of it, to himself and his wife and his heirs. The lands so limited to his heirs, the second husband, having survived his wife, devised and otherwise disposed of: *Held* R and C, the two sons of the first marriage, were entitled under their mother's settlement to all the lands; and the parties claiming under the second husband were accountable for the rents and profits from his death.
Calthorpe v May (1707) 7 Bro Parl Cas 413; 3 ER 269

62 Second husband — Settlement by woman in favour of issue of first marriage
If a parent makes a voluntary conveyance in trust for his children, and keeps it in his own power, or in the hands of his agent, and it is got from him, this ought not to bind him; but where a *feme* having issue by her first husband makes a suitable provision for them before a treaty for her second

marriage; this is good, and not liable to be avoided by a second husband.

King v Cotton (1732) 2 P Wms 674; 24 ER 912

63 Creditors — Settlement remaining in control of settlor

Husband after marriage purchases a term to himself and wife, and the survivor and the executors, administrators and assigns of such survivor; husband assigns the term in mortgage, proviso to be void on payment of the money by him or wife, or the executors of him or wife. Proviso that the husband, his executors or administrators shall till default of payment quietly enjoy. Husband, seven years after, contracts debts and dies. Decreed that this settlement of the term being after marriage, in the power of the husband, and the equity of redemption being reserved to him as well as to his wife, and being also in the case of creditors, was assets to pay debts.

Watts v Thomas (1726) 2 P Wms 364; 24 ER 767

64 Creditors — Claim under prior agreement to charge

On 14 June 1858, defendant L, being indebted to plaintiff signed a memorandum of agreement whereby "in consideration of the forbearance of plaintiff in not requiring immediate repayment of the moneys he had advanced to or for him," he, L, agreed to give and execute to plaintiff a charge on the interest to which he was entitled by right of marriage in the property settled on his wife, or to which she was entitled in respect of her former marriage as a security "for the repayment of the moneys plaintiff had advanced to or for him, L"; and defendant, L, further pledged himself not to incumber his interests in such property or any part thereof. On 18 June, four days afterwards, defendant L, with the knowledge, but without the consent of plaintiff, executed a post-nuptial settlement, whereby he conveyed all his interest in right of his wife in the property settled on her on her first marriage to trustees on trusts for her for life, then for himself for life, and after the decease of the survivor for the children. About a month afterwards, on 13 July, defendant L, executed a deed purporting to be in pursuance of the agreement of 14 June whereby he charged all the dividends, interest and annual proceeds of the trust funds which were settled at the time of his wife's first marriage, and also his share in the trust funds themselves, with the payment to plaintiff of £800, and interest from 14 June. He also, by the same deed, assigned his said share in the trust funds to plaintiff by way of mortgage, with a proviso for redemption to L on repayment by him of the sum of £800 and interest: *Held* the post-nuptial settlement could not prevail against the rights of plaintiff under the memorandum of 14 June.

Carew v Arundel (1861) 5 LT 498; 8 Jur NS 71

Scottish, Irish and Commonwealth Cases

65 Personal representatives of dead settlor

The personal representatives of a deceased settlor are necessary parties to an action by his widow to set aside a deed of settlement executed by the settlor and his wife conveying property to trustees.

Fonseca v Jones (1911) 21 Man LR 168 (CAN)

66 Sole beneficiary

While a person who creates a trust of which he is sole beneficiary can terminate the trust at any time and have a reconveyance to him of the trust property even though the purposes of the trust have not been fully accomplished the difficulty in many cases is to determine whether the settlor is the sole beneficiary or whether there are contingent interests created under the trust in favour of others.

Re McCrossan (1961) 28 DLR (2d) 461; 36 WWR 209 (CAN)

c Grounds for avoidance

i In general

CROSS REFERENCES See no 87 et seq post (self-protective settlement); HUSBAND & WIFE vol 27(1) (2nd reissue) no 1573 et seq (divorce or separation)

67 General rule

Where it is sought to set aside a voluntary settlement, the absence of a power of revocation is an important circumstance to be taken into account, but there is not, and there ought not to be, any rule that the omission of such a power, or that the settlor was never advised that such a power should be inserted, can alone invalidate such a settlement. The court has to determine whether the settlement is the free determined act of the party executing it.

A maiden lady, advanced in life, settled real estate upon herself for life, and after her decease to the use of her nephew in fee. It was shown that the instructions were given by herself to the family solicitor, who at the time of its execution spent four hours in explaining it to her, though she was not shown to have been previously furnished with any copy or draft; but it was sufficiently understood by her, and was in accord with her intentions at the time. It contained no power of revocation, nor did the solicitor appear ever to have consulted her upon that point. Some years afterwards she filed a bill to set it aside, alleging undue unfluence, intimidation, incapacity and

ignorance; but upon the evidence their lordships dismissed the bill.

Toker v Toker (1863) 3 De GJ&Sm 487; 32 LJ Ch 322; 8 LT 777; 46 ER 724, LJJ

ANNOTATIONS **Distd** Coutts v Acworth (1869) LR 8 Eq 558 **Apld** Hall v Hall (1873) 8 Ch App 430

68 Fraud

E, by his marriage contract, covenanted that his whole property at the time of his death should belong to the issue of the marriage. His wife died in his lifetime, leaving a daughter, an only child, who, when about twenty-one years of age, married a young man of about the same age, and in a year after a son was born of the marriage. The husband then proposed to go abroad to improve his fortune, and E, who was then a prosperous trader, persuaded him and his wife to execute a deed, in the nature of a post-nuptial contract, by which, in consideration of a sum of £315, they discharged him from all claims whatever on his property. They were at this time ignorant of the daughter's claims under her father and mother's marriage contract, and E, attended by his man of business, brought them the deed to sign on the night of the husband's departure, and it was then executed. It was stated in the deed that E had paid a moiety of the £315 at the time of the execution of the contract, and that the other moiety was to be paid after his death. But in point of fact he paid down nothing at the time of the execution, but only renounced a debt of £61 due to him from the husband for goods, and gave a promissory note for the other £96. E lived for a considerable time after; and two days before his death, by a trust deed of settlement, conveyed the bulk of his property, amounting to £14,000, to trustees to build a hospital.

The daughter's post-nuptial contract reduced on the ground of fraud and circumvention.

Ewen v Bannerman (1830) 2 Dow&Cl 74; 6 ER 657, HL

69 Absence of independent advice

An ignorant woman, possessed of money, lent part to a man having her confidence, and afterwards executed a deed, prepared by the borrower's solicitor, by which the borrower covenanted to pay interest to her for her life, and to pay of the capital to two of his daughters, and the remainder to two of her relations. The woman soon afterwards married, and she and her husband filed a bill against the borrower to set aside the deed, on the allegation that she executed it believing it to be a mortgage on the borrower's estate, and on the ground that the deed was a fraud on the marital right of the husband. The court on the ground that the two cases made by the bill were not sustained, gave plaintiffs leave to try an issue whether the deed was obtained by fraud; and, secondly, whether, when she executed the deed, she was contracted to be married; and, thirdly, whether plaintiff, the husband, when he married, knew of the settlement, and as the woman had not the protection of the borrower or his solicitor, to which she was entitled, not having the advice of her own solicitor, the bill was dismissed, without costs, if plaintiffs did not try the issue.

Griggs v Staplee (1848) 2 De G&Sm 572; 12 LTOS 307; 13 Jur 29; 64 ER 255

70 Absence of independent advice

Phillips v Mullings no 73 post

71 Absence of independent advice

Plaintiff, who was in financial difficulties, was desirous of making a voluntary settlement upon himself and his family, and was also desirous of conferring some benefit on C, who had acted as his confidential solicitor, but had so far received nothing for his services. Accordingly he executed two deeds, respectively dated 15 May 1900. By the first of these deeds some real estate and other property were settled upon trust for plaintiff for life, and after his death as to part in trust for his son and daughter, and as to the remaining part in trust for C.

By the second deed certain furniture and chattels were vested in trustees for sale, and out of the proceeds thereof C was to receive £500. The deeds were prepared in the office of C, but were at his suggestion submitted by plaintiff to A, an independent solicitor.

Continuing to be pressed by his financial difficulties, plaintiff, on 14 March 1901, executed a further deed supplemental to the first deed of 15 May 1900, whereby the trusts of the former deed were in effect revoked, and plaintiff assigned the whole of his property of every description, present and future, to his son and C upon trust for his son and daughter and C in equal shares in consideration of a covenant by them to pay plaintiff an annuity of £500 a year to be increased to £800 in certain events. This deed was at C's suggestion prepared by T, an independent solicitor.

At the time the several deeds were executed C was continuing to act as plaintiff's solicitor in all other matters relating to his affairs. Plaintiff brought an action against C, the son and daughter, and A and T claiming to have the several deeds set aside with consequential relief, on the ground that he was induced to execute the same by the influence of C: *Held* (1) no competent and independent advice was given to plaintiff by the solicitor A, who, although he apparently intended to do his duty, had not before him the materials to enable him to do it; therefore the onus thrown upon C had not been discharged; and as regarded him the deeds of 15 May 1900 could

not be allowed to stand, and must be set aside, although as regarded plaintiff's children the gifts thereunder must be treated as if they had been made by an independent deed and were valid; (2) as to the deed of 14 March 1901, the solicitor, T, had not before him sufficient materials to enable him to advise plaintiff; the bargain carried out by that deed was entered into at a time when C was continuing to act as plaintiff's solicitor, and he was acting in concert with plaintiff's daughter; it was executed by plaintiff under the influence of C and without fully understanding what was being done, and without competent and independent advice; and consequently that deed must be set aside *in toto* and as against all parties.

Wright v Carter [1903] 1 Ch 27; 72 LJ Ch 138; 87 LT 624; 51 WR 196; 19 TLR 29, CA

72 Absence of independent advice

A lady, two months after she came of age, executed a voluntary settlement, being told as a matter of prudence she ought not to omit making it. The deed contained no power of revocation, and was executed by the lady without independent legal advice. Then years afterwards she filed a bill to set aside the settlement on the grounds that it was a hasty and improvident act, and contrary to her intention: *Held* under the circumstances the deed must be set aside.

Everitt v Everitt (1870) LR 10 Eq 405; 39 LJ Ch 777; 23 LT 136; 18 WR 1020

73 Absence of independent advice

In order to support a voluntary settlement, it must be shown that all the provisions are proper and usual; or if there are any unusual provisions, that they were brought to the notice of and understood by the settlor. No general rule can be laid down as to the proper and usual provisions in such a settlement, but a power of revocation is not essential.

A young man of improvident habits, being entitled to a sum of money, was induced by the trustees of the money, and by a solicitor, to execute a settlement by which he assigned a part of the money to trustees on trust to invest and to pay him during his life the income on such part thereof as they should think fit, and after his death on trust to hold the same for his wife and children, if any, and subject thereto on trust for certain cousins of his. He had no power of appointment in default of issue, and no power of revocation, and no power to appoint new trustees. The deed was explained to him, and the particular clauses were brought to his notice: *Held* the deed could not be set aside by the settlor.

Phillips v Mullings (1871) 7 Ch App 244; 41 LJ Ch 211; 20 WR 129, LC

74 Absence of independent advice

An old man of eighty-six years of age executed a conveyance of certain freeholds in consideration of natural love and affection, to his son, to the use of himself for life, with remainder to his son in fee. The deed did not contain any power of revocation, and the propriety of inserting such a power had not been suggested to the grantor. Subsequently the grantor conveyed all his property to his daughter, who by the deed of conveyance covenanted to indemnify him against a mortgage debt to which part of the property was subject.

On a bill by the daughter to set aside the prior voluntary conveyance: *Held* the deed must be set aside, as it contained no power of revocation, and as it was clear that the propriety of reserving such a power had not been suggested to the grantor; but without costs, as there was no evidence that the execution of the deed had been obtained by fraud.

Mountford v Keene (1871) 24 LT 925; 19 WR 708

ANNOTATION **Expld** Hall v Hall (1873) 8 Ch App 430

75 Absence of independent advice

A lady in her sixty-ninth year executed, at the instance of her relatives and without independent advice, a voluntary settlement containing no power of revocation, and under the impression that the deed had the effect of a will: *Held* the deed must be set aside.

Henshall v Fereday (1873) 29 LT 46; 21 WR 570, LJJ

76 Absence of independent advice

The absence of a power of revocation, and the fact that the attention of the settlor was not called to that absence, do not make a voluntary settlement invalid, they are merely circumstances to be considered in deciding on the validity of a voluntary settlement. A widow instructed a solicitor to prepare a deed settling certain houses and buildings on herself for her life, and after her death for the benefit of her children. The deed, as prepared, did not exactly correspond with the instructions, but was read over to and executed by her. There was no suggestion made to her that the deed ought to contain a power of revocation. Some years afterwards she burnt it, and expressed satisfaction at having got rid of it. She executed a mortgage of part of the settled property, after asking the consent of a son who was both beneficially interested and a trustee of the settlement, and made a will purporting to dispose of the whole property: *Held* under the circumstances, the deed of settlement was valid, and not affected by the want of a power of revocation or by the divergence from the instructions.

Hall v Hall (1873) 8 Ch App 430; 42 LJ Ch 444; 28 LT 383; 21 WR 373, LC&LJJ

ANNOTATION **Distd** Henshall v Fereday (1873) 29 LT 46

77 Absence of independent advice

On the marriage of S to his wife in 1906 a marriage settlement in the usual form was executed, and at the death of S's wife on 13 March 1931, very substantial funds were subject to its trusts. Plaintiffs who were the only two children of S's marriage, took a beneficial interest in the trust funds, subject to a life interest of S and in default of the exercise of a power of appointment vested in S. A few months after the death of S's wife, S suggested to plaintiffs, who then were in their early twenties and not legally trained, that it would be in their interest to sign deeds of settlement that had been prepared for them on his instructions. The effect of the intended settlements was not explained to plaintiffs, nor did they take independent advice on them, nor did they attempt to read the deeds, but they had a vague idea that the settlements related to the trust funds settled under their mother's marriage settlement and served the purpose of tying up the money in the family. Each of the plaintiffs signed a voluntary settlement dated 3 June 1931, whereby the interest of the settlor in the trust funds constituted under the marriage settlement of S's wife was settled upon the settlor for life, with further trusts thereafter. S died on 5 October 1946. Plaintiffs asked that the settlements should be set aside: *Held* in view of the complicated legal situation existing under the marriage settlement, which called for an explanation to a person not legally trained and could not be appreciated by just reading the complicated recitals of the voluntary settlements even if plaintiffs had attempted to read them neither of plaintiffs understood what he or she was doing when signing the voluntary settlements. Consequently, the voluntary settlements of 3 June 1931, had to be set aside although they were not obtained by undue influence of S, who considered that he was acting in the best interest of plaintiffs.

Strauss v Sutro [1948] LJR 33; 177 LT 562; 91 Sol Jo 653

78 Absence of independent advice — Onus of proof

The party taking a benefit under a voluntary settlement or gift containing no power of revocation, has thrown upon him the burden of proving that there was a distinct intention on the part of the donor to make the gift irrevocable, and where the circumstances are such that the donor ought to be advised to retain a power of revocation, it is the duty of a solicitor to insist upon the insertion of such power, and the want of it will in general be fatal to the deed.

Coutts v Acworth (1869) LR 8 Eq 558; 38 LJ Ch 694; 21 LT 224; 17 WR 1121

79 Absence of independent advice — Onus of proof

Wollaston v Tribe no 942 post

80 Deed not fully explained to settlor

Phillips v Mullings no 73 ante

81 Deed not fully explained to settlor — Effect of confirmation of settlement — By subsequent deed

Where a settlor filed a bill to obtain the declaration of the court that a settlement executed by him eleven years previously was not binding upon him by reason of its being an unreasonable one, and of his having executed it in ignorance of its effect: *Held* a subsequent deed executed by plaintiff reciting part of the former deed, and purporting to be in exercise of one of the powers therein contained, was an absolute confirmation of the whole, and was a bar to plaintiff's suit, though the deed was one which, apart from lapse of time and subsequent confirmation, the court could not have upheld.

Jarratt v Aldam (1870) LR 9 Eq 463; 22 LT 192; 18 WR 511; sub nom

Jarratt v Oldham (1870) 39 LJ Ch 349

ANNOTATION **Consd** Hoblyn v Hoblyn (1889) 60 LT 499

82 Settlement executed in anticipation of immediate death

A settlement on his family by a person in-*extremis* and not containing a power of revocation set aside, the court being of opinion that it was executed in expectation of his immediate death but not with the intention that it should be operative in case of his recovery.

Forshaw v Welsby (1860) 30 Beav 243; 30 LJ Ch 331; 4 LT 170; 7 Jur NS 299; 9 WR 225; 54 ER 882

ANNOTATION **Consd** Hall v Hall (1873) 8 Ch App 430

83 Settlement not carrying out intentions of settlor

Ogilvie v Allen (1899) 15 TLR 294, HL; affg SC sub nom

Ogilvie v Littleboy (1897) 13 TLR 399, CA

84 Settlement not carrying out intentions of settlor

Rectification was claimed of a settlement, whereby plaintiff, shortly after he attained twenty-one, settled certain reversionary property belonging to him on trusts for himself for life, then for his wife and issue, and in default of issue for his paternal next of kin. It was proved that plaintiff was at the time of the execution of the deed of extravagant habits; that he expressed a desire to preserve his property in the family; and that the settlement was, before execution, read over and its provisions carefully explained to him, and that he fully understood and assented to

them. The trustees of the settlement were made defendants to the action for rectification: *Held* (1) there was no fraud or undue influence exercised upon plaintiff; but, inasmuch as there was an omission to explain to him that the settlement did not contain a usual power, *viz*, to appoint as he wished in case of failure of issue, it must be rectified by the insertion of such a power before the limitation to the next of kin; (2) as the trustees of the settlement had in all respects acted properly, and were bound to come before the court to uphold the settlement, they were entitled to a charge on the funds settled for their costs.

James v Couchman (1885) 29 Ch D 212; 54 LJ Ch 838; 52 LT 344; 33 WR 452; 1 TLR 305

ANNOTATION As to (1) **Consd** Rake v Hooper (1900) 83 LT 669

85 Extinction of life interest by order of Divorce Division

By a marriage settlement made in 1916, the wife settled a fund on trust, subject to the payment of an annuity to the husband, to pay the income to herself during her life, and on further trust if the husband should survive the wife to pay the income of the fund to the husband during his life on trusts, under which, on the occurrence of certain events whereby, if the income had belonged to him absolutely he would have been deprived of the right to receive it, his life interest would determine and a discretionary trust of the income would arise in favour of the husband and the issue of the marriage during the remainder of the husband's life. In 1928 the marriage was dissolved by decree of the Probate, Divorce and Admiralty Division, and by an order of that division made in 1929 it was ordered that the marriage settlement be varied "by extinguishing all the rights power and interests of the [husband] in and under the said settlement as if he were already dead and had died in the lifetime of the" wife. There was one child of the marriage. The question arose whether, notwithstanding the order of 1929, the discretionary trusts of income during the husband's lifetime could arise in favour of the issue of the marriage: *Held* the husband's protected life interest was extinguished for all purposes by the 1929 order, and the discretionary trust was so connected with that life interest that it also was destroyed by that order.

Re Allsopp's Marriage Settlmt Trusts, Public Trustee v Cherry [1959] Ch 81; [1958] 2 All ER 393; [1958] 3 WLR 78; 102 Sol Jo 489

Scottish, Irish and Commonwealth Cases

86 Absence of power of revocation

The absence of a power of revocation in a voluntary settlement is not a ground for setting it aside.

Hillock v Button (1881) 29 Gr 490 (CAN)

ii Self-protective settlements

CROSS REFERENCE See no 67 et seq ante (absence of power of revocation)

87 Lack of understanding of settlor — Burden of proof

A deed prepared by an attorney, and executed by his client, a young man who had applied to him to procure a loan of money, settling the property of the client so as to restrict his power of dealing with it, and appointing the attorney the trustee, recited that the trusts of the deed were created at the desire of the client, and for the purpose of placing the property under the management of the attorney. The client, by his bill to set aside the deed, denied the truth of the recitals, and insisted that the settlement was made without his knowledge or authority. The attorney, by his answer, alleged that the recitals were true, and that the deed was made and executed with the knowledge and authority of the client, and in order to prevent him from dissipating his property, but gave no evidence of such knowledge or authority: *Held* the burden of proof was upon the attorney, and the court set aside the deed.

Moore v Prance (1851) 9 Hare 299; 20 LJ Ch 468; 18 LTOS 51; 15 Jur 1188; 68 ER 517

88 Lack of understanding of settlor — Settlement containing unusual clauses

Phillips v Mullings no 73 ante

89 Lack of understanding of settlor — Whether propriety of clauses considered

(1) Where an action is brought by the settlor against the trustees to set aside a voluntary settlement, the court will not consider the propriety or impropriety of the clauses, except as evidence that the settlor did not understand what he was doing: the only question being whether the settlor understood what he was doing, and its effect on his position with regard to the property. (2) Where a settlement is set aside the trustee has no claim to his costs as a matter of right, there being no contract in existence; and, therefore, if costs are given against him he has no right of appeal.

Dutton v Thompson (1883) 23 Ch D 278; 52 LJ Ch 661; 49 LT 109; 31 WR 596, CA

ANNOTATIONS As to (1) **Consd** Strauss v Sutro [1948] LJR 33. As to (2) **Consd** Merry v Pownall [1898] 1 Ch 306

90 Lack of understanding of settlor — As to details of settlement — Reliance on professional adviser

Plaintiff was entitled to a settled estate as tenant in tail male in remainder, subject to two preceding life interests of his aunt, the protector of the settlement, and his mother. Plaintiff attained twenty-one on 10 December 1878, and shortly after that date it was thought by his mother very desirable and important that some resettlement of the estate should be made. Accordingly he executed two deeds, both dated 2 January 1879, to which the protector of the settlement was a party, one being the usual disentailing deed and the other a resettlement. The estate was thereby relimited to the use of plaintiff for life, with remainder to uses in favour of the issue of plaintiff, and in default of issue, then in favour of his cousins, children of the protector of the settlement, as tenants in common, with ultimate remainder to plaintiff in fee. An action was brought by plaintiff claiming to have the resettlement cancelled and set aside or modified in effect. The question was whether plaintiff had been made sufficiently aware of the nature and effect of the deed, and had had the proper amount of independent advice which is necessary, in order that such a resettlement, executed by a person who has just attained his majority, should be upheld. Plaintiff admitted in his evidence he understood that by the deed he was giving his property to his cousins in the event of his death without issue; but he stated that he did not understand, and it was not explained to him that the deed was an irrevocable instrument, and he believed that it was something in the nature of a will, which he supposed it was his duty to execute upon attaining twenty-one. He had a short time previously executed a disentailing deed, and made a will in favour of his cousins in reference to another estate belonging to him. On the other hand, the evidence of defendants went to show that plaintiff understood generally what he was executing but that he declined an offer made by his legal adviser to have the deed read over to him, on the ground that he should not understand if it was read. It did not appear that plaintiff's attention had been specifically called in detail the nature and effect of the several clauses of the deed: *Held* as plaintiff had an accurate general knowledge of what he was doing, and only refused to receive a detailed explanation of the provisions of the deed because he trusted his solicitor to look into those details on his behalf, he was as much bound as if he were himself a lawyer, and had drawn the deed with his own hand.

Lovell v Wallis (No 2) (1884) 50 LT 681

91 Absence of professional advice

A settlement made by a woman in contemplation of marriage, without the knowledge of her intended husband, and without proper legal advice, set aside.

Prideaux v Lonsdale (1863) 1 De GJ&Sm 433; 2 New Rep 144; 8 LT 554; 9 Jur NS 507; 11 WR 705; 46 ER 172, LJJ

ANNOTATIONS **Apld** Everitt v Everitt (1870) LR 10 Eq 405 **Distd** Phillips v Mullings (1871) 7 Ch App 244

92 Absence of professional advice — Improvidence of settlement — Settlement by young woman shortly after majority

Everitt v Everitt no 72 ante

Scottish, Irish and Commonwealth Cases

93 Absence of independent advice

The absence of independent advice will not vitiate a deed of settlement executed by a woman if the obtaining of independent advice would not have made any difference in the result.

Linderstam v Barnett (1915) 19 CLR 528 (AUS)

iii Settlement in favour of objects of settlor's bounty

CROSS REFERENCES See no 67 et seq ante (absence of power of revocation); FAMILY ARRANGEMENTS, UNDUE INFLUENCE AND VOIDABLE CONVEYANCES vol 25 (2nd reissue) no 658 et seq (undue influence generally), no 751 et seq (infirmity or incapacity of grantor generally), no 910 et seq (undue influence generally)

94 Undue influence — Benefit to father — Settlement by son tenant in tail

Son tenant in tail of an estate, upon the death of the mother, who was tenant for life, makes a settlement of it for the benefit of the family, in consequence of an agreement so to do in the mother's life; although the father derives some benefit under the settlement, it shall not be set aside, as entered into under undue influence.

Kinchant v Kinchant (1784) 1 Bro CC 369; 28 ER 1183

95 Undue influence — Benefit to father — Settlement by daughter tenant in tail

V, having an infant daughter, who was tenant in tail in possession of certain estates, and tenant in fee in remainder in another, in which he had himself a prior life interest and having held possession of such estates as guardian in socage during her minority, procured her, on her coming of age, in 1843, to bar the entail and by the disentailing deed to give to him an immediate estate for life in two-thirds of the land of which she was tenant in tail. V had not maintained his

daughter during her minority out of his own moneys though of capacity to have done so. He never accounted to his daughter for the receipt or rents during her minority. On the other hand he had defrayed about £700 costs of litigation on her behalf. The infant came of age in February 1843; the disentailing deed giving V a life estate was engrossed in May 1843, and executed in June 1843. It was wholly prepared by the confidential solicitor of the father, V. In 1844 the whole circumstances were for the first time known to the daughter. Shortly after, she married plaintiff, to whom the circumstances were also known and proceedings to set aside the life estate so obtained by V seem to have been then contemplated as possible. In 1845 plaintiff wrote to V upbraiding him with having so obtained the life estate and insisting that V should pay a sum of £200 in respect of the marriage outfit of the daughter. In the same year by post-nuptial settlement, the lands in question were conveyed to trustees "subject to the life estate of V." Plaintiff's wife, V's daughter, died in 1850. In 1853 plaintiff brought this bill to have the life estate of V set aside: *Held* although the transaction was apparently one which could have been set aside in 1843, or even in 1844 if proceedings had been taken immediately after the marriage, yet plaintiff was now precluded from relief, on the ground of laches; and the same reason applied to prevent relief in respect of the rents received by V during his late daughter's minority.

Wright v Vanderplank (1855) 2 K&J 1; 25 LTOS 303; 1 Jur NS 932; 3 WR 637; 69 ER 669; affd (1856) 8 De GM&G 133; 25 LJ Ch 753; 27 LTOS 91; 2 Jur NS 599; 4 WR 410; 44 ER 340, LJJ

ANNOTATIONS **Consd** Turner v Collins (1871) 7 Ch App 329; Mitchell v Homfrey (1881) 50 LJQB 460 **Apld** Allcard v Skinner (1887) 36 Ch D 145; De Witte v Addison (1899) 80 LT 207; Powell v Powell [1900] 1 Ch 243

96 Undue influence — Benefit to clergyman — Settlement by widow

Voluntary settlement by a widow upon a clergyman and his family set aside; as obtained by undue influence and abused confidence in defendant' as an agent undertaking the management of her affairs; upon the principles of public policy and utility, applicable to the relation of guardian and ward, etc.

Huguenin v Baseley (1807) 14 Ves 273; 33 ER 526

ANNOTATIONS **Consd** Hunter v Atkins (1834) Coop temp Brough 464; Middleton v Sherburne (1841) 4 Y&C Ex 358; Toker v Toker (1863) 3 De GJ&Sm 487 **Apld** Coutts v Acworth (1869) LR 8 Eq 558; Baker v Loader (1872) LR 16 Eq 49; Allcard v Skinner (1887) 36 Ch D 145; Berry v Glazebrook (1891) 7 TLR 574; Morley v Loughman [1893] 1 Ch 736 **Distd** Wright v Carter [1903] 1 Ch 27 **Consd** Re Lloyds Bank Ltd, Bomze & Lederman v Bomze [1931] 1 Ch 289 **Consd** Zamet v Hyman [1961] 3 All ER 933 **Distd** Re Brocklehurst, Hall v Roberts [1978] 1 All ER 767

97 Undue influence — Benefit to brother — Settlement by spinster — Without professional assistance

(1) A voluntary deed made by an unmarried lady in favour of her brother, with whom she was residing at the time, and executed by her without professional assistance, set aside at the instance of the lady and her husband.

(2) The sale of a reversionary interest by a sister to her brother set aside upon the ground of undervalue, after a lapse of ten years, the sister having continued under the influence of her brother up to a period of within two years of the bill being filed.

Sharp v Leach (1862) 31 Beav 491; 7 LT 146; 8 Jur NS 1026; 10 WR 878; 54 ER 1229

98 Misrepresentation — That object of settlement illegitimate son of settlor

Coxon v Schofield (1893) 9 TLR 290

iii FISCAL CONSEQUENCES OF SETTLEMENT

LAW See Halsbury's Laws (4th edn) vol 42 paras 619 et seq

iv STAMP DUTY AND COSTS

LAW See Halsbury's Laws (4th edn) vol 42 paras 623, 624

2 Capacity to make a settlement

LAW See Halsbury's Laws (4th edn) vol 42 paras 625, 626

CROSS REFERENCES See INFANTS vol 28(3) (2nd reissue) no 956 et seq (as to jurisdiction of court in respect of wards of court generally), no 1319 et seq (avoidance of contracts by infants generally), no 1371 et seq (infants' settlements on marriage, at common law), no 1372 et seq (settlements on marriage of ward of court), no 1379 et seq (infants' settlements on marriage under statute); MENTAL HEALTH vol 34 (reissue) no 157 et seq (persons of unsound mind)

3 Contracts for settlements

i CONTRACTS IN GENERAL

LAW See Halsbury's Laws (4th edn) vol 42 para 627

ii CONTRACTS TO SETTLE PROPERTY ON MARRIAGE

1 Marriage articles

A Limitations inserted in settlements

a In general

LAW See Halsbury's Laws (4th edn) vol 42 para 628 et seq

99 Power of court to construe — Without directing settlement
To save expense, the court declared the construction of executory marriage articles instead of directing a settlement to be executed in conformity therewith.
Byam v Byam (1854) 19 Beav 58; 24 LJ Ch 209; 1 Jur NS 79; 3 WR 95; 52 ER 270

100 Construction according to intention — Against actual words
Ward v Bradley (1687) 2 Vern 23; 23 ER 626

101 Construction according to intention — Against actual words
Kentish v Newman no 2856 post

102 Construction according to intention — Against actual words
There is no other difference between marriage settlements or marriage provisions made upon a valuable consideration and voluntary assignments of terms, than that in the first case the court will sometimes make a stronger and more favourable construction to answer that intention than they will in the other (*Lord Hardwicke C*).
Hodgson v Bussy (1740) Barn Ch 195; 2 Atk 89; 27 ER 610; sub nom
Hodsell v Bussell (1740) 9 Mod Rep 236, LC

103 Construction according to intention — Against actual words
Targus v Puget no 108 post

104 Construction according to intention — Against actual words
The cases establish that in carrying marriage articles into effect the court does not confine its view to the strict words of the articles but seeks to effectuate the intention of the parties. Is this, then, such a settlement as the husband agreed to make? His contract was to settle the property on the wife and her children, and though it is to be settled in such way and manner as the trustees may think proper yet their discretion is not as to who shall be the objects of the settlement but as to the manner and way in which the persons who are marked out as the objects of it shall take. Now, by the settlement a great part of the property is in immediate advancement to the husband, and another considerable part of it he takes absolutely upon an event which had happened. It appears to me that such a settlement cannot be deemed conformable to the articles (*Gifford MR*).
Webb v Kelly (1825) 3 LJOS Ch 172

105 Construction according to intention
Brudenell v Elwes (1802) 7 Ves 382; 32 ER 155, LC

ANNOTATIONS **Consd** Re Mortimer, Gray v Gray [1905] 2 Ch 502

106 Construction according to intention
Devise of copyhold estates, the legal estate being outstanding, "To my son RWG, to be entailed upon his male heirs, and failing such to pass to his next brother, and so on from brother to brother, allowing £2,500 to be raised upon the estates for female children each." *Quaere*: whether a trust executed or executory; and if the latter, whether an estate tail in RWG. The point too doubtful to compel a purchaser to take the title. No difference between marriage articles and executory trusts in wills, except that the former afford *primâ facie* evidence of intent, which does not belong to latter.
Jervoise v Northumberland (Duke) (1820) 1 Jac&W 559; 37 ER 481, LC

107 Construction according to intention
Sackville-West v Holmesdale (Viscount) no 247 post

108 Construction according to intention — Words supplied
Trust money in marriage articles in power of the court, and construed against the words for sake of the intent, by supplying the word, if wife should die without issue.
Targus v Puget (1750) 2 Ves Sen 194; 28 ER 126

109 Whether articles executory or final — Considered as minutes only
Blandford (Marchioness) v Marlborough (Dowager Duchess) no 1180 post

110 Whether articles executory or final — Considered as minutes only
Randall v Willis no 164 post

111 Whether articles executory or final — Considered as minutes only
Phillips v James no 147 post

112 Whether articles executory or final — Considered as minutes only — Unless rights of parties finally declared — Covenant to stand seised
In articles under seal, after a recital of an intended marriage between B and C, A, the father of B, "for

the support and settlement in the world of the young couple, freely and clearly giveth and settleth upon B his land from Michaelmas next" for life, remainder to the first son of the marriage, "and so on successively for every other son" with remainders over. This is a covenant to stand seised, and not an executory contract.

Doe d Jones v Williams (1833) 5 B&Ad 783; 2 Nev&MKB 602; 110 ER 980

113 Whether articles executory or final — Considered as minutes only — Unless rights of parties finally declared — Though future act remains to be done

Where an instrument, executed previously to a marriage under the name of "articles of agreement," appears on the face of it finally to declare the intention of the parties, and does not point to a future instrument as necessary to complete the contract, it will not be treated as executory, though, in order to give full effect to its provisions, a future act may remain to be done after its execution.

De Havilland v De Saumarez, De Havilland v Bingham (1865) 14 WR 118, LJJ

ANNOTATIONS **Consd** Mayn v Mayn (1867) LR 5 Eq 150

114 Whether articles executory or final — Considered as minutes only — Unless rights of parties finally declared — Though future act remains to be done

M, by voluntary articles under seal, covenanted with his two daughters that he would at such time in his lifetime as he thought fit, or, failing his so doing, his executors should, within six months after his decease, settle certain securities specified in the schedule and standing in M's name, or other securities of equivalent value, upon certain trusts, as to one moiety in favour of his daughter I and her issue, which trusts were stated at length, and as to the other moiety in favour of his daughter E and her issue, which trusts were stated by reference to those of the other moiety. The articles reserved a life interest to M, and provided that M, whilst sole trustee and the trustees or trustee for the time being, might sell any of the securities "for the time being constituting the settled fund," or such part as "might from time to time be subject to the intended trusts aforesaid," and invest the proceeds of sale as therein mentioned; also, that M during his life, and after his death his daughter I, in the event of her marriage, might revoke the intended trusts of her moiety and resettle the same by way of marriage settlement giving a life interest to her husband; with a similar power in the case of E's moiety declared by reference to other moiety; also, that after M's death the statutory power of appointing new trustees of either moiety should vest in I and E respectively; and defined the "settled fund" as meaning the securities specified in the schedule or the investments representing the same. The schedule specified the securities, and provided that any allotments of new shares or stocks in virtue thereof were not included in the settlement, but were to belong to M: *Held* the articles constituted a complete settlement which the court would enforce at the instance of the daughters.

Johnstone v Mappin (1891) 60 LJ Ch 241; 64 LT 48

Scottish, Irish and Commonwealth Cases

115 Construction according to intention

Articles are not to be construed in the same manner as formal dispositions, but the court has to consider what the contract is, which the parties intended to enter into; and where the words are short and defective, to presume what was the probable intent.

Taggart v Taggart (1803) 1 Sch&Lef 84 (IR)

116 Construction according to intention — Where words of limitation omitted

Re Public Works Comrs, Ex p Rice (1896) 30 ILT 57 (IR)

117 Whether articles executory or final — Considered as minutes only

Bushell v Bushell (1803) 1 Sch&Lef 94, 95 (IR)

118 Whether articles executory or final — Considered as minutes only

Fegan v Meegan [1900] 2 IR 441 (IR)

b Settlements of realty

i Estate for life with remainder to heirs

LAW See Halsbury's Laws (4th edn) vol 42 para 628 et seq

CROSS REFERENCE See no 1176 et seq post (beneficial interests in realty)

119 General rule — Limitation construed as strict settlement — Exclusion of rule in Shelley's case

Upon a marriage, articles were entered into, whereby it was agreed, that the wife's portion should be laid out in the purchasing of lands, which should be settled on the husband and wife for their lives, and the life of the longer liver of them, and after to the heirs of the body of the wife, by the husband to be begotten; yet the Master of the Rolls decreed the settlement to be

to the first and others sons, etc, so as the husband and wife might not have power to bar the issue.
Jones v Langhton (1698) 1 Eq Cas Abr 392; 21 ER 1126

120 General rule — Limitation construed as strict settlement — Exclusion of rule in Shelley's case
Articles to settle lands to one for life, remainder to the heirs of his body; in execution of the articles, equity shall go according to the intent, and not direct an estate tail according to the words.
Collins v Plummer (1708) as reported in 1 P Wms 104; 24 ER 313, LC

121 General rule — Limitation construed as strict settlement — Exclusion of rule in Shelley's case
One devises his lands for payment of his debts, and then to A for life, with power to make leases, etc, remainder to the heirs male of the body of A, though this be but the devise of a trust, and executory, and expressed to be to A for life, yet it is an estate tail in A, barrable by a fine and recovery.
Secus in case of marriage articles to settle an estate on A for life, remainder to the heirs male of his body; this being an agreement to do future act, and in which the issue are particularly considered and looked upon as purchasers.
Bale v Coleman (1711) 1 P Wms 142; 2 Eq Cas Abr 309; 24 ER 330; sub nom
Baile v Coleman (1711) 2 Vern 670

ANNOTATION **Consd** Bagshaw v Spencer (1748) 1 Ves Sen 142

122 General rule — Limitation construed as strict settlement — Exclusion of rule in Shelley's case
Nandike v Wilkes (1716) Gilb Ch 114; 25 ER 80

123 General rule — Limitation construed as strict settlement — Exclusion of rule in Shelley's case
In marriage articles the children are considered as purchasers (*Lord Hardwicke C*).
Seale v Seale (1715) 1 P Wms 290; Gilb Ch 105; Prec Ch 421; 24 ER 393, LC

124 General rule — Limitation construed as strict settlement — Exclusion of rule in Shelley's case
(1) S on his marriage covenants to settle lands to the use of himself for life, remainder to the heirs of his body by his intended wife; and to make a settlement accordingly within two years, or in default thereof, to stand seised to the same uses; though this is an estate-tail in S at law, yet a court of equity will turn it into a strict settlement.

(2) If a defective settlement in any particular has been made, a second must be made till the use in the articles are well and effectually raised, for till then the covenant subsists.
Trevor v Trevor (1719) 5 Bro Parl Cas 122; 9 Mod Rep 161; 2 ER 574, HL

ANNOTATION As to (1) **Consd** West v Erisey (1726) 1 Com 412

125 General rule — Limitation construed as strict settlement — Exclusion of rule in Shelley's case
The principle is clear, that in general, where in marriage articles a settlement is agreed to be upon the parties and the heirs of their bodies, the settlement shall be made in strict settlement (*Lord Hardwicke C*).
Glanville v Paine (1740) Barn Ch 18; 2 Atk 39; 27 ER 537, LC

126 General rule — Limitation construed as strict settlement — Exclusion of rule in Shelley's case
Marriage articles not decreed in strict settlement where by a difference in the penning the parties intended to leave part in the father's power.

Where by articles part of an estate is limited to father for life, to wife for life, to first and every other son and daughters in tail; another part to father for life, and heirs male of his body by that wife; *Lord Macclesfield* said, if that had been the sole limitation, he should without scruple decree in strict settlement according to the common rule; but where the parties had shown they knew the distinction when to put it out of the power of the father and when to leave it in his power, he would not vary the last limitation, decreeing to the father in tail as to the last, though not as to the first (*Lord Hardwicke C*).
Howel v Howel (1751) 2 Ves Sen 358; 28 ER 229, LC

127 General rule — Limitation construed as strict settlement — Exclusion of rule in Shelley's case
On marriage, the husband executes a deed poll whereby he purports to settle all his real and personal estate on the wife and the heirs of her body by him begotten, obliging her to give each of her children by him begotten £1,000 apiece at twenty-one and to divide the residue equally amongst them at her death. This gives an estate for life only to the wife, with remainder in fee to the children as tenants in common. These marriage articles so far tied up the property of the settlor, that a real estate purchased by him in his lifetime with part of his personal estate, shall be considered as personal estate and be disposed of accordingly.
Lowther v Westmoreland (Earl) (1784) 1 Cox Eq Cas 64; 29 ER 1064

128 General rule — Limitation construed as strict settlement — Exclusion of rule in Shelley's case

No distinction between executory trusts by marriage articles and will, except the inference from the object of the former, to provide for the issue, that the father should not have the power to defeat it. Therefore estate for life with remainder to the heirs of the body a strict settlement in the one case; an estate tail in the other, unless clearly not meant in their technical sense.

Blackburn v Stables (1814) 2 Ves&B 367; 35 ER 385

ANNOTATION **Consd** Sackville-West v Holmesdale (1870) LR 4 HL 543

129 General rule — Limitation construed as strict settlement — Exclusion of rule in Shelley's case

By marriage articles, a husband covenanted, in consideration of his wife's portion, to settle an estate to his own use, and after his decease to the use of his heirs on the body of his intended wife, and for want of such issue to his own right heirs for ever. The articles did not express any further intention of providing for the children of the marriage, and made a provision for the intended wife in lieu of dower. No settlement was executed; and the husband mortgaged the estate, and at the same time delivered the articles to the mortgagee: *Held* on his death, under the articles, he was entitled to a life estate only, and the mortgagee took with notice, and could not therefore hold as against the issue of the marriage.

Davies v Davies (1814) 4 Beav 54; 49 ER 258

130 General rule — Limitation construed as strict settlement — Exclusion of rule in Shelley's case

Lambert v Peyton no 152 post

131 Application of rule — Whether applied in favour of daughter

Articles on marriage to settle lands on husband and wife for their lives, remainder to the heirs male of the body of the husband by the wife, remainder to the heirs male of the body of the husband by any other wife, remainder to the heirs "female" of the body of the husband by this wife. A settlement is made before the marriage, and said to be pursuant to the articles, whereby the lands are limited to the husband for life *sans* waste, and with power to make leases, remainder to the first, etc, son of the marriage in tail male, remainder to the first, etc, son of any other marriage in tail male, remainder to the "heirs of the body" of the husband. There are issue two daughters, and the husband suffers a recovery, and devises the premises to his sister; the daughters may in equity compel the devisee to convey the premises to them.

West v Errissey (1727) 2 P Wms 349; 1 Bro Parl Cas 225; 1 Com 412; 24 ER 760, HL

ANNOTATIONS **Apld** Glanville v Paine (1740) Barn Ch 18 **Consd** Roberts v Kingsly (1749) 1 Ves Sen 238; Highway v Banner (1785) 1 Bro CC 584; Randall v Willis (1800) 5 Ves 262

132 Application of rule — Whether applied in favour of daughter

Articles on marriage to settle lands on husband and wife for their lives, remainder to the first, etc, son of the marriage, remainder to the heirs male of the body of the husband by any wife, remainder to the heirs of the body of the husband by the first wife, remainder to the husband in fee, with provisions for the daughters of the first marriage, if no son; husband has one daughter by the first wife, suffers a recovery, and married a second wife, and takes notice of the first marriage articles in his second marriage settlement; the daughter by the first marriage barred by this recovery. Diversity betwixt a limitation by marriage articles to the heirs of the body of the man and the heirs female of the body of the man; and sons more favoured than daughters.

Powell v Price (1729) 2 P Wms 535; 24 ER 850; sub nom

Price v Powel (1729) 1 Barn KB 201

133 Application of rule — Whether applied in favour of daughter

(1) By settlement on the marriage of HA with JC in case there was no issue male, and there should be daughters living at the death of the father, who should attain twenty-one or be married, then such daughters should have £2,000 apiece; there were no sons, but only three daughters; defendant who was one, married AD and previous to his marriage, covenanted to assign with his wife's consent £500 to trustees, in trust after the death of AD and defendant, to pay it amongst the children of the bodies of defendant and AD and that he should after the marriage assign to the trustees all the money and securities for it then due and belonging to defendant. HA died in 1744; AD in 1745, intestate, to whom defendant administered and received the £2,000. The children, who are a son and daughter, have a right to the portion, and decreed to be secured for their benefit.

The precedent part of the articles include a small part of the real estate, the new plaintiffs being heirs of the body; that estate certainly is in the power of the mother in point of law, and vests in the mother in tail; but in this court being under articles is to be carried into strict settlement to the wife for life, to the first and other son in tail, and in default of issue male to daughters (*Lord Hardwick C*).

(2) Covenant by husband to assign a contingent portion of the wife to uses of the marriage. The right of calling for it vests in husband, who dies without doing so: the wife bound by this covenant.
Bash v Dalway (1747) 3 Atk 530; 26 ER 1106; sub nom
Bush v Dalway (1747) 1 Ves Sen 19, LC

ANNOTATION As to (2) **Consd** Honner v Morton (1828) 3 Russ 65

134 Application of rule — Against purchaser for value with notice — Articles not produced
Where articles were entered into previous to marriage, for settling by the wife's father lands to the use of the husband and wife for their lives, and the life of the survivor, and after the death of the survivor, to the use of the heirs of the body of the husband on the wife, remainder over; and a settlement was made after the marriage reciting the articles, and said to be made in pursuance of the marriage; upon a bill brought by a son of the marriage, the court refused to decree the articles to be carried into execution by a strict settlement against a purchaser for a valuable consideration, who had notice of them; on the ground of the articles not being produced by which alone the court could alter the settlement.
Cordwell v Mackrill (1766) 2 Eden 344; Amb 515; 28 ER 930, LC

135 Application of rule — Against mortgagee with notice
Davies v Davies no 129 ante

136 Application of rule — Estate tail to husband — Provision restraining waste
Griffith v Buckle (1686) 2 Vern 13; 23 ER 620

137 Exceptions to rule — Power to bar not in first taker alone
Whateley v Kemp (1734) cited in 2 Ves Sen at p 358; 28 ER 230

138 Exceptions to rule — Power to bar not in first taker alone
Howel v Howel no 126 ante

139 Exceptions to rule — Power to bar not in first taker alone
Settlement on marriage, to the husband for life, remainders to wife for life, remainder to the heirs of their bodies, a strict settlement, but not so where the power of barring the entail is given to both.
Highway v Banner (1785) 1 Bro CC 584; 28 ER 1312

ANNOTATION **Consd** Brudenell v Elwes (1802) 7 Ves 382

140 Exceptions to rule — Power to bar not in first taker alone
Brudenell v Elwes (1802) 7 Ves 382; 32 ER 155, LC

141 Exceptions to rule — Articles executed by legal settlement
By marriage settlement, purporting to be made in pursuance of articles recited in it, and estate was conveyed to the husband and wife; and the heirs of their bodies: *Held* they thereby became tenants in tail special, and a court of law could not construe the deed as making them tenants for life with remainder to their issue in tail, even supposing that such be the construction to be put upon the articles by a court of equity.
Doe d Daniell v Woodroffe (1842) 10 M&W 608; 12 LJ Ex 147; on appeal sub nom
Woodroffe v Doe d Daniell (1846) 15 M&W 769; 15 LJ Ex 356; 7 LTOS 368; affd (1849) 2 HL Cas 811; 13 Jur 1013; 9 ER 1301, HL

Scottish, Irish and Commonwealth Cases

142 General rule — Limitation construed as strict settlement — Exclusion of rule in Shelley's Case
Brennan v Fitzmaurice (1839) 2 I Eq R 113 (IR)

143 General rule — Limitation construed as strict settlement — Exclusion of rule in Shelley's Case
Rochfort v Fitzmaurice (1842) 4 I Eq R 375; 1 Con&Law 158; 2 Dr&War 1 (IR)

144 Exceptions to rule — Estate tail to eldest son in possession with remainder in fee
Dillon v Blake (1864) 16 I Ch R 24 (IR)

ii Limitation in favour of issue

LAW See Halsbury's Laws (4th edn) vol 42 para 628 et seq

CROSS REFERENCE See no 1176 et seq post (beneficial interests in realty)

145 When construed as strict settlement — Estate for life with remainder to issue
This court will carry into strict settlement, an estate limited to a husband for life, to the wife for life, remainder to the issue of their two bodies.
Villiers v Villiers (1740) 2 Atk 71; Barn Ch 307; 2 Eq Cas Abr 305; 26 ER 444, LC

146 When construed as strict settlement — Estate for life with remainder to issue
By marriage articles, it was agreed, that £3,000 should be laid out in land, and settled on the husband and wife for their lives, remainder to such issue, etc, as they should appoint; and in default of appointment, to the issue of their bodies. On the death of the husband without appointment: *Held* the land should be settled in strict settlement, *viz*, on wife for life, remainder to the first and other sons in tail.
Dod v Dod (1755) Amb 274; 27 ER 184

ANNOTATIONS **Apld** Phillips v James (1865) 3 De GJ&Sm 772 **Consd** Grier v Grier (1872) LR 5 HL 688

147 When construed as strict settlement — Estate for life with remainder to issue

By articles executed in contemplation of a marriage, the father of the intended husband, in consideration of a sum of money to be paid by his son, covenanted to execute a conveyance of certain real estates to trustees for the use of his son for life, with remainder to the intended wife for life or during widowhood, with remainder "to the use and benefit of the issue of the intended marriage, their heirs and assigns for ever." No conveyance was ever executed; the husband succeeded to the estate, and upon the death of himself and his wife there survived a son and two daughters, all of whom had children: *Held* the articles, being executory, were not to be construed in the same manner as formal dispositions, but must be treated as short notes or instructions upon which a settlement would be prepared; the court would, therefore, consider what was the contract which the parties intended to enter into when the words were insufficient or defective; and upon the words in this case the sons of the marriage took successive estates tail, and the daughters of the marriage estates in common in tail with cross-remainders between them in tail.

Phillips v James (1865) 3 De GJ&Sm 72; 12 LT 685; 11 Jur NS 660; 13 WR 934; 46 ER 565, LJJ

148 When construed as strict settlement — Estates in tail male and female for successive life tenant — Priority of estate

The settlor conveyed real estate to trustees in fee, to the use of A, B, C and four others successively, for life, and afterwards upon trust to convey to all and every the sons and daughters of the eight tenants for life, "who should be then living, and to the heirs male and female of his, her and their body and bodies respectively, in a course of entail," the sons and daughters of A, and their heirs, to take before all the other persons named, and the sons and daughters of B and their heirs to take next after the sons and daughters of A and their heirs, and similar as to the five others in succession, and the sons of all and every the persons last above named and the heirs, etc, to take before the daughters and their heirs: *Held* the daughters of A took in priority of the sons of B.

Randall v Daniel (1857) 24 Beav 193; 53 ER 331

149 When construed as strict settlement — Covenant to settle on issue

A covenant in marriage articles to settle an estate, after the payment of an annuity to the intended wife, "upon his issue" by the intended wife, must be construed as a covenant for strict settlement, and excludes the husband from creating charges in favour of younger children.

By articles of marriage it was recited that the intended husband had received a sum of £600 from J, his intended wife, and he covenanted to settle upon her an annuity of £60 for her life, to commence from his death, charged upon his lands, with the ordinary powers of distress and entry, and to settle the residue and remainder of his lands "upon his issue by" J, his intended wife. There were several children of the marriage. Some years after the marriage he executed a deed by which he charged on his lands various sums of money in favour of younger children, devising the lands themselves to his eldest son, and his other sons successively in tail male: *Held* this deed creating these charges was void, for the covenant in the articles gave him no power to charge the lands for the benefit of the younger children, and must be interpreted to mean that he would settle the lands in the ordinary form of strict settlements.

Grier v Grier (1872) LR 5 HL 688, HL

150 Right of children to take as tenants in common

By a deed it was, amongst other things, agreed and declared that A, his executors, administrators, and assigns, should raise out of certain hereditaments £800, and should invest same in the names of trustees at interest upon Government or real securities "upon trusts to be declared for the benefit of J for her life with remainder to her children and as to J to and for her separate use, and with all the powers for changing the security, and for maintenance, and other powers and trusts which are usually inserted in a money settlement of the like nature." No subsequent declaration of trust of the £800 was ever made: *Held* the deed was executory only, and the settlement so directed ought to have limited the £800, after the death of J, amongst her children as tenants in common, and not as joint tenants.

Mayn v Mayn (1867) LR 5 Eq 150; 17 LT 439

151 Meaning of "issue" — Includes female

The bill was brought by the daughter and only child of the first marriage of J for a specific performance of articles previous thereto, insisting she ought to be tenant in tail of the lands therein mentioned. Issue in the articles means female as well as male, and consequently plaintiff is entitled to have a settlement of these lands in tail, and when defendant, the son of the second marriage, comes of age, he must convey to her.

Hart v Middlehurst (1746) 3 Atk 371; 26 ER 1014, LC

ANNOTATIONS **Consd** Phillips v James (1865) 2 Drew&Sm 404; Grier v Grier (1872) LR 5 HL 688

152 Meaning of "issue" — "Issue male" — Not son of daughter

In marriage articles in 1802, which were to be, but never were, followed by a formal settlement, two separate estates, one belonging to the intended husband, the other to the intended wife, were included. Both were vested in trustees, in trust to permit the husband and wife to receive the profits during life, and, as to her portion, should she survive her husband, "to such of her issue male by her said husband as she may, by her last will and testament, notwithstanding her coverture, direct, limit, or appoint"; and in case of no appointment, to the "issue male" of the husband and wife; and in case of no issue male, then to go amongst her daughters; "and in case of failure of issue male or female then to go to such person or persons" as she should appoint. There were two children of the marriage, a son and a daughter. The wife survived the husband many years, and made a will, which, reciting the power reserved to her by the articles, appointed her property to her grandson, the son of her daughter, describing him as "issue male" of her marriage: *Held* the articles were executory; if in accordance with them a settlement had been executed, the estate would have been put in strict settlement; and the power reserved by them was not well exercised; the grandson, the son of a daughter, not coming within the description of "issue male" therein contained.

Lambert v Peyton (1860) 8 HL Cas 1; 11 ER 325

ANNOTATION **Follď** Re Du Cros' Settlemt [1961] 3 All ER 193

Scottish, Irish and Commonwealth Cases

153 When construed as strict settlement — Estate for life with remainder to issue

A, having seven daughters and no sons, by articles entered into on the marriage of his daughter B, covenanted to secure to her and her children by C, her intended husband, a share of his real estate equal to that of any other of his daughters. A died without having made any settlement: *Held* B was entitled to an estate for life, remainder to her first and other sons in tail, remainder to her daughters in tail.

Hamilton v Cathcart (1977) Wallis by Lyne 282 (IR)

154 Right of children to take as tenants in common

On articles previous to the marriage of W with R the father of W "bound the whole of the farm of, etc as a dowry or marriage portion to his son W along with R the one-half of said farm to be the right title and interest of the issue whether son or daughter, if begotten on the body of R by W." The issue take as tenants in common.

Taggart v Taggart (1803) 1 Sch&Lef 84 (IR)

155 Meaning of "issue" — Includes females

It is only where the contract has expressed an intention to provide for issue generally, that females are included in the provision.

Macguire v Scully (1829) Beat 370 (IR)

156 Meaning of "issue" — Children

Campbell v Sandys (1803) 1 Sch&Lef 281 (IR)

157 Meaning of "issue" — Children

Re Denis' Trusts (1875) 10 LR Eq 81 (IR)

158 Meaning of "issue" — Not extended to children of predeceasing child

Cattanach's Trustees v Cattanach (1901) 4 F (Ct of Sess) 205; 39 Sc LR 154; 9 SLT 284 (SCOT)

iii Other cases

LAW See Halsbury's Laws (4th edn) vol 42 para 628 et seq

CROSS REFERENCE See no 1176 et seq post (beneficial interests in realty)

159 Provision for covenant to enjoy free from incumbrance

Vane v Barnard (Lord) (1708) Gilb Ch 6; 25 ER 5, LC

160 Reservation by settlor of power to charge — Parties without notice of existing incumbrances — Priorities

A by articles previous to the marriage of his daughter agrees to settle several real estates to certain uses, but reserves to himself a power of charging them with £30,000 to pay his debts. He had previously mortgaged those estates for £27,000, but it did not appear that that fact was disclosed to all the parties at the time of executing the articles. On a question, whether the £30,000 should be raised over and above the prior incumbrances: *Held* those prior incumbrances should be paid out of the £30,000; and A should have the residue, after paying the costs of the suit.

Inchiquin (Earl) v Fitzmaurice (1785) 5 Bro Parl Cas 166; 2 ER 603, HL; varying SC sub nom *Shelburne (Countess) v Inchiquin (Earl)* (1784) 1 Bro CC 338, LC

161 Construction according to intention — Provision for remainder to sons in tail — Intention to settle in tail male

(1) Articles executed before a marriage, having stipulated that estates should be limited to the first and other sons of the marriage in tail, but it being proved that the intention was to limit the estates to the first and other sons in tail male, the court, after the marriage had taken place, directed that, in the settlement to be executed in pursuance of the articles, limitations to the first and other sons in tail male should be inserted.

(2) A power was reserved, in articles before marriage, to husband and wife to alter and vary the provisions and terms of the articles in such manner as to them should seem fit, previous to the execution of the settlement: *Held* not to authorise the insertion in the settlement of a power enabling the husband to jointure a future wife, or to charge portions for younger children of a future marriage.

(3) A stipulation was made in articles before marriage that the intended settlement, which related to estates in Ireland, should contain all the covenants, provisions, and conditions usually contained in marriage settlements made in England: *Held* to authorise the insertion of a power of sale and exchange under which lands in England might be taken in exchange for lands in Ireland.

(4) A reference was made to the master to inquire whether certain proposed powers of leasing were usual in that part of Ireland in which the estates were situated, and whether any circumstances connected with the property rendered such powers expedient, and to the interest of all parties, with liberty to state special circumstances.

Bedford (Duke) v Abercorn (Marquess) (1836) 1 My&Cr 312; 5 LJ Ch 230; 40 ER 394, LC

ANNOTATION **Distd** Mason v Mason (1870) 19 WR 741

c Settlements of leaseholds

LAW See Halsbury's Laws (4th edn) vol 42 para 628 et seq

CROSS REFERENCES See no 2806 et seq post (beneficial interests in personalty); LANDLORD & TENANT vol 31(3) (2nd reissue) no 8845 (articles operating as assignment)

162 Covenant to settle leaseholds — To correspond with settlement of realty — Provision by court restricting absolute vesting

Covenant in a marriage settlement to settle leasehold estates in trust for such persons and such or the like estates, ends, intents and purposes, as far as the law would allow, as declared concerning real estates limited to the first and other sons in tail male, with several remainders, executed by giving the absolute interest in the leasehold estates to the first tenant in tail in possession, having attained the age of twenty-one.

Lincoln (Countess) v Newcastle (Duke) (1806) 12 Ves 218; 33 ER 84, HL; varying SC sub nom *Newcastle (Duke) v Lincoln (Countess)* (1797) 3 Ves 387

ANNOTATIONS **Consd** Ware v Polhill (1805) 11 Ves 257; Banks v Le Despencer (1840) 10 Sim 576; Dungannon v Smith (1846) 12 Cl&Fin 546; Scarsdale v Curzon (1860) 1 John&H 40

d Settlements of personalty

LAW See Halsbury's Laws (4th edn) vol 42 para 628 et seq

CROSS REFERENCE See LIMITATION OF ACTIONS vol 32(2) (2nd reissue) no 3214 (whether settlor a trustee within Statute of Limitations (repealed))

163 Usual form of settlement — Of wife's personal estate

Ante-nuptial articles were signed which provided for the wife's personal estate being vested in trustees, "the trusts of the income being for the benefit of the husband and wife during their lives, and the trusts of the capital being for and amongst the children according to the appointment of the husband and wife, or the survivor of them, and in default of appointment, to the children equally; and in the event of there being no children, and of the husband being the survivor, the trust property to be at his absolute disposal." After the marriage a settlement was executed which limited the income to the husband and wife during their joint lives, and to the survivor of them during his or her life, and then gave the capital to the children absolutely as tenants in common; but if there was no child, and the husband survived the wife, then to the husband. There was only one child of the marriage and he died at the age of six months in the lifetime of the parents. The husband died in the lifetime of the wife: *Held* the capital of the fund and the arrears of income at the death of the husband belonged to the wife, for the court would have carried the articles into effect by giving the wife the first life estate to her separate use, and by making the shares of sons contingent on their attaining twenty-one and of daughters on their attaining twenty-one or marrying, or by inserting clauses of survivorship and accruer on the death of sons under twenty-one, and of daughters under that age and unmarried, so that the husband would have had no title as next of kin of his deceased infant child, and the settlement must be rectified accordingly.

Cogan v Duffield (1876) 2 Ch D 44; 45 LJ Ch 307; 34 LT 593; 24 WR 905, CA

ANNOTATION **Apld** Re Gowan, Gowan v Gowan (1880) 17 Ch D 778

164 Provision for husband to settle personal estate — Real estate purchased with personal — To be construed as personal

Articles before marriage for setting real estates of the husband and also all and singular his personal estate of what nature or kind soever; a proper execution would be by a covenant, that real estate, that should be purchased with the personal, should with respect to the objects of the settlement be considered

personal; the settlement therefore, made after marriage, containing no such covenant, and being in other respects a defective execution, real estates purchased by the husband, according to the evidence in order to defeat the right of his wife, were decreed to be conveyed by his devisee according to the articles.

If a formal deed was executed before marriage, containing such a covenant, it is impossible that I could do anything with it. But an article is only the head and minute of an agreement, not to be followed literally (*Lord Loughborough C*).

Randall v Willis (1800) 5 Ves 262; 31 ER 577

ANNOTATION **Distd** Lewis v Madocks (1803) 8 Ves 150

165 Provision for limitation to wife and husband successively for life — Remainder to children — Remainder over to stranger — Insertion of power of appointment to wife in default of children

Where marriage articles provide *simpliciter* for the limitation of the wife's property to herself and her husband successively for life, with remainder to their children, with remainder over to strangers, the court would *primâ facie* order the insertion in the settlement of a power of appointment to the wife in default of children; and it would be the duty of counsel preparing a settlement under similar instructions to insert such a power, or, at least, to call the attention of the parties to the propriety of introducing it.

Harbidge v Wogan (1846) 5 Hare 258; 15 LJ Ch 281; 10 Jur 703; 67 ER 909

166 Provision for power of wife to dispose "as if still unmarried" — Life estate with power of appointment — Remainder to next of kin in default of appointment

A father by his will settled stock upon his daughter for life, remainder to her issue, subject to a life interest in any husband who might survive her. She married and had one only child, a son, and her husband died. When she had attained eighty years of age she married a gentleman, a member of the Irish and English bar, of about fifty-four years of age. She had accumulated much personal property, the savings of her income. Before the marriage, which it was agreed should be kept secret from the son, a very voluminous and long continued correspondence took place between the lady and gentleman, in which she insisted that her property should be settled so that she should have the command of it "as if still unmarried," he being entitled, as husband, to a life interest, if surviving, in the stock bequeathed by the father's will. The intended husband drew two documents, in very obscure language, in one of which he bound himself to consent to her "disposition of a sum of £2,000 out of whatever funds or dividends she" should be "entitled to, be possessed of or have legally acquired at the time of her decease." The marriage took place, and was kept secret from the son until the wife's decease, she continuing the use of her visual name, which took place in about six months, without her having made any disposition of her savings, leaving her son sole next of kin. After her decease the husband filed a bill against the trustee of the fund settled by the father of the lady for payment of the life interest, and the son filed a bill against the husband praying, amongst other things, a declaration that, as next of kin, he was entitled to the savings of his mother's income. The validity of the marriage was conclusively established, before the final hearing of the two suits, by a court of competent jurisdiction: *Held* the correspondence showed that the lady implicitly relied upon the skill and integrity of the intended husband to prepare instruments to carry her wishes into effect; those wishes were proved to be that her property should be so settled as that she should dispose of it as if unmarried; the court would have given her a life estate, with power of appointment, and in default for her next of kin, to the exclusion of the husband, and no such settlement having been prepared, as it was the duty of the husband to have prepared, the husband could take no more than the life interest under his wife's father's will, and the son was entitled to the whole of his mother's savings.

Corley v Stafford (Lord), Campbell v Corley (1857) 1 De G&J 238; 26 LJ Ch 865; 30 LTOS 77; 3 Jur NS 1225; 5 WR 646; 44 ER 714, LJJ

167 Provision for life interest to wife — "Free from marital control and liability" — Restraint on anticipation not to be inserted

Where articles for a settlement directed the property to be conveyed on trust to pay the income to the wife, or such person as she should appoint, during her life, for her own absolute use and benefit, free from marital control and liability: *Held* in the settlement a restraint against anticipation should not be inserted.

Symonds v Wilkes (1865) 12 LT 598; 11 Jur NS 659; 13 WR 1026, LJJ

Scottish, Irish and Commonwealth Cases

168 Provision for survivor of husband and wife to leave fraction to issue if any — Whether wife bound to hand over fraction immediately to children

M'Donnell v M'Donnell (1843) 2 Con&Law 481 (IR)

169 Provision for power to husband to appoint to younger children of marriage — Appointment

among children of first and second marriage — Fund to be equally divided between the two classes
Alleyne v Alleyne (1845) 8 I Eq R 493; 2 Jo&Lat 544 (IR)

170 Limitation to husband and wife and children of previous and intended marriage — Husband and wife take as joint tenants — Unborn children to be admitted as and when necessary
O'Hea v Slattery (1895) 1 I R 7 (IR)

171 Provision for power of appointment by survivor of husband and wife among children — Appointment of life estate with power of appointment
Wright's Trustees v Wright (1894) 21 R (Ct of Sess) 568; 31 Sc LR 450; 1 SLT 558 (SCOT)

B Powers and provisions

a Insertion of usual powers and provisions

LAW See Halsbury's Laws (4th edn) vol 42 para 634

172 What may be inserted in settlement — All powers tending to better enjoyment of estate
By marriage articles it was agreed that estate should be settled in strict settlement, and that there should be contained in the settlement powers to the husband to charge the estates, by way of mortgage, with a certain sum, and also to charge the estate with another sum for younger children, and to create terms for raising those sums, and likewise all other powers, etc, usually inserted in settlements of the like nature, and which would be proper for effecting any of the purposes aforesaid: *Held* a power of sale and exchange might be introduced into the settlement.

My opinion . . . is that the person who prepared these articles, intended that any usual power, provision, clause, covenant or agreement that would tend to the better enjoyment of the estates, should be inserted in the settlements, or, in other words that the clause in question should be taken as if it stood thus: "and likewise all other powers, provisions, clauses, covenants and agreements which shall be proper for effectuating any of the purposes aforesaid, and which are usually inserted in settlements of the like nature," which would include everything (*Shadwell V-C*).
Hill v Hill (1834) 6 Sim 136; 58 ER 545

173 What are usual powers — Power of sale and exchange
Powers of sale and exchange, inserted in a settlement under a clause in articles for all usual powers.

Powers of selling, exchanging and investing in new purchases, usual.
Peake v Penlington (1813) 2 Ves&B 311; 35 ER 337

ANNOTATIONS **Consd** Brewster v Angell (1820) 1 Jac&W 625 **Apld** Wise v Piper (1880) 13 Ch D 848

174 What are usual powers — Power of sale and exchange
Hill v Hill (1836) no 172 ante

175 What are usual powers — Power of sale and exchange
Bedford (Duke) v Abercorn (Marquess) (1836) no 161 ante

176 What are usual powers — Power of sale and exchange
By a post-nuptial settlement a husband covenanted to settle property, to which his wife was contingently entitled, upon trusts for the wife for life to her sole and separate use, with remainder to the children equally, with remainders over. No power of appointment among children was covenanted to be reserved either to the wife, or the husband, or to both jointly. In an action brought by the wife to establish her equity to a settlement, and asking the court to declare that a settlement in pursuance of the covenant was a proper settlement for that purpose: *Held* the settlement should be amended by giving an exclusive power of appointment by deed or will among the children to the wife.
Oliver v Oliver (1878) 10 Ch D 765; 48 LJ Ch 630; 39 LT 563; 27 WR 657

ANNOTATION **Distd** Re Parrott, Walter v Parrott (1886) 33 Ch D 274

177 What are usual powers — Power to vary investments
Peake v Penlington no 173 ante

178 What are usual powers — Power to vary investments
A marriage contract, in the Portuguese language, between British subjects resident in Lisbon, expressed that the parties were desirous that it should be regulated, made binding and carried into full and complete effect according to the laws of England. Some years afterwards the parties, who were then resident in England, filed a bill, praying that a settlement in strict conformity with the contract and containing all the covenants' clauses, powers, etc, usually inserted in marriage settlements and deemed necessary, and, at the same time, consistent with the substance of the contract, might be executed under the decree of the court: *Held* a power to appoint new trustees as often as should be necessary, and notwithstanding the contract provided that the settled moneys should be invested, as they had been, in the English and French funds, a power to change those securities for any other of the Government stocks or funds of England or France or for real securities in Great

Britain or Ireland, were proper powers to be inserted in the settlement.

Sampayo v Gould (1842) 12 Sim 426; 11 LJ Ch 121; 59 ER 1196

179 What are usual powers — Power of leasing

Bedford (Duke) v Abercorn (Marquess) no 161 ante

180 What are usual powers — Not power to jointure future wife

Bedford (Duke) v Abercorn (Marquess) no 161 ante

181 What are usual powers — Not power to charge portions for children of future marriage

Bedford (Duke) v Abercorn (Marquess) no 161 ante

182 What are usual powers — Power to appoint new trustees

Sampayo v Gould no 178 ante

183 What are usual powers — Not covenant to settle after-acquired property

By the marriage settlement of M, dated in 1854, property was settled upon trust, after the deaths of himself and his wife, for the children of the marriage as M and his wife should jointly appoint; and in default of such appointment as the survivor should appoint; and in default of any appointment, in trust for all the children who should attain twenty-one in equal shares. There were only two children who attained twenty-one. One of them, C, by an ante-nuptial agreement, agreed to settle "all her half or other share and interest whatsoever" in the property subject to the trusts of the original settlement. The agreement provided that the settlement should contain certain specified provisions, and generally such other agreements clauses, and provisions as were "usually inserted in settlements of a like kind." M and his wife, who predeceased him, made no joint appointment under the deed of 1854, but by his will, in exercise of his power, he appointed the sum of £2,000 to C absolutely: *Held* a covenant to settle after-acquired property was not a "usual" clause in settlements of a like kind with that to be executed in accordance with the agreement for a settlement and the £2,000 was not bound by the agreement.

Re Maddy's Estate, Maddy v Maddy [1901] 2 Ch 820; 71 LJ Ch 18; 85 LT 341; 45 Sol Jo 673

Scottish, Irish and Commonwealth Cases

184 What are usual powers — Vesting clauses to sons at twenty-one and daughters at twenty-one or marriage — With survivorship and accruer

Hynes v Redington (1834) L&G temp Plunk 33 (IR)

185 What are usual powers — Vesting clauses to sons at twenty-one and daughters at twenty-one or marriage — With survivorship and accruer

Vesting clauses to sons at twenty-one, and daughters at twenty-one or marriage, are proper to be introduced in a settlement in pursuance of articles directing "usual and proper clauses." So are clauses of survivorship and accruer, if the intent appears to be that no part of the property shall go over, unless all goes over.

Roche v Roche (1845) 8 I Eq R 714 (IR)

186 What are usual powers — Vesting clauses to sons at twenty-one and daughters at twenty-one or marriage — With survivorship and accruer

Re Martin's Trusts (1857) 6 I Ch R 211 (IR)

187 What are usual powers — Vesting clauses to sons at twenty-one and daughters at twenty-one or marriage — With survivorship and accruer

Cronin v Roche (1858) 8 I Ch R 103 (IR)

188 What are usual powers — Vesting clauses to sons at twenty-one and daughters at twenty-one or marriage — With survivorship and accruer

Herring-Cooper v Herring-Cooper [1905] 1 LR 465 (IR)

b Insertion of particular powers and provisions

LAW See Halsbury's Laws (4th edn) vol 42 para 634

CROSS REFERENCE See no 1000 et seq post (statutory powers in settlements)

189 What may be inserted in settlement — Provision for power of leasing for twenty-one years — Not power to grant building leases for longer period

Articles for a settlement, with a power of leasing for twenty-one years, and other usual powers, etc, do not authorise the introduction of a power of granting building leases for longer terms.

Pearse v Baron (1821) Jac 158; 37 ER 810

190 What may be inserted in settlement — Provision for power to alter terms of articles — Not power to jointure future wife

Bedford (Duke) v Abercorn (Marquess) no 161 ante

191 What may be inserted in settlement — Provision for power to alter terms of articles — Not power to charge portion for children of future marriage

Bedford (Duke) v Abercorn (Marquess) no 161 ante

192 What may be inserted in settlement — Provision for general and special powers by separate codicils — Necessity for inclusion of both powers

Greene v Wiglesworth no 266 post

193 What may be inserted in settlement — Not hotchpot clause
The court will not insert a hotchpot clause in executory marriage articles in the absence of any words therein indicating the intention of the parties to introduce such clause.
Lees v Lees (1871) 5 IR Eq 549 (IR)

C Variation of articles

LAW See Halsbury's Laws (4th edn) vol 42 para 636

194 Variation before marriage — Whether new agreement presumed — Ante-nuptial settlement
(1) Where articles are entered into before marriage, and settlement made after marriage different from those articles, as if by articles the estate was to be in strict settlement, and by the settlement the husband is made tenant in tail, whereby he hath it in his power to bar the issue, this court will set up the articles against the settlement. (2) But where both articles and settlement are previous to the marriage, at a time when all parties are at liberty, the settlement differing from the articles will be taken as a new agreement between them, and shall control the articles.
Legg v Goldwire (1736) Cas temp Talb 20; 25 ER 637, LC

ANNOTATION **Consd** Bold v Hutchinson (1855) 5 De GM&G 558

195 Variation before marriage — Whether new agreement presumed — Ante-nuptial settlement
Re Gundry, Mills v Mills no 620 post

196 Variation before marriage — Contract approved by court
Semble: it was not incompetent to the parties before the marriage to vary *bona fide* the terms of the contract, notwithstanding it had been approved by the court.
Cook v Fryer (1842) 1 Hare 498; 11 LJ Ch 284; 6 Jur 479; 66 ER 1128

197 Variation before marriage — In absence of husband's legal adviser
An arrangement for a marriage settlement having been effected, with the assistance of the solicitors of both parties, an alteration was made on the eve of the marriage, in the absence of the husband's solicitor, the court, under the circumstances, considered the original arrangement binding, and directed that it should be carried into effect accordingly.
Caton v Rideout (1846) 8 LTOS 68; 10 Jur 896

198 Variation after marriage — Variation refused — Though reasonable
Anon (1678) Freem Ch 38; 22 ER 1044, LC

199 Variation after marriage — Conformance with proved intention of parties
Bedford (Duke) v Abercorn (Marquess) no 161 ante

200 Variation after marriage — Separation of husband and wife — Due to cruelty of husband — Life interest to wife during separation
By articles before marriage £6,000, part of the portion, is agreed to be invested in land, and settled to the husband for life, then to his wife for life, remainder as a provision for younger children, remainder to the husband in fee. The husband having by his cruelty forced his wife to separate from him; the court decreed the interest of the £6,000 to be paid her for her separate maintenance till cohabitation.
Oxenden v Oxenden (1705) 2 Vern 493; 1 Eq Cas Abr 67; Gilb Ch 1; 23 ER 916; sub nom
Rockingham (Lord) v Oxendon (1705) Prec Ch 239

201 Power to vary reserved — What variations authorised — Not provisions for wife and issue of second marriage
Bedford (Duke) v Abercorn (Marquess) no 161 ante

202 Power to vary reserved — Settlement by wife in anticipation of marriage — Ante-nuptial revocation deed by husband and wife
Upon a marriage contemplated between A and B, the lady's fortune vested in C her former guardian, was, on 14 March, after treaty and agreement with C, vested in trustees for the lady, "her executors and administrators and assigns" until the marriage, and afterwards for her, her husband and children. On 27 March, and before the marriage, the husband and wife, without the intervention of C, revoked the settlement, and married the next day. A bill by the husband, claiming the fund unaffected by the trusts of the settlement, was dismissed with costs, the court holding that a revocation, under such circumstances, could not be maintained.
Page v Horne (1848) 11 Beav 227; 17 LJ Ch 200; 11 LTOS 121; 12 Jur 340; 50 ER 804; previous proceedings (1846) 9 Beav 570

ANNOTATIONS **Consd** Bond v Walford (1886) 32 Ch D 238; Zamer v Hyman [1961] 3 All ER 933

203 Power to vary reserved — Marriage not celebrated
A *feme sole*, in contemplation of a marriage with T, vested personal property in trustees, upon trust for the sole benefit of herself, her executors, etc, until her marriage, if any, with subsequent trusts for her issue. She never married T, but before her marriage with M the trustees handed over to her a part of the fund: *Held* the settlement was irrevocable; she had no power of absolute disposition until marriage; the trusts were to arise on any marriage; and the trustees

had committed a breach of trust for which they were answerable.

M'Donnell v Hesilrige (1852) 16 Beav 346; 22 LJ Ch 342; 20 LTOS 164; 16 Jur 1148; 51 ER 812; sub nom *MacDonell v Hesilrige* (1852) 1 WR 71

D Settlements deviating from articles

204 Whether rectification granted

Articles and settlement mentioned to be made in pursuance thereof, were both made before the marriage, but the settlement varies from the uses in the articles: decreed to go according to the articles.

Honor v Honor (1710) 1 P Wms 123; 2 Vern 658; 2 Eq Cas Abr 38; 24 ER 321, LC

205 Whether rectification granted — Settlement made more strictly than articles intend — Provision for daughters postponed

Burton v Hastings (1715) Gilb Ch 113; 25 ER 79

206 Whether rectification granted

Trevor v Trevor no 124 ante

207 Whether rectification granted

Legg v Goldwire no 194 ante

208 Whether rectification granted

A settlement under articles, deviating from them, set right and made to agree with the articles and what the estate was demnified, by the tenant for life not upholding it as he ought, declared to be a specialty debt, and to be answered out of his assets.

Langley v Furlong (1758) 1 Dick 315; 21 ER 290

209 Whether rectification granted

Settlement set aside as being contrary to articles, and a new settlement to be executed agreeable to the articles.

Neal v Cust (1775) 2 Dick 513; 21 ER 369

210 Whether rectification granted

Bold v Hutchinson no 457 post

211 Whether rectification granted

Previously to the marriage of an infant, on whose behalf an order for maintenance had been made, the draft of a proposed ante-nuptial statement was approved by the intended husband. The draft contained a covenant by the intended husband to settle after-acquired property of the wife; but no provisions as to the husband and children of a future marriage. The marriage took place, but the draft was never engrossed, nor was any settlement previous to marriage executed. A post-nuptial settlement was made, but it contained no provision for the husband and children of the wife by a future marriage, and no covenant to settle after-acquired property.

Settlement varied so as to comprise after acquired property of the wife, but not so as to extend to the husband and children of a future marriage.

Re Hoare's Trusts (1862) 4 Giff 254; 1 New Rep 161; 7 LT 523; 9 Jur NS 167; 11 WR 181; 66 ER 700

212 Whether rectification granted

A father being seised in fee of a large estate, and having a small estate for life with remainder to his son in tail male, the father and son executed a deed of conveyance of the father in fee of the small estate, and a deed of settlement of the large estate to the use of the father for life, with remainder to the son for life, with remainder to the eldest and other sons of the son successively in tail male. The deed contained no powers of jointuring widows or of raising portions for younger children. A joint power of revocation appeared in the draft as originally prepared by counsel, but had been struck out. The father and son has each a wife and a large family, and each declared that had he been aware of the effect of the deed he would not have executed it: *Held* under the circumstances the deed must be rectified by adding a power of revocation, and with plaintiff's consent it was directed that a new settlement with all proper powers, should be made under the direction of the court.

Welman v Welman (1880) 15 Ch D 570; 49 LJ Ch 736; 43 LT 145

ANNOTATION **Consd** Paul v Paul (1880) 15 Ch D 580

213 Settlement must carry out intent of articles — Not sufficient that articles followed verbatim

Marriage settlement rectified by a strict settlement agreeably to the ordinary course, notwithstanding it agreed with the articles *verbatim*, and both made before marriage.

Roberts v Kingsly (1749) 1 Ves Sen 238; 27 ER 1005

214 Settlement must carry out intent of articles

Cogan v Duffield no 163 ante

215 Necessity for clear proof of intention — That settlement should pursue articles

The court will not rectify a settlement which varies the interest of an adult from what it appears to be under the articles to his disadvantage, unless where it was clearly intended that the settlement should pursue the articles.

Partyn v Roberts (1756) Amb 315; 27 ER 213

Scottish, Irish and Commonwealth Cases

216 Whether rectification granted

King v King-Harman (1873) 7 IR Eq 446 (IR)

E Settlements created under direction in will

a In general

LAW See Halsbury's Laws (4th edn) vol 42 para 630 et seq

CROSS REFERENCE See no 222 et seq post (whether settlement ordered in case of share of daughter or other female)

217 Whether settlement ordered — Sufficiency of limitations in will

Devise to trustees, of money to be laid out in land, and to be settled as counsel should advise, in trust for A and the heirs male of his body, to take in succession and priority; and the interest of the money, till laid out, to be paid to A his sons and issue, A shall have but an estate for life, with remainder to first and other sons in tail, etc.

Lord Camden took a distinction between the case where testator has given complete directions for settling his estate with perfect limitations and where his directions are incomplete and are rather minutes or instructions and cannot be performed in the words of the will. In the former case the legal expression shall have legal effect though perhaps contrary to his intention. In the latter case the court will consider the intention and direct the conveyance according to it.

White v Carter (1768) Amb 670; 27 ER 435; previous proceedings (1766) 2 Eden 366

218 Whether settlement ordered — Sufficiency of limitations in will

Testator directed £6,000 to be settled on the marriage of his daughter, and then went on to give it to trustees, with a separate life interest to his daughter; after her death for her children, on their attaining twenty-one, if the mother should be then dead; but if not, then not till after her decease; and if no child should live to attain a vested interest, then to fall into his residue; and he gave his residue to A for life, remainder to B: *Held* testator had made a positive settlement, and the court could not add to it in any way.

Fullerton v Martin (1860) 1 Drew&Sm 31; 29 LJ Ch 469; 1 LT 531; 6 Jur NS 265; 8 WR 289; 62 ER 290

219 Whether settlement ordered — Sufficiency of limitations in will

Re Parrott, Walter v Parrott no 228 post

220 Whether settlement ordered — Share to be secured for benefit of children and their mother

Testator directed that a share of his property, upon the death of the husband of his daughter E, which happened, should be secured for the benefit of the children of E and for that of their mother: *Held* the share must be settled upon E for her life with remainder to her children.

Combe v Hughes (1872) LR 14 Eq 415; 41 LJ Ch 693; 27 LT 366; 20 WR 793

221 Compliance with condition imposed on testamentary gift

By a settlement dated 30 December 1947, F, who attained the age of twenty-one on 10 July 1947, in compliance with clause 11 of testator's codicil dated 13 November 1930, directed the trustee, the N Bank, to hold her interests under the settlement of 28 April 1915, the second marriage settlement and the supplemental settlement on the trusts thereinafter specified. No appointment of the funds subject to the second marriage settlement and the supplemental settlement had been made. The N Bank was the trustee of the testator's will and codicils and also of the 1915 settlement, the second marriage settlement, the supplemental settlement and the settlement of 1947: *Held* F had effectively settled her interest under the second marriage settlement and the supplemental settlement, because she had executed the settlement on 30 December 1947, in order to comply with clause 11 of the codicil and to enable her to enjoy her share of residue, and equity would not permit her thereafter, if and when an appointment were made in her favour, to repudiate her settlement; moreover, the N Bank, as trustee, already held the relevant funds before the settlement of 30 December 1947, was executed and therefore, the direction to the bank and declaration of trusts in the settlement of 30 December 1947, were effective without the assistance of a court of equity.

Re Burton's Settlements, Scott v National Provincial Bank Ltd [1955] Ch 82; [1954] 3 All ER 193; [1954] 3 WLR 581; 98 Sol Jo 734

b Share given to daughter or other female relative

222 Whether ordered to be settled — Share to be for daughter's sole use

Testator directed his property to be divided between his children at twenty-five share and share alike, and all moneys inherited by his daughters to be placed in the hands of trustees, to be settled on them for the sole use of themselves and their lawful issue: *Held* "strict settlement" was not intended by these words,

but the money inherited was to be settled upon the daughters, and their lawful issue, which would have the effect of giving to the daughters an absolute interest.

Samuel v Samuel (1845) 2 Coop temp Cott 119; 14 LJ Ch 222; 5 LTOS 34; 9 Jur 222; 47 ER 1082

223 Whether ordered to be settled — Share to be for daughter's sole use — To the exclusion of husband

Testator, by his will, gave real and personal property to his daughter A absolutely; but by a codicil made subsequent to her marriage, he directed that "it should be settled to the exclusion of her present or any future husband, that the same might belong to her during her life, and be secured for the benefit of her children, equally, after her death, so that the issue of any such child dying in her lifetime might take his or her parent's share"; and, in default of such children or other issue, over: *Held* (1) the property must be settled in trust for A for life, to her separate use, without power of anticipation; and after her decease, upon trust for such of her children as should survive her, and for the issue living at her death of such of her children as should not survive her, equally, as tenants in common, the issue to take *per stirpes*, but *inter se* equally as tenants in common; (2) there should be limitations in the nature of cross-remainders in favour of such of the children and issue as should survive A in respect of the share of any child dying in her lifetime without leaving issue, and in respect of the share of any issue of any child similarly dying; (3) the realty should be settled as realty; and, as testator, by simply directing a settlement, must have intended, with powers of leasing and sale and exchange, and with a receipt clause; (4) the settlement should contain provisions for maintenance, education and advancement and a power to appoint new trustees.

Turner v Sargent (1853) 17 Beav 515; 22 LTOS 129; 2 WR 50; 51 ER 1134

ANNOTATION As to (3) **Follld** Wise v Piper (1880) 13 Ch D 848

224 Whether ordered to be settled — Share not to be liable to debts or control of husband

A father directed a fund, given to his daughter, to be settled "upon her and her issue," so that "the same might not be liable or subject to the debts, control or engagements of any husband" whom she might happen to marry during her lifetime: *Held* the settlement ought to give the daughter a power of appointment by will, in default of issue.

Form of settlement in such a case.

Stanley v Jackman (1857) 23 Beav 450; 28 LTOS 334; 5 WR 302; 53 ER 177

ANNOTATION **Distd** Findon v Findon (1857) 1 De G&J 380

225 Whether ordered to be settled — To be settled on child for life remainder to issue — Gift over on default of issue

Testator bequeathed to his daughter an annuity of £100 while she remained single but on her marriage and on some adequate provision made and which he directed to be made be settlement for her life and to the use of her issue he bequeathed to and for her use £2,500 and in default of such issue he bequeathed that sum for the benefit of his grandchildren who should be then living. The daughter married but no settlement was made and the annuity continued to be paid to her. She had an only child who died in her lifetime under age: *Held* the gift over did not take effect and her personal representative was entitled to the £2,500.

Findon v Findon (1857) 1 De G&J 380; 26 LJ Ch 561; 30 LTOS 19; 5 WR 794; 44 ER 770, LC

226 Whether ordered to be settled — Directed to be strictly settled

Where testator directed that his daughters' shares under his will should be "settled upon themselves strictly": *Held* the income of each daughter's share should, during the joint lives of herself and her husband, be paid to her for life for her separate use, without power of anticipation; and if she died first, then her share should go as she should by will appoint, and in default of appointment to her next of kin, exclusively of her husband; and if she survived, then to her absolutely.

Loch v Bagley (1867) LR 4 Eq 122; 15 WR 1103

ANNOTATIONS **Distd** Re Spicer, Spicer v Spicer (1901) 84 LT 195 **Consd** Re Bannister, Heys-Jones v Bannister (1921) 90 LJ Ch 415

227 Whether ordered to be settled — Directed to be strictly settled

Testator gave his residuary estate to trustees upon trust for his sons and daughters who should attain twenty-one in equal shares, and declared that no daughter should be entitled in any case to receive her share, but should receive the income thereof only with power to dispose of the principal by will, if unmarried; but, in the event of any daughter marrying, then testator especially empowered his trustees to see that her share was duly and properly settled upon her by deed, so that same should be preserved for her separate use independently of her husband: *Held* the share of a daughter marrying should be settled so as to give her a life estate for her separate use without power of anticipation, with trusts in favour of the children of the marriage, and the ultimate trusts usually in a settlement of the wife's property.

Re Spicer, Spicer v Spicer (1901) 84 LT 195

228 Whether ordered to be settled — Directed to be settled on daughter for life

Testator bequeathed as follows: "To my daughter A, wife of M, I bequeath £10,000. This amount to be settled upon her for life and to be invested for her in good securities in the names of two or more trustees. At her death £8,000 of the above sum to be divided equally amongst her children, and the remaining £2,000 to be given to her husband if living: if deceased, then the whole amount is to be equally divided amongst her children." The daughter and her husband and child applied for a sanction of the court to a settlement of the legacy: *Held* (1) a settlement ought to be directed, treating the directions in the will as instructions for a settlement; (2) on the construction of the will, the settlement must be so framed to make the contingent gift of £2,000 to "her husband if living" apply only to M and not to any future husband, and so as to confine the trusts in favour of the daughter's children to her children by him; (3) the settlement ought to be framed so as to restrain the daughter from anticipating the income & so as to make the fund divisible only among children who being sons should attain twenty-one, or being daughters attain that age or marry, and it ought to contain the usual powers of maintenance and advancement, and a power of appointment by the daughter in default of children, with the usual limitations to herself or her next of kin in default of appointment, but not any power of appointment among the children, as such a power would be inconsistent with the direction for equal division; (4) the costs ought to be paid out of the legacy and not out of the residuary estate.

Re Parrott, Walter v Parrott (1886) 33 Ch D 274; 55 LT 132; 34 WR 553, CA

229 Whether ordered to be settled — To be settled at marriage

Testator left to his daughter, J, the sum of £2,000 to be settled on her when she married, or to be paid to her on her attaining twenty-one: should she die not leaving issue, the £2,000 to fall into the residue of his estate. J married in her father's lifetime. The court directed the legacy to be settled in trust for her separate use for life; remainder for her children living at her death, according to her appointment; in default of appointment, for her sons at twenty-one and her daughters at that age or on marriage; remainder for her next of kin; and, if she had no child living at her death, the legacy to become part of testator's residue.

Young v Macintosh (1843) 13 Sim 445; 1 LTOS 106; 7 Jur 383; 60 ER 172

ANNOTATION **Consd** Cogan v Duffield (1876) 2 Ch D 44

230 Whether ordered to be settled — To be settled at marriage — Attainment of majority

Testator, by his will, directed his property to be divided into nine shares, and gave one and a half shares to each of his two daughters, "to be settled on themselves at their marriage." At his death, the two daughters were infants. The two daughters having attained twenty-one, and being unmarried: *Held* they were entitled to their shares absolutely, and there was no trust for a settlement which the court could execute.

Magrath v Morehead (1871) LR 12 Eq 491; 41 LJ Ch 120; 24 LT 868

ANNOTATION **Folld** Re Bannister, Heys-Jones v Bannister (1921) 90 LJ Ch 415

231 Whether ordered to be settled — To be settled at marriage — Attainment of majority

Testator directed by his will that his residuary real and personal estate should, after the death of his widow, be "equally divided amongst and settled for their own and sole use upon my dear children and should they marry, the husband to have no control over their property." Testator left him surviving three daughters only [over twenty-one years old]: *Held* the expression in the will of testator was not sufficiently precise to raise an executory trust; an intention to restrict the gifts to life interests could not be extracted from the language used by testator; and the daughters took their shares absolutely.

Re Bannister, Heys-Jones v Bannister (1921) 90 LJ Ch 415; 125 LT 54

232 Whether ordered to be settled — To be settled at attainment of majority

Laing v Laing (1839) 10 Sim 315; 9 LJ Ch 48; 3 Jur 1119; 59 ER 636

233 Whether ordered to be settled — Share of married daughter — Power of executors to settle

Testator, possessed of real and personal property, desired his executors, out of such moneys of his as might come to their hands, to purchase two annuities for W and her children; with regard to the rest of his property, of what kind soever, he desired his executors after payment of his debts, to pay and make over the whole to his daughter M, the wife of B, and to the children of his daughter after her decease: *Held* the executors took a power to settle the freehold property upon the daughter for life, with remainder after her decease to her children and their heirs.

Knocker v Bunbury (1840) 6 Bing NC 306; 8 Scott 414; 9 LJCP 212; 133 ER 121

234 Whether ordered to be settled — Share of niece — Settled for separate use with trust for issue

Testator gave one-third of his residue to his niece which he desired might be settled by his executors, on her, for her separate use for her life, but to devolve to her issue at her death, and failing issue, then to revert to his nephew. The court directed the third to be settled in trust for the niece for her separate use for life, and, after her death, in trust for her issue then living, and if there should be no such issue, then in trust for the nephew.

Stonor v Curwen (1832) 5 Sim 264; 58 ER 336

ANNOTATION **Apld** Lyddon v Ellison (1854) 19 Beav 565

235 Form of settlement

Devise to the heir-at-law and his issue male in strict settlement; remainder in trust to be sold, and the money to be distributed among certain persons or the survivors or survivor of them; and that the share of one should previous to her marriage be settled upon her for life; and after her death upon her issue; in default of issue upon her right heirs; the produce of the sale is to be considered as personal; and vests in the survivors at the death of the tenant for life without issue male. A settlement in trust for the husband for life, then for the wife for life, then for the children, as they should appoint, in default of appointment equally; if no children, according to their joint appointment; in default thereof to the husband, his executors, etc, is a sufficient execution of the direction in the will.

Brograve v Winder (1795) 2 Ves 634; 30 ER 815

ANNOTATIONS **Apld** Maberly v Strode (1797) 3 Ves 450 **Consd** Burrell v Crutchley (1809) 15 Ves 544 **Dbtd** Webb v Kelly (1825) 3 LJOS Ch 172

236 Form of settlement

Stonor v Curwen no 234 ante

237 Form of settlement

Young v Macintosh no 229 ante

238 Form of settlement

Turner v Sargent no 223 ante

239 Form of settlement

Stanley v Jackman no 224 ante

240 Form of settlement

Loch v Bagley no 226 ante

241 Form of settlement

Re Parrott, Walter v Parrott no 228 ante

242 Form of settlement

Testator bequeathed his personal estate upon trusts for his children equally, and directed that in case his daughter M, or any future born daughter, should marry during minority with, or after majority without, such consent as therein mentioned, the share of such daughter or daughters so marrying should be assigned to trustees in settlement "upon such respective marriages" for the benefit of such daughter or daughters so marrying for life, "and after her or their deceases for the uses of her or their intended husband or husbands for his or their life or lives, and after their decease respectively," for the children of "such marriage or respective marriages," with a gift over in the event of a daughter dying "without leaving any issue her surviving." M, the only daughter of the testator, was twice married. On her first marriage, she being then an infant, a settlement of her share was made on herself, husband and children, containing no provisions in favour of the husband or children of a future marriage. On her second marriage a settlement of her share was made whereby a life interest was limited to her second husband in the event of his surviving her, which happened. She subsequently died without leaving issue her surviving: *Held* the executory trust contained in the will authorised a settlement of a daughter's share on her for life with remainder to any husband she might leave for his life; and the second husband of M was accordingly entitled to a life interest in her share.

Nash v Allen (1889) 42 Ch D 54; 61 LT 193; 37 WR 646; sub nom

Re Nash, Nash v Allen (1889) 58 LJ Ch 754

ANNOTATION **Apld** Re Potter's Will Trusts, Re Thomson's Settlement Trusts, Eckford v Thomson [1943] Ch 255

243 Form of settlement

Testator gave legacies upon certain trusts for each of his daughters for life, and, after her death, for her husband and children, and subject thereto he directed that each legacy should "sink into, and form part of, my residuary estate and be applied and disposed of as hereinafter mentioned." He gave his residue to his children equally, "the shares of daughters to be paid to the same trustees respectively and to be settled upon the same trusts" as their respective legacies. One of the daughters having died unmarried: *Held* the direction for settlement of daughters' shares of residue being executory, the court, in framing a settlement of such a share, would modify the ultimate gift over by inserting a limitation in favour of the other residuary legatees excluding the particular daughter, and the share of deceased daughter of testator was divisible accordingly among the other residuary legatees.

Re Ballance, Ballance v Lanphier (1889) 42 Ch D 62; 58 LJ Ch 534; 61 LT 158; 37 WR 600

244 Form of settlement

Re Spicer, Spicer v Spicer no 255 post

245 Whether ordered to be settled — Direction to settle legacies on daughters independent of coverture — And added to money settled on marriage
Eustace v Robinson (1880) 7 LR Ir 83 (IR)

c Limitations and provisions inserted

i In general

CROSS REFERENCE See no 254 et seq post (limitations inserted in particular instances)

246 General principles governing preparation of settlement — General intent of testator
White v Carter no 217 ante

247 General principles governing preparation of settlement — General intent of testator — Not strict meaning of words in will
(1) The general intent of testator in creating an executory trust for a settlement of his property, not any strictly technical meaning attached to the words he has used, is to govern the preparation of the settlement.

(2) The manner of executing an executory trust must be guided by the object of the author of the trust provided such object is one which can be legality effectuated.

(3) There is no difference between the construction to be put on an executory trust created by marriage articles and on an executory trust created by a will, except so far as the former, by its nature, furnishes more emphatically the means of ascertaining the intention of those who created the trust.
Sackville-West v Holmesdale (Viscount) (1870) LR 4 HL 543; 39 LJ Ch 505, HL; subsequent proceedings, sub nom
Holmesdale (Viscount) v West (1871) LR 12 Eq 280

ANNOTATION As to (1) **Consd** Re Johnston, Cockerell v Essex (1884) 26 Ch D 538

248 General principles governing preparation of settlement — Object of testator — If object legal
Sackville-West v Holmesdale (Viscount) no 247 ante

249 General principles governing preparation of settlement — Limitations void for remoteness
Testatrix directed her trustees to settle her property, but in such a way, that some of the limitations would be void for remoteness: *Held* in carrying the direction into effect, the court would modify the limitations, so as to make them consistent with the rules of law and equity.
Lyddon v Ellison (1854) 19 Beav 565; 24 LTOS 123; 18 Jur 1066; 2 WR 690; 52 ER 470

250 General principles governing preparation of settlement — For benefit of family
Turner v Sargent no 223 ante

251 General principles governing preparation of settlement — Favour strict settlement
Papillon v Voice (1731) 2 P Wms 471; 1 Eq Cas Abr 185; Kel W 27; Fitz-G 38; 24 ER 819, LC

ANNOTATIONS **Consd** Bagshaw v Spencer (1748) 1 Ves Sen 142; Sayer v Masterman (1757) Wilm 386; Austen v Taylor (1759) Amb 376; Jervoise v Northumberland (1820) 1 Jac&W 559

252 General principles governing preparation of settlement — Whether differing from those for construction of articles
Blackburn v Stables no 128 ante

253 General principles governing preparation of settlement — Whether differing from those for construction of articles
Sackville-West v Holmesdale (Viscount) no 247 ante

ii Limitations in particular instances

CROSS REFERENCES See no 222 et seq ante (settlement of share of daughter or other female), no 246 et seq ante (general principle directing limitations)

254 Direction to render barring of entail impossible — Estate for life
A devises lands to trustees to pay debts and legacies, and then to settle the remainder on her son B and the heirs of his body, with remainders over; and directs, that special care should be taken in the settlement, that it should never be in the power of her son to dock the entail. Decreed the son should be only tenant for life, without impeachment of waste, and should not have an estate tail conveyed to him.
Leonard v Sussex (1705) 2 Vern 526; 23 ER 940

ANNOTATIONS **Apld** Papillion v Voice (1728) Kel W 27 **Consd** Davenport v Davenport (1863) 1 Hem&M 775

255 Direction to settle on persons for their several lives — Estates tail
Devise to A in fee, with directions to settle on descendants of his mother for their several lives, etc. A may limit an inheritance to effectuate the general intent.
Godolphin v Godolphin (1747) 1 Ves Sen 21; 27 ER 865, LC

256 "Die without issue male"
Tollett v Tollett (1753) Amb 194; 27 ER 131, LC

257 Direction to settle life estate — Estate tail

Devise of land to trustees in trust to pay an annuity, and subject thereto in trust to A for life; remainder to trustees to preserve, etc; remainder to the heirs of the body of A; remainder to testator's right heirs, and the residue of testator's personal estate to be laid out in land, and settled to the same uses: *Held* A was entitled to an estate tail in the lands to be purchased.

Austen v Taylor (1759) 1 Eden 361; Amb 376; 28 ER 725

ANNOTATION **Consd** Jervoise v Northumberland (1820) 1 Jac & W 559

258 Direction for estate tail

Testator devised his estates to trustees, "upon trust as counsel should advise, to convey, settle, and assure, the said premises to or for the use of or in trust for his daughter J for her life, and after her death then on the heirs of his body, etc." The court directed the estates to be settled upon J for her life, with remainder to her first and other sons in tail general with remainder to her daughters in tail general etc. The limitations being to both sons and daughters in tail general, there is no necessity for a subsequent limitation to J and the heirs of her body.

Bastard v Proby (1788) 2 Cox Eq Cas 6; 30 ER 3

259 Direction for estate tail — With benefits for other children

Jervoise v Northumberland (Duke) no 106 ante

260 Direction for remainder to issue "in tail male" — Daughters entitled

Testator devised freehold estates to trustees in trust to settle and convey them to the use of GR for life, with remainder to his issue in tail male, in strict settlement, and in default of such issue the estates to go over. GR had no son but had several daughters, all born after testator's death: *Held* the words "in tail male" were descriptive, not of the issue, but of the interest they were to take, and the daughters were entitled to take, under the limitation in remainder, as tenants in common.

Trevor v Trevor (1847) 1 HL Cas 239; 9 ER 747, HL

ANNOTATION **Consd** Walmesley v Gerard (1861) 29 Beav 321

261 Direction to secure for benefit of family

Testator directed that upon the death of his wife, to whom he gave a life interest in all her property, both real and personal, his nephew, whom he named, should be heir to all his property not otherwise disposed of; but added, that, as he had had little intercourse with his nephew, and was apprehensive that his habits might require some control, whatever portion of the property might be possessed by him was to be secured by the executors for the benefit of his family: *Held* the real estate was to be settled on the nephew for life, with remainder to his sons successively in tail male, with remainder to his daughters as tenants in common in fee; and the personal estate upon the nephew for life, with remainder to all his children as joint tenants, with a proviso that in the event of all the children dying under twenty-one, and, daughters, unmarried, or, if sons, without issue, the personalty should be held in trust for the nephew absolutely.

White v Briggs (1848) 2 Ph 583; 15 Sim 300; 17 LJ Ch 196; 41 ER 1068, LC

ANNOTATIONS **Consd** Davenport v Davenport (1863) 1 Hem&M 775; Keay v Boulton (1883) 25 Ch D 212

262 Direction as to ultimate remainder

Devise subject to life interest of testator's widow, upon trust to convey, assign, and assure freehold property "unto and to the use of my son TF, and the heirs of his body lawfully issuing, but in such manner and form, nevertheless, and subject to such limitations and restrictions, as that if TF shall happen to die without leaving lawful issue, then that the property may after his death descend unincumbered unto and belong to my daughter RF, her heirs, executors, administrators, and assigns": *Held* the devise was an executory trust to be executed by a conveyance to the use of TF during his life, with remainder to his first and other sons and daughters as purchasers in tail, with remainder to RF in fee.

Thompson v Fisher (1870) LR 10 Eq 207; 18 WR 860

263 Direction to settle as executor should think fit

Clark v Fellows (1717) 2 Eq Cas Abr 743; 22 ER 630, LC

264 Strict settlement — Revocation clause where tenant born in testator's lifetime — Whether clause applicable to interests held by tenants in common

By clause 4 of his will a testator who died in 1942 devised his real estate on trust for Mrs C for life with remainder to her sons in tail male with remainder, by clause 4(1)(viii), "upon trust for all her daughters who attain the age of twenty-one or marry under that age if more than one in equal shares as tenants in common" with remainders over. Clause 7(1) provided that where any person who, under the foregoing limitations, would become "a tenant in tail male or in tail by purchase of the premises hereinbefore devised in settlement" was born or *en ventre sa mère* in testator's lifetime, that interest was revoked and the property should be held on trust for such person for life with remainder to his or her sons in tail male with remainder to the sons in tail general. Clauses 8 and 9 respectively empowered every person thereby made tenant for life to appoint yearly

rentcharges to a surviving spouse and portions to children other than an eldest or only son. Mrs C died in 1970 having had three daughters only who were born in 1927, 1929 and 1936 respectively. Each of these daughters who survived her had several children including at least one son. On a summons to determine whether clause 7 applied to the interests in common in tail of the daughters: *Held* (1) Clause 7, being a clause of revocation, should be strictly construed; the only proper meaning of the description in clause 7(1), "a tenant in tail male or in tail by purchase of the premises hereinbefore devised in settlement", was that it referred to a tenant in tail of the entirety of the settled property, and it would not be accurate to describe one of several tenants in tail as a tenant in tail of the settled property; accordingly, in order to apply to Mrs C's daughters, clause 7(1) would have to be changed by the addition of some such words as "or of an undivided share thereof"; (2) although the addition of those words would be a relatively small step to take, such a change should not be made because it would then be impossible to apply clauses 8 and 9, which empowered a tenant for life to provide for a surviving spouse or younger children, a result wholly inconsistent with the scheme of the will; (3) Mrs C's daughters, therefore, held the settled property as tenants in common in tail under clause 4(1)(viii) of the will.

Re Caldwell's Will Trusts, Jenyns v Sackville West [1971] 1 All ER 780; [1971] 1 WLR 181; 115 Sol Jo 1288

Scottish, Irish and Commonwealth Cases

265 Direction to settle as jointure on wives of sons marrying

A direction, after a devise to testator's three sons during their lives, that "in case all or any of my said three sons should think of marrying I empower and direct my said trustees or the survivor of them to settle and secure the share or shares of such son or sons so marrying as a jointure on the wife of such marriage during her life and to their issue share and share alike," enures for the benefit of any wife, whether in the case of a first or any subsequent marriage, and whether there is or not any issue of such marriage, at any rate if there be a gift over in case of the son dying "without children."

Mason v Mason (1871) 19 WR 741 (IR)

iii Powers inserted

266 Power of sale — Direction to insert general and special power

Testator having, by will devised all his estates to trustees, in trust to convey to his son and his issue, in strict settlement, with a remainder to his nephew and his issue; by a codicil directed that a power should be inserted, enabling the trustees, with consent of the son, to sell one of the estates to the nephew, on his agreeing to assume testator's name, and by a second codicil directed that the settlement should contain usual powers to the trustees, with the consent of the tenants for life, and guardians of infant tenants in tail in possession, to sell "all or any part" of the estates: *Held* the special power was not revoked by the general one, but that the settlement must contain both.

Greene v Wiglesworth (1818) 1 Swan 234; 1 Wils Ch 313; 37 ER 134

267 Power of sale and exchange — Direction to insert all proper and usual powers

A will directing a settlement of estates, and that there should be inserted all proper powers for making leases, and otherwise, according to circumstances, for the tenants for life, to be exercised by them when qualified, and when not by the trustees, does not authorise the insertion of a power of sale and exchange to the trustees, to be exercised with the consent of the tenant for life.

Quaere: whether the will authorises the introduction of a power of sale and exchange of any description.

Brewster v Angell (1820) 1 Jac&W 625; 37 ER 506, LC

268 Power of sale and exchange — Direction to insert all proper and usual powers — For making leases and otherwise

A will, directing a settlement of estates, and that there should be inserted all proper powers for making leases, and otherwise, according to circumstances to and for the tenants for life, to be exercised by them when qualified and when not, by the trustees, does not authorise the insertion of a power of sale and exchange.

Horne v Barton (1822) Jac 437; 37 ER 915

269 Power of sale and exchange — Settlement of realty and personalty

Testator, who made his will in 1810, and died in 1820, directed by his will that his daughters' shares in his property, which consisted of realty and personalty, should be so settled that, if they married, one-half of their fortune should be settled on them and their children, exclusive of their husbands: *Held* this direction authorised the insertion in the settlement of a power of sale and exchange of that moiety of a daughter's share in testator's real estate which was to be settled on her and her children.

Wise v Piper (1880) 13 Ch D 848; 49 LJ Ch 611; 41 LT 794; 28 WR 442

270 Power to charge portions — Direction to insert all other usual clauses, powers and provisos — Settlement of realty on sons

A will directed a settlement to be made of real estate on A and his first and other sons in tail, with powers of jointuring, leasing, sale and exchange, and all other clauses, powers and provisos usually inserted in settlements of the same kind: *Held* these last words did not authorise the insertion of a power to charge with portions.

Higginson v Barneby (1826) 2 Sim&St 516; 57 ER 443

271 Power to appoint new trustees — Direction to insert all other usual clauses, powers and provisos — Strict settlement

Testator directed his real estates to be settled on certain persons in strict settlement, and that there should be inserted, in the settlement so to be made, powers of leasing, sale, partition and exchange, "and my will is that, in such intended settlement, shall be inserted all such other proper and reasonable powers as are usually inserted in settlements of the like nature": *Held* a power to appoint new trustees, was a proper and reasonable power to be inserted in the settlement.

Lindow v Fleetwood (1835) Sim 152; 58 ER 551

272 Power of appointment — Settlement settled by court — Life estate to husband

Where testator had directed that, in the event of the marriage of his daughter, a certain portion of his property should be secured to her and the issue of her marriage by a settlement or some other good assurance, in such manner as his trustees or trustee for the time being might think fit, the court, on an application to which the surviving trustee was a party, approved of a power in the settlement made on the marriage of the daughter, enabling her to appoint by will a life estate in the property to her husband.

Charlton v Rendall (1853) 11 Hare 296; 68 ER 1287

273 Power of appointment — Settlement settled by court — Life estate to husband

In making a settlement of property directed to be settled on the wife and children of testatrix's son, the court has jurisdiction to give to the husband a life interest and also power to appoint the fund amongst the issue of the marriage jointly with the wife during the coverture, and alone if he survive her.

Re Gowan, Gowan v Gowan (1880) 17 Ch D 778; 50 LJ Ch 248

274 Power of appointment — Settlement settled by court

Smithers v Green (1877) cited in 2 Seton's Judgments & Orders 7th ed 907

ANNOTATION **Consd** Re Gowan, Gowan v Gowan (1880) 17 Ch D 778

275 What powers inserted — Where no direction

Turner v Sargent no 223 ante

iv Waste

CROSS REFERENCE See no 3579 et seq post (generally)

276 Whether tenant for life made liable for waste

A devises lands to his sister B and C and their heirs and assigns, upon trust, that until his granddaughter D should marry or die, to receive the profits, and thereout to pay her £100 a year for her maintenance: the residue to pay debts and legacies. After payment thereof, in trust for the said D and upon further trust, that if she lived to marry a protestant of the Church of England, and at the time of such marriage be of the age of twenty-one or upwards, or if under that age, such marriage be with the consent of the said B then to convey, with all convenient speed, after such marriage, to the use of the said D for life, *sans* waste voluntary waste in houses excepted; remainder to her husband for life; remainder to the issue of her body, with remainders over, and upon further trust, that if the said D die unmarried, then to the use of B for life; remainder to the son of his other granddaughter E in tail; remainder to defendant C remainder to his first and other sons; remainder to A's right heirs; and upon further trust, that if D marry not according to the will, then upon such marriage to convey to trustees, as to one moiety to the use of D for life, then to trustees to preserve contingent remainders: remainder to her first and every other son, being a protestant, with remainders over; and as to the other moiety, to the son of his daughter E in like manner. A dies, D attains her full age; and upon a treaty of marriage with F applies to B and C for a conveyance to herself for life; remainder to her intended husband for life; remainder to the issue of her body; B executes such conveyance, but C refuses; D suffers a recovery of the whole to the use of herself in fee, and then marries F who made a considerable settlement upon her; she covenants to settle her estate upon husband and wife; remainder to first, etc, sons in tail, remainder to survivor of husband and wife in fee. They bring a bill to compel C to convey, etc, decreed, not an estate tail to D, but an estate for life *sans* waste, *ut supra*, as being the intent of A upon the will with remainders over in strict settlement.

Glenorchy (Lord) v Bosville (1733) as reported in Cas temp Talb 3; 2 Eq Cas Ab 743; 25 ER 628, LC

ANNOTATION **Consd** Meure v Meure (1737) 2 Atk 265

277 Whether tenant for life made liable for waste — Timber estate

Testator devised F, a well timbered estate, to defendant in fee, and directed him to settle it on himself for life, with divers remainders over, and directed that such settlement should contain such powers of jointuring, etc, as defendant should direct, and all other usual and proper provisions for giving effect to his intentions therein expressed, and all such other powers and provisions as counsel should advise: *Held* the successive tenants for life ought not to be made dispunishable for waste, but power should be inserted in the settlement for trustees to cut timber in a due course of management for the benefit of all parties interested.

Davenport v Davenport (1863) 1 Hem&M 775; 3 New Rep 26; 33 LJ Ch 33; 9 LT 370; 10 Jur NS 35; 12 WR 6; 71 ER 339

ANNOTATION **Follď** Stanley v Coulthurst (1870) LR 10 Eq 259

278 Whether tenant for life made liable for waste

Although, where the object of a direction that property shall be strictly settled appears to be simply to prevent the first taker from alienating the property, he will be made tenant for life without impeachment of waste; yet, where there are other circumstances to show that he was intended to take simply an estate for life, he will not be made dispunishable for waste.

Personalty was settled by will on a woman for life, for her separate use, without power of anticipation, and after her death in moieties on her two sons for life and their first or other sons who should attain twenty-one. There was a power to invest in real estate, to be settled in strict settlement, subject to the same uses, trusts and powers as the trust funds were then subject to, or as near thereto as the nature and quality of the estates would permit: *Held* the tenants for life of realty purchased under the power ought to be impeachable for waste.

Stanley v Coulthurst (1870) LR 10 Eq 259; 39 LJ Ch 650; 23 LT 761; 18 WR 969

d Costs

279 Fall on particular legacy

Under a direction by will to accumulate and lay out a certain sum of money in the purchase of land to be settled to uses thereby declared, the costs of the investment are to be paid out of the particular sum directed to be invested.

Gwyther v Allen (1842) 1 Hare 505; 66 ER 1131

280 Fall on particular legacy

Re Parrott, Walter v Parrott no 228 ante

F Covenants to leave property by will

a Covenant to leave share

i In general

LAW See Halsbury's Laws (4th edn) vol 42 para 630 et seq

281 "One full fourth part" — Fourth in value not in specie

A father, on the marriage of his son, covenanted with trustees to bequeath one full fourth part of all his real and personal estate, after payment of his debts, to the trustees of the marriage settlement, who were to sell and convert same into money and stand possessed of the proceeds upon the trusts of the settlement. After the father's death, in a suit to administer his estate: *Held* the covenant meant a fourth in value and not a fourth *in specie*.

Bell v Clarke (1858) 25 Beav 437; 27 LJ Ch 674; 31 LTOS 324; 4 Jur NS 499; 6 WR 476; 53 ER 703

282 "Equal share" — Advances to other children — In lifetime of covenantor

P, on his daughter's marriage, settled a sum of money on her and her husband and their issue; and, after reciting that he had agreed to make a further provision for his daughter, equal to his other younger children, covenanted to settle, by his will or otherwise, on the husband and wife and their issue, as great a share of his property as he should, by his will or otherwise, provide for any of his other younger children, to take effect on the death of the survivor of himself and his wife; and if he died intestate, or omitted to make sure provision, that the executors should pay to the trustees as great a share of his property as any of his younger children should, in that event, become entitled to: *Held* the trustees had a claim upon the executors in respect of subsequent advancements by the settlor to his other younger children in his lifetime, and not merely for a provision equal to that which any of the other children became entitled to at his death.

Willis v Black (1828) 4 Russ 170; 7 LJOS Ch 3; 38 ER 769, LC

Scottish, Irish and Commonwealth Cases

283 "Equal share" — Advances to other children — In lifetime of covenantor

Stephens v Stephens (1886) 19 LR Ir 190 (IR)

284 Covenant for gift to daughter on marriage and to leave her one-fourth share of estate — Advance

to husband before marriage charged to husband and wife — Set-off of advance against wife's share

A father, before his daughter's marriage, in 1857, wrote a letter to her intended husband, saying he would give her £2,500 when she came of age, and one-fourth of his residuary estate at his death. In 1858, and before she came of age, the father advanced money to the husband, for which he took his note, but which he charged in his ledger to the joint account of the husband and wife, and intended, if the same was not repaid, to set off the amount against his daughter's share of his estate: *Held* in a suit by the wife in the husband's lifetime for the administration of the estate, that the executors had a right to set off the advance against the wife's share.

Torrance v Chewett (1866) 12 Gr 407 (CAN)

ii Effect of covenant

LAW See Halsbury's Laws (4th edn) vol 42 para 630 et seq

CROSS REFERENCE See no 306 et seq post (liability to lapse by disposition inter vivos)

285 Whether constituting debt — Charge on real estate

Anon (1561) Benl 9; Ben 121; 3 Leon 6; 73 ER 937

286 Whether constituting debt — Bankruptcy of settlor

By a settlement, in the Scottish form, made upon the marriage of a Scotsman, domiciled in Scotland, with an Englishwoman, the husband covenanted to pay after his death an annuity to his widow and portions to his children, for which causes the wife assigned her real and personal estate "to and in favour of her husband, in conjunct fee and liferent and the children of the marriage, whom failing, the wife, her heirs, and assigns." For some years after the solemnisation of the marriage the husband and wife continued domiciled in Scotland, the wife in the meantime becoming entitled under her father's will to a share in the corpus of his personal estate. They then changed their domicil to England, after which the trustee of the will of the wife's father paid part of the wife's portion of testator's estate to the husband upon the joint receipt of the husband and wife: *Held* the husband having become bankrupt before the filing of the bill, and the effect of the settlement, interpreted according to the Scottish law, being to give him a life interest in the fund, with remainder to his wife absolutely, his life interest could not be impounded to secure the performance of his covenant to pay the annuity and portions.

Duncan v Cannan (No 2) (1855) 7 De GM&G 78; 24 LJ Ch 460; 25 LTOS 2; 1 Jur NS 291; 3 WR 318; 44 ER 31, LJJ

287 Whether constituting debt — Election

Settlor on the marriage of his daughter, covenanted that, immediately after his death, a share, which in the event became one-third of all and singular his real and personal estate should be settled for the benefit of the daughter, her husband and their children, in equal shares. One of the four children of the marriage, a daughter, died in the settlor's lifetime leaving a husband who also died in the settlor's lifetime and two infant children who survived the settlor. Settlor made a will whereby after directing payment of his debts he disposed of personal chattels, gave a number of legacies and amongst others a legacy of £4,500 and part of the residue of his estate, to his nephews and nieces and his two infant great-grandchildren above-mentioned in equal shares: *Held* the liability under the covenant was not a debt to be paid before the division of residue, and the infants were bound to elect between the benefits under the settlement and under the will.

Bennett v Houldsworth (1877) 6 Ch D 671; 46 LJ Ch 646; 36 LT 648

ANNOTATION **Folld** Re Vernon, Garland v Shaw (1906) 95 LT 48

288 Whether constituting debt — Election

V on the marriage of his daughter covenanted with the trustees of her settlement that his heirs, executors, and administrators would, within twelve calendar months after his decease or that of his wife, pay to them a share, which ultimately became one-sixth, ascertained by the number of his children, of his real and personal estate upon trusts for his daughter for life for her separate use without power of anticipation, then to her husband J for life, and subject to a joint power of appointment among their issue, and in default of such appointment as the survivor should appoint, to the children of the marriage at twenty-one or marriage. The settlement contained an agreement and declaration that any share passing to the daughter under her father's will should, if she elected to claim under the will, be a satisfaction of the covenant. The father subsequently made a will whereby he confirmed the covenant in the settlement, and, after a trust for payment of his debts, directed his trustees to stand possessed of an equal share of his residuary estate upon trust for his daughter for life, and then for her children at twenty-one or marriage, in default of children for any husband of his daughter for life and subject thereto such share to fall into residue. The daughter having elected against the will, the question arose whether her husband and children could claim under the will and as to their rights having regard to the provisions of the settlement and will: *Held* the liability under the covenant in the set-

tlement was not a debt to be deducted before ascertaining the testator's residue.

Re Vernon, Garland v Shaw (1906) 95 LT 48

289 Position of covenantee — On performance of covenant — Position of ordinary legatee

A person who has covenanted to bequeath or otherwise provide that a share of his estate shall go to the covenantee fulfils his covenant by bequeathing the share to the covenantee, who then stands in the same position as any other legatee.

Jervis v Wolferstan (1874) LR 18 Eq 18; 43 LJ Ch 809; 30 LT 452

290 Liability to lapse

Needham v Smith no 309 post

291 Liability to lapse

A father, on the marriage of his daughter, covenanted that if she should survive him or leave any child, children, or issue, he would by will, give and devise, or otherwise effectually settle and assure to trustees, a share equal with his other children of the property he should have at his death to the use therein mentioned, being uses for the benefit of the husband and wife and the children of the marriage, with a clause of survivorship and accruer in the event of children dying under twenty-one and without issue. Some years afterwards the father made a will, giving property to trustees upon the trusts therein declared, the limitations being in substance the same as those set out in the articles. The children of the marriage all died without issue in the lifetime of the covenantor, one of them only having attained twenty-one. The wife survived her father: *Held* the representative of the child who attained twenty-one was not entitled to anything, for the covenantor was at liberty to make a settlement either by deed or will and he was not bound by the covenant so to frame his will as to guard the child's interest from lapse.

Re Brookman's Trust (1869) 5 Ch App 182; 39 LJ Ch 138; 22 LT 891; 18 WR 199, LJ

ANNOTATION **Consd** Brookman v Smith (1871) LR 6 Exch 291

Scottish, Irish and Commonwealth Cases

292 Position of covenantee — On performance of covenant — Property only bound after payment of debts

Ennis v Smith (1839) Jo & Car 400 (IR)

293 Position of covenantee — On performance of covenant — Property only bound after payment of debts

A covenant in a marriage settlement, that the wife shall, out of the property of which the husband shall die seized or possessed, receive an annuity, only binds the property remaining after payment of debts.

Rowan v Chute (1861) 13 I Ch R 169 (IR)

b Covenant to leave specific sum

LAW See Halsbury's Laws (4th edn) vol 42 para 630 et seq

CROSS REFERENCES See BANKRUPTCY vol 5(1) (2nd reissue) nos 9120 et seq, 9297, vol 5(2) (2nd reissue) no 13668 (bankruptcy of covenantor); LIMITATION OF ACTIONS vol 32(2) (2nd reissue) no 2815 (whether covenant creates debt: limitation of action)

294 Effect of covenant — Whether creating debt

Covenant by a father in his son's marriage settlement, by will or otherwise, in his lifetime, to settle £3,000, to be charged upon all real and personal property of which he should at or immediately before his death be seised or possessed, so as, immediately after the decease of the survivor of himself and wife, to become well and effectually vested in the trustees of the settlement, upon trust for the son's widow and the issue of the marriage: *Held* to create a specialty debt, to be proved accordingly in the administration of the father's estate.

Eyre v Monro (1857) 3 K&J 305; 26 LJ Ch 757; 30 LTOS 61; 3 Jur NS 584; 5 WR 870; 69 ER 1124

295 Effect of covenant — Whether creating debt

A covenant in a marriage settlement to bequeath a legacy of not less than £2,500 constitutes a specialty debt for £2,500, and is not merely payable out of such assets as are applicable for the payment of legacies.

Graham v Wickham (1863) 1 De GJ&Sm 474; 2 New Rep 410; 32 LJ Ch 639; 8 LT 679; 9 Jur NS 702; 11 WR 1009; 46 ER 188, LJJ

296 Effect of covenant — Whether creating debt

Testator, who died in 1823, had covenanted in 1815 with trustees of a settlement made on the marriage of his son, that he, his heirs, executors, or administrators, would, during his life, or within three months after his death, pay to the trustees £3,000, to be held by them upon the trusts of the settlement. Testator, by his will, devised his P estate to trustees for sale for payment of his debts, the trustees of that estate being also his executors, and he devised his D estate to which he was entitled in remainder expectant on the death of F, who died in 1860, to trustees upon trust for T for life, with remainders over. T mortgaged his equitable life interest in 1863,

the £3,000 not having been paid, though interest thereon had been paid down to 1849 by the executors and trustees of the P estate, the trustees of the son's marriage settlement instituted a suit for the purpose of having that sum, with interest, raised by sale or mortgage of the D estate: *Held* the covenant was not a conditional, but an absolute covenant; at the end of three months after testator's death the £3,000 became demandable by the trustees under the covenant; and such demand then became a debt against the devisee of the estate under the statute against fraudulent devises.
Coope v Cresswell (1866) 2 Ch App 112; 36 LJ Ch 114; 15 LT 427; 15 WR 242; 11 Sol Jo 953, LC

297 Security for payment — Nor ordered
One covenants on marriage articles to pay £10,000 within six months after his death; and after growing old and infirm, covenantee would have obliged him to have given security: *Held* they could not alter this agreement of the parties, or make it better than they themselves had; and though executors might be obliged to give better security for legacies payable *in futuro*, that is, because they are in nature of trustees, and there is no agreement one way or another.
Warrington (Earl) v Langham (1699) Prec Ch 89; Colles 149; 1 Eq Cas Abr 132 pl 14; 24 ER 43, LC

298 Provision for election to take share of property — In lieu of specified sum
Waller v Fuller (1715) 2 Eq Cas Abr 301 pl 18; 22 ER 253, LC

299 Covenant to leave specified stock — Effect of conversion of stock
B covenanted, that his executors should, within six months after his decease, settle £4,000 stock in the navy 5 per cent annuities, on his wife and children. The navy 5 per cent stocks having been reduced to 4 per cent stock, and that stock having been converted into a 3½ per cent stock: *Held* on the construction of the Acts of Parliament, that this covenant would be satisfied by a purchase of £4,200 in the 3½ per cent annuities.
Milward v Milward (1834) 3 My&K 311; 3 LJ Ch 141; 40 ER 119

300 Sum payable at specified date — Default in payment — Interest payable at 5 per cent
Testator in his lifetime covenanted by deed that within one month after his death a sum of £1,500 should be paid to certain trustees in trust for the benefit of children, as provided for by a marriage settlement. No rate of interest was provided for in the event of payment not having been made by his executors within the time prescribed. Default was made in payment of the principal sum within that time: *Held* testator's estate should be charged with interest in the principal sum unpaid at 5 per cent per annum.
Knapp v Burnaby (1861) 30 LJ Ch 844; 5 LT 52; 9 WR 765

ANNOTATION **Follo** Re Horner, Fooks v Horner [1890] 2 Ch 188

301 Sum payable at specified date — Default in payment
Testator covenanted that his executors or administrators should pay a sum of £2,000 within six calendar months after his decease. Default was made in payment of the sum at the time named: *Held* the sum carried interest from the time named to the date of payment: the sum being payable at a certain time within Civil Procedure Act 1833 (c 42) s 28.
Re Horner, Fooks v Horner [1896] 2 Ch 188; 65 LJ Ch 694; 74 LT 686; 44 WR 556; 40 Sol Jo 498

Scottish, Irish and Commonwealth Cases

302 Effect of covenant — Whether creating debt
A father in his daughter's ante-nuptial marriage contract bound himself to pay at his death a sum of £1,000 to her marriage-contract trustees. He afterwards executed a trust-disposition and settlement, by which he directed his trustees to pay his debts, and divide the residue of his estate equally among his children: *Held* the provision in the marriage contract was a debt due by the deceased, and was not to be deducted from the daughter's share of residue.
Elliott v Bowhill (1873) 11 Macph (Ct of Sess) 735; 45 Sc Jur 446 (SCOT)

303 Effect of covenant — Whether creating debt — Continuing covenant
Wood v Jamieson (1844) 6 I Eq R 420; 1 Jo&Lat 3 (IR)

c Covenant to leave by will or otherwise

LAW See Halsbury's Laws (4th edn) vol 42 para 630 et seq

304 Whether performance by will sufficient — Although share thereby lapses
Re Brookman's Trust no 291 ante

305 Whether performance by will sufficient — Although share thereby lapses
Jervis v Wolferstan no 289 ante

d Satisfaction and performance

LAW See Halsbury's Laws (4th edn) vol 42 para 630 et seq

CROSS REFERENCES See EQUITY vol 20(3) (2nd reissue) no 1745 et seq (generally), no 1770 et seq (presumption against double portions), no 2072 et seq (satisfaction of covenant to provide for wife), no

2136 et seq (performance of covenant to provide money)

e Dispositions defeating covenant

LAW See Halsbury's Laws (4th edn) vol 42 para 630 et seq

CROSS REFERENCE See nos 290, 291 ante (defeat of covenant by lapse)

306 General rule — Right of covenantor to dispose inter vivos

Covenant by a father to give or leave by his will all his personal estate equally among his children does not deprive him of the right of unlimited expense, and of any fair application, even by gift, if absolute, and *bonâ fide*; but a disposition for the purpose of defeating the covenant cannot stand, therefore transfers of stock to one of the children by the father were upon the circumstance of a reservation of the dividends for his life and other evidence of a partial intention, to elude the covenant, set aside.

Jones v Martin (1798) 5 Ves 266n; 6 Bro Parl Cas 437; 8 Bro Parl Cas App I 242; 31 ER 582, HL

ANNOTATIONS **Consd** Lewis v Madocks (1803) 8 Ves 150; Fortescue v Hennah (1812) 19 Ves 67; Logan v Wienholt (1833) 7 Bli NS 1; Eyre v Monro (1857) 3 K&J 305

307 General rule — Right of covenantor to dispose inter vivos

Father under covenant for an equal division at his death of all the property he should die seised or possessed of between his two daughters or their families, though he retains the power of free disposition by act in his life, cannot defeat the covenant by a disposition in effect testamentary; as by reserving to himself an interest for life.

Fortescue v Hennah (1812) 19 Ves 67; 34 ER 443

ANNOTATION **Consd** Logan v Wienholt (1833) 7 Bli NS 1

308 General rule — Right of covenantor to dispose inter vivos

Where A being seised of certain real estates, conveyed part of them to the uses of the settlement at the time of his second marriage, and also covenanted with the trustees that he would, by will or otherwise, give and devise all other his real estates, and also his personal estate and effects whatsoever and wheresoever, to and amongst the children both of his first and second marriage, share and share alike: *Held* this covenant was applicable only to such real and personal estate of which A might die seised or possessed, and it did not prevent him from disposing freely, during his life, of such part of his real estate as was not settled, or which he might acquire subsequently to the date of the settlement.

Needham v Kirkman (1820) 3 B&Ald 531; 106 ER 755

309 General rule — Right of covenantor to dispose inter vivos

By covenant in a marriage settlement, the husband was bound to give by his last will or otherwise, to his children in equal shares all his real estates, other than a settled estate, and personal property: *Held* (1) the covenant bound only such real estate as he should die seised of; (2) the covenant bound shares of the settled estate, which the husband became entitled to by devise from a child, who died in his lifetime; (3) children living at the death of the husband were alone entitled to the benefit of the covenant.

Needham v Smith (1828) 4 Russ 318; 6 LJOS Ch 107; 38 ER 825

310 Exception to rule — Disposition defeating covenant

A disposition in fraud of a covenant in marriage articles, to give a fourth part of the covenantor's real and personal estate at the time of his death, rescinded.

Gregor v Kemp (1722) 3 Swan 404; 36 ER 926, LC

311 Exception to rule — Disposition defeating covenant

Jones v Martin no 306 ante

312 Exception to rule — Disposition defeating covenant — Interest reserved to covenantor — Life interest

Fortescue v Hennah no 307 ante

313 Exception to rule — Disposition defeating covenant — Interest reserved to covenantor — Life interest

A person who has covenanted that a certain share of his estate at his decease shall be settled upon certain trusts cannot, as against the persons entitled under the covenant, convey any portion of his property upon trust for himself for life, and after his decease upon trusts different from those with respect to which the covenant was made.

By the marriage settlement of W and R, certain property was settled in trust, after the decease of R, for W for life. By the same indenture G, the father of R, covenanted that one-half of his property, at his decease, should go upon the trusts of the settlement. Shortly before he died, G by deed conveyed a certain estate upon trust for himself for life, and after his decease to his two daughters in equal shares, for their sole and separate use respectively: *Held* the deed in question was fraudulent and void as against W, and must be set aside in equity.

Phelps v Amcott (1869) 21 LT 167; 17 WR 703

314 Testamentary disposition defeating covenant — Invalid

Articles in marriage to pay £500 with his daughter by such a time, and to secure to her all his real and personal estate when he died; and afterwards he devised all his personal estate to another, which being contrary to the articles, that agreement was decreed to be performed.

Harmore v Brook (1674) Cas temp Finch 183; 2 Rep Ch 92; 23 ER 101

315 Testamentary disposition defeating covenant — Invalid

A covenant to leave a beneficiary a share in the covenantor's property at death cannot be defeated by a disposition during the covenantor's lifetime which is testamentary in its nature.

Re Bennett, Bennett v Bennett [1934] WN 177; 78 L Jo 231; 178 LT Jo 172; revsd 78 Sol Jo 876, CA

316 Testamentary disposition defeating covenant — Invalid — Covenant for interest greater than that bequeathed

Covenant, in a settlement by A, to bequeath to B, his intended wife, all such goods, chattels, plate, and personal estate, of which A should die possessed; or that, if he died intestate, B should take possession, and enjoy all such goods, chattels, plate, and other personal estate, carried the whole personal estate and effects of A, and he could not make any alteration in the *quantum* of interest of B therein.

Davies v Davies (1831) 1 LJ Ch 31

317 Testamentary disposition defeating covenant — Covenant amounting only to provision against intestacy

A covenant to settle on particular persons all the covenantor's personal estate, subject only, nevertheless, and without prejudice to any other dispositions, qualifications, or changes, which he should make by his will or concerning the same or any part thereof, is only a provision for a case of intestacy, and does not prevent the covenantor from bequeathing the whole of his personal estate to other persons.

Stocken v Stocken (1838) 4 My&Cr 95; 7 LJ Ch 305; 2 Jur 693; 41 ER 38, LC

318 Testamentary disposition defeating covenant — Breach of covenant by objects of settlement

Mathew v Phillips (1704) Colles 347; 1 ER 319, HL

2 Informal contracts to settle property on marriage

A Requisites for enforceable contracts

a What amounts to offer

LAW See Halsbury's Laws (4th edn) vol 42 para 637

319 What amounts to offer — General words spoken to incite suitors

Weeks v Tybald (1604) Noy 11; 74 ER 982

320 What amounts to offer — Proposals for settlement — Sent to friends of lady

Proposals in writing being sent to the friends of the woman, relating to an intended marriage, though no answer was returned; yet the man being admitted to be a suitor, and the marriage ensuing, this in equity was decreed to be an agreement executed on all sides.

Parker v Serjeant (1674) Cas temp Finch 146; 23 ER 80

321 What amounts to offer — Representation of intention to do something in future — No present intention of assuming obligation

Construction of a letter; as not amounting to an absolute agreement to give a marriage portion.

It would be surprising afterwards to find that in this very letter, he had become bound to make a settlement, or to give a promise which would be as binding upon him. . . . It is clear he means to reserve it entirely within his own power, to bind himself, or not, as he might think fit, after the marriage should have taken place. . . . This letter therefore is no agreement (*Grant MR*).

Randall v Morgan (1805) 12 Ves 67; 33 ER 26

ANNOTATIONS **Consd** Warden v Jones (1857) 23 Beav 487; Goldicutt v Townsend (1860) 28 Beav 445

322 What amounts to offer — Representation of intention to do something in future — No present intention of assuming obligation

P while in India, made his will, leaving his daughter, who was born there, a lakh of rupees. Upon the completion of her education, P who had returned to England, sent her back to India, and on that occasion he wrote to a particular friend, to whose guardianship and charge he confided her, "In regard to her settlement in life I shall be naturally anxious." "You may assure the young gentleman she may choose that, on his marriage with her he shall have £2,000 sterling, nor will that be all; she is and shall be noticed in my will, but to what further amount I cannot say, owing to the present reduced, and reducing state of interest, which puts it out of my power to determine at present what I may have to dispose of." H having made proposals of marriage, was informed of the letter written by P, and also of the will he had made, and after some negotiations the marriage was solemnised in 1826, and in 1829 H and his wife returned to England. In the same year P, who was a domiciled Scotchman, executed, in

Edinburgh, another will, by which he gave all his real and personal property for the benefit of his wife and his two sons by her, and, in case of their dying without issue, he gave the whole to the issue of his daughter. P died in 1831 without having made any provision for his daughter, leaving the will made by him in India in the state it was when he executed it; and upon a bill filed by his daughter, insisting that testator had contracted to settle a lakh of rupees upon her, and that the contract was contained in the letter written by him: *Held* in construing contracts, the court must ascertain the real meaning of the words used; when no definite or specific sum was mentioned or referred to, the court cannot enforce any contract, testator had not afforded means of reference to any other document, except from the answer of H there was no evidence that he married on the faith and belief that a lakh of rupees would be settled; and it was not evidence to be acted upon in favour of plaintiff against the estate of testator, as previous to marriage it had been pointed out to H that the letter did not state any precise sum; and testator had left himself unfettered by any contract.

Moorhouse v Colvin (1851) 15 Beav 341; 21 LJ Ch 177; 18 LTOS 296; 51 ER 570; affd (1852) 21 LJ Ch 782; 19 LTOS 370, LJJ

323 What amounts to offer — Representation of intention to do something in future — Letters promising to leave property by will

On a treaty respecting the marriage of H, who was believed to have considerable expectations from his uncle, E, the guardians of the lady desired a settlement; and H addressed a letter to E, who answered: "I have made my will, and left you my property in the county of T, which is very considerable." The guardians still refused their consent, "until a suitable settlement shall be made by E of real estate upon the marriage, in the usual course of settlement, and until the sum of £10,000 shall be secured to the trustees of the estate" of the father of the lady, from whom H had some time before borrowed that money, in order to become a partner in a bank. The resolution of the trustees was communicated to E, who, in September 1815, wrote, "My sentiments respecting you continue unalterable; however I shall never settle part of my property out of my power while I exist; my will has been made for some time, and I am confident that I shall never alter it to your disadvantage. I have mentioned before, and I again repeat, that my county of Tipperary estate will come to you at my death, unless some unforeseen occurrence should take place. I have never settled anything on any of my nephews, and I should give cause for jealousy if I was to deviate in this instance from a resolution I have long made." This answer was, at the desire of E communicated to the guardians, who, in March 1816, consented to the proposed marriage, which accordingly took place in July of that year. A settlement was then drawn up, in which it was recited, that "H has reason to expect that he will, upon the decease of E, become entitled, by virtue of the will of E, to a certain portion of his estate and property, pursuant to the declaration of E, contained in his letter to H of September 1815." E was made one of the trustees of the settlement, and, about twelve months afterwards, he executed the deed; but there was no evidence that he knew anything of its contents beyond the fact that he was named as one of the trustees. E afterwards devised his property to other persons: *Held* H could not maintain a suit to compel the trustees under the will of E to convey the Tipperary estate to him, for that E's letters did not amount to a contract to settle it on him.

Maunsell v White (1854) 4 HL Cas 1039; 22 LTOS 293; 10 ER 769, HL

ANNOTATIONS **Distd** Bold v Hutchinson (1855) 3 Eq Rep 743 **Consd** Re Allen, Hincks v Allen (1880) 49 LJ Ch 553

324 What amounts to offer — Representation of intention to do something in future — Amounting to positive undertaking

Upon the treaty for a marriage, the father of the lady wrote to the husband, "I still adhere to my last proposition, *viz*, to allow Elizabeth £100 a year, . . . and at my decease she shall be entitled to her share of whatever property I may die possessed of": *Held* (1) this was contract binding on the father; (2) it was not so vague as to prevent its being enforced; (3) parol evidence was inadmissible to show what was intended by the words "her share."

Laver v Fielder (1862) 32 Beav 1; 1 New Rep 188; 32 LJ Ch 365; 7 LT 602; 9 Jur NS 190; 11 WR 245; 55 ER 1

ANNOTATIONS **Consd** Re Allen, Hincks v Allen (1880) 49 LJ Ch 553; Re Fickus, Farina v Fickus [1900] 1 Ch 331

325 What amounts to offer — Representation of intention to do something in future — Amounting to positive undertaking

After proposals of marriage had been accepted, the lady's father wrote to the intended husband as follows: "V being my only child, of course she will come into the possession of what belongs to me at my decease." In a subsequent letter, addressed to the mother of the intended husband, the father, after declining then to extract £4,000 from his business, and stating that some years since he had made a will leaving "all my property" in trust for his daughter for life for her separate use, and the principal to be divided as she by her will might ultimately dispose of, he said, "It has been my intention, in the event

of the marriage taking place, to make a similar will in accordance with the facts of the case, and of course I should settle my property, subject to my sister's annuity, on my daughter absolutely and independent of her husband; or, in other words, in strict settlement." He further "agreed" to allow his daughter and her husband £100 a year during his life; and added, "I will take care that my property, which, I suspect, will exceed £4,000, shall be properly secured upon her and her children after my death." The marriage having taken place, the father, who was then a widower, afterwards married again, and made a will whereby he devised and bequeathed parts of his property to his wife, and gave several life annuities: Upon bill by the daughter, claiming to have all the property of which testator died seised or possessed settled upon her in strict settlement: *Held* the above expressions of intention on the part of testator amounted to a contract to settle the whole of the property which he should die seised or possessed upon plaintiff in strict settlement.

Coverdale v Eastwood (1872) LR 15 Eq 121; 42 LJ Ch 118; 27 LT 646; 37 JP 212; 21 WR 216

ANNOTATIONS **Consd** Alderson v Maddison (1880) 5 Ex D 293; Re Allen, Hincks v Allen (1880) 49 LJ Ch 553

326 What amounts to offer — Representation of intention to do something in future

P, shortly before his marriage with plaintiff, wrote her a letter, in which occurred the following passage: "and now, my dearest Lizzie, as life is very uncertain at my time of life, and as you are of all the world the person I love best, I hereby will and bequeath to you, after my death, the eight cottages in Peckham's Walk, occupied by C and F and others. You will keep this letter as a proof of my intention, in case of any sudden change occurring to me rendering me incapable of, or not in a state of mind fit for, the performance of so important a document, and making null and void any former will, and bequest I may have made previously. I am doing this, my dearest, as a temporary provision for you in case of any emergency. . . . I am your future husband in its most holy sense—P." Another part of the will contained a reference to the wedding ring, of which plaintiff then apparently had the custody. After the marriage P died, leaving a will, whereof defendants were executors and trustees. By this will the eight cottages were not left to plaintiff. Plaintiff claimed a declaration that P duly contracted with her to leave to or settle upon her the eight cottages and that by virtue of the letter plaintiff was entitled to them in equity: *Held* no contract had been intended; the writer had mistakenly thought that he was making a gift.

Vincent v Vincent (1887) 56 LT 243; 3 TLR 398, CA

327 What amounts to offer — Representation of intention to do something in future

In 1873, a father, prior to the marriage of his daughter, in a letter to her intended husband stated: "You are of course aware that with my large family E will have little fortune. She will have a share of what I leave after the death of her mother, who I wish to leave in comfortable independence if I should leave her a widow." The intended husband accepted the letter as giving him some rights, and the marriage took place. The father afterwards acquired a large fortune, and died in 1898. His wife predeceased him. By his will he left a legacy of £2,000 to the daughter, and gave the residue of his estate equally between six of his other seven children. The daughter and her husband claimed by virtue of the letter to be entitled to an equal eighth share of the father's estate: *Held* the letter did not constitute a contract by the father, but was merely an expression of his intentions.

Re Fickus, Farina v Fickus [1900] 1 Ch 331; 69 LJ Ch 161; 81 LT 749; 48 WR 250; 44 Sol Jo 157

328 What amounts to offer — Representation intended to influence the conduct of another

A representation made by one party for the purpose of influencing the conduct of another, and acted on by him, will in general be sufficient to entitle him to the assistance of a court of equity, for the purpose of realising such representation; and so in proposals of marriage; if the parent, or his agent deliberately holds out inducements to the suitor to celebrate the marriage, and he consents and celebrates it, believing it was intended that he should have the benefits so held out to him, a court of equity will give effect to the proposals.

Proposals of marriage written by the lady's brothers, acting by her father's authority, stated that "Mr JPT, the father, also intends to leave a further sum of £10,000 in his will to Miss T to be settled on her and her children, the disposition of which, supposing she has no children, will be prescribed by the will of her father. These are the bases of the arrangement, subject, of course, to revision; but they will be sufficient for B to act upon." B, upon receiving the proposals, provided a jointure as required by them for his intended wife, and then married her. In the settlement, afterwards executed, there was no mention of this sum of £10,000, and it was not left by JPT in his will: *Held* his estate was liable to the payment of the £10,000 with interest from the end of one year after his death.

Hammersley v De Biel (1845) 12 Cl&Fin 45; 8 ER 1312, HL; affg SC sub nom

De Biel v Thomson (1841) 3 Beav 469

ANNOTATIONS **Expld** Lassence v Tierney (1849) 1 Mac&G 551 **Apld** Surcome v Pinniger (1853) 17 Jur 196

Distd Maunsell v White (1854) 4 HL Cas 1039 **Consd** Bold v Hutchinson (1855) 20 Beav 250 **Distd** Kay v Crook (1857) 3 Sm&G 407; Cooper v Wormald (1859) 27 Beav 266 **Apld** Prole v Soady (1859) 2 Giff 1 **Distd** Forshaw v Welsby (1860) 30 Beav 243; Goldicutt v Townsend (1860) 28 Beav 445 **Apld** Loxley v Heath (1860) 27 Beav 523 **Distd** Sands v Soden (1862) 31 LJ Ch 870 **Apld** Walford v Gray (1865) 5 New Rep 235; Williams v Williams (1868) 37 LJ Ch 854; Coverdale v Eastwood (1872) 21 WR 216 **Consd** Dashwood v Jermyn (1879) 12 Ch D 776; Re Allen, Hincks v Allen (1880) 49 LJ Ch 553; Re Badcock, Kingdon v Tagert (1880) 17 Ch D 361 **Apld** Viret v Viret (1880) 50 LJ Ch 69 **Consd** Maddison v Alderson (1883) 8 App Cas 467 **Apld** Synge v Synge [1894] 1 QB 466 **Distd** Re Fickus, Farina v Fickus [1900] 1 Ch 331 **Consd** Re Holland, Gregg v Holland [1902] 2 Ch 360

329 What amounts to offer — Representation intended to influence the conduct of another — Necessity for clear proof

Where the evidence with sufficient certainty proved that declarations and representations were actually made by a father to the intended husband, defendant W, and to other persons, previously to, and in contemplation of, and subsequent to the marriage of his natural daughter to defendant W, and that the marriage was contracted in a confidence in such representations, that he had irrevocably settled or intended to settle the E estate, and a sum of sicca rupees, as a provision for, and which would upon his death become the property of, his reputed daughter and her children: and where there was evidence, parol and documentary, that certain documents, purporting to settle the estate and sicca rupees, were executed by the settlor, but there was a total want of evidence as to the contents or effect of such documents, the court gave effect to the representations by declaring that plaintiffs, the children of the marriage, were entitled to the estate and the sicca rupees as tenants in common absolutely.

It is essential in such a case that there should also be perfect or reasonable certainty as to the amount and nature of the property to which the representations apply.

Prole v Soady (1859) 2 Giff 1; 29 LJ Ch 721; 1 LT 309; 5 Jur NS 1382; 8 WR 131; 66 ER 1

ANNOTATION **Consd** Re Badcock, Kingdon v Tagert (1880) 17 Ch D 361

330 What amounts to offer — Representation intended to influence the conduct of another — Necessity for clear proof

Jameson v Stein no 343 post

331 What amounts to offer — Representation intended to influence the conduct of another

In a letter to plaintiff's mother, defendant, after stating that he had formed an attachment to plaintiff, stated that he had enough to maintain a wife upon, and that if her daughter had or might have money, his wish and intention would be that it should be settled for her sole and entire use. Plaintiff's mother accepted defendant's proposals, and a marriage took place without the knowledge of plaintiff's mother, and without a settlement having been made of plaintiff's property. Defendant refused to make a settlement, alleging that the letter did not contain a binding agreement: *Held* all plaintiff's present and future property must be settled in the usual manner.

Alt v Alt (1862) 4 Giff 84; 32 LJ Ch 52; 7 LT 266; 8 Jur NS 1075; 66 ER 630

ANNOTATIONS **Apld** Viret v Viret (1880) 50 LJ Ch 69 **Consd** Re Spicer, Spicer v Spicer (1901) 84 LT 195

332 What amounts to offer — Representation intended to influence the conduct of another

Property was settled on the marriage of A and B on their children as A and B or the survivor of them should appoint and in default of appointment on the children equally if they survived A and B and the issue of any who died earlier to take their parents' share. A on the marriage of his daughter promised in writing that neither he nor his wife would exercise the power and on the faith of which promise the daughter's share in the fund in default of appointment was settled; but subsequently A and B did execute the power: *Held* a child of the daughter's marriage who was prejudiced by the appointment was entitled after her mother's death to have the appointment set aside although her claim was paramount to her mother's settlement.

Walford v Gray (1865) 5 New Rep 235; 11 LT 620; 11 Jur NS 106; 13 WR 335; affd 12 LT 437; 11 Jur NS 473, LC

333 What amounts to offer — Representation intended to influence the conduct of another

Defendant before, and as an inducement to, his marriage with plaintiff promised in writing, as part of the terms of the marriage, to leave a house and land to her for her life. Plaintiff consented to the terms proposed, and the marriage took place; but defendant subsequently conveyed the property by deed to a third person. In an action to recover damages for breach of contract: *Held* (1) as defendant had put it out of his power to perform the contract there had been a breach, in respect of which plaintiff had an immediate right of action to recover damages, and the measure of such damages was the value of the possible life estate to which plaintiff would be entitled if she survived defendant; (2) where a proposal in writing to leave property by will, made to induce a marriage, is accepted, and the marriage takes place on the faith of it, if the proposal relates to a defined piece of real property the court has power to decree a conveyance of that property after the death of the

person making the proposal against all who claim under him as volunteers.

Synge v Synge [1894] 1 QB 466; 63 LJQB 202; 70 LT 221; 58 JP 396; 42 WR 309; 10 TLR 194; 9 R 265, CA

334 What amounts to offer — Expression of desire

On Tuesday, an intended husband, who was an infant, wrote to the trustee of the intended wife, "that he especially wished his wife's property entirely settled on herself," and that the wedding was to take place on Saturday. They married, unknown to the trustee, on Wednesday, without any settlement: *Held* this letter contained no settlement or agreement for a settlement binding on the husband or wife.

Beaumont v Carter, Carter v Beaumont (1863) 32 Beav 586; 8 LT 685; 55 ER 230

335 What amounts to offer — Vague representations

A, upon the engagement of his daughter to T, wrote a letter to T saying that the settlement proposed by him was satisfactory, and that he, A, had made his will dividing his property equally among his daughters. The marriage took place, T believing, as he alleged, that the will operated as a settlement of one-third of A's property on his wife. T made no settlement, and his wife died in A's life, leaving children. A died, having made another will, whereby he left all his property to H, another daughter. Upon a claim by T and his children to a third share of A's estate: *Held* the letter constituted only a conditional contract, and T not having performed his part of the contract it was not binding, and in any event the letter was too vague to be enforced as a contract, and the claim was disallowed.

Re Allen, Hincks v Allen (1880) 49 LJ Ch 553; 28 WR 533

336 What amounts to offer — Conditional offer

Re Allen, Hincks v Allen no 335 ante

337 Necessity for communication of offer

A letter from a father to his daughter by which he agreed to give her £3,000 portion, and this not shown to the man who afterwards married the daughter, did not take the promise out of Statute of Frauds.

Ayliffe v Tracy (1722) 2 P Wms 65; 9 Mod Rep 3; 2 Eq Cas Abr 19; 24 ER 642, LC

b What constitutes acceptance

LAW See Halsbury's Laws (4th edn) vol 42 para 637 et seq

338 What constitutes acceptance — Acts done on faith of offer — Marriage

Parker v Serjeant no 320 ante

339 What constitutes acceptance — Acts done on faith of offer — Marriage

Settlement decreed according to a letter previous to the marriage, though no express assent; the marriage having taken place immediately, a distinct, positive, dissent would be necessary to prevent the effect of the letter and that could be evidenced only by an actual settlement before marriage.

Luders v Anstey (1799) 4 Ves 501; 31 ER 257, LC; subsequent proceedings (1800) 5 Ves 213, LC

ANNOTATION **Distd** Moorhouse v Colvin (1851) 21 LJ Ch 782

340 What constitutes acceptance — Acts done on faith of offer — Marriage

I should be very unwilling to relax a principle, which has long prevailed both at law and in equity; that, if a representation is made upon the circumstances of a person about to form a connection in marriage, and that representation is of such a nature, that, if not made good, or if varied, it will materially affect the circumstances in life of that party, courts both of law and equity will hold the party bound to make good that representation, even at the suit of individuals, concerned in fraudulently defeating such a representation, upon which that connection was proceeding. It is, however, of equal importance, that this should not be carried to the extent, that, whenever anything occurs in general treaty, not entering into particulars, or showing that the marriage actually took place upon such representation, that principle is to be applied to a case, to which it has no application, and was never intended to be applied (*Lord Eldon C*).

De Manneville v Crompton (1813) 1 Ves&B 354; 35 ER 138, LC

ANNOTATIONS **Consd** St George v Wake (1833) Coop temp Brough 129; Taylor v Pugh (1842) 1 Hare 608

341 What constitutes acceptance — Acts done on faith of offer — Marriage

Hammersley v De Biel no 328 ante

342 What constitutes acceptance — Acts done on faith of offer — Marriage

Moorhouse v Colvin no 322 ante

343 What constitutes acceptance — Acts done on faith of offer — Marriage

(1) Where a person seeks to make a third party make good representations made by him on his marriage, he must establish, and that clearly, first, that sufficient representations were made; and secondly, that the marriage took place on the faith of them.

A husband and wife alleged that, on their marriage, the wife's father stated in a letter, which, however, they stated had been destroyed, "that he could do no more for her than he had done, and that he had settled his W estate upon her." He had, in fact, previously settled that estate on her, but subject to a prior charge of £5,000. They sought to have the representation made good by payment of the £5,000 out of the father's estate. The court doubted whether the principle applied to such a representation, and also whether the marriage took place on the faith of it, and refused relief.

Quaere: whether the notice of the existence of the settlement in this case was not notice of its contents.

(2) The owner of an estate voluntarily charged it with his own simple contract debt, and, by the same deed, settled the estate, subject thereto, on himself for life, with remainder to his daughter. He afterwards paid off the debt, but declared that the charge should continue for the benefit of his personal estate. After his death: *Held* the charge still subsisted and must be raised and paid.

The representation made by testator was in a letter written to his daughter, and the burden of proof lies on Mrs M to show the contents of this letter (*Romilly MR*).

Jameson v Stein (1855) 21 Beav 5; 25 LJ Ch 41; 25 LTOS 300; 52 ER 759

344 What constitutes acceptance — Acts done on faith of offer — Marriage

Prole v Soady no 329 ante

345 What constitutes acceptance — Acts done on faith of offer — Marriage

A parol promise by a father, prior to the marriage of his son, to make a future provision for him, his wife and children, cannot be enforced if the marriage did not take place by reason of any reliance on such promise, or if it was not acted on as a reason and consideration for the marriage.

Goldicutt v Townsend (1860) 28 Beav 445; 54 ER 437

346 What constitutes acceptance — Acts done on faith of offer — Marriage

Viret v Viret no 366 post

347 What constitutes acceptance — Acts done on faith of offer — Marriage

Synge v Synge no 333 ante

348 What constitutes acceptance — Acts done on faith of offer — Consent to marriage

Alt v Alt no 331 ante

349 What constitutes acceptance — Acts done on faith of offer — Consent to marriage

An unattested paper signed by A, and by him handed to B stated that as a mark of his esteem and great friendship he agreed to allow B £500 a year, and that after his, A's, death he had in lieu thereof bequeathed to him £10,000. B took this document to C, who thereupon consented to the marriage of her daughter with B, such consent having hitherto been withheld on the ground of B's want of means. The marriage took place, but no settlement was made by B on his wife. A died about six months after signing the paper, having paid B the first quarter of the allowance of £500 a year. His will contained no provision whatever in favour of B: *Held* assuming the consent of C to her daughter's marriage with B to have been given on the faith of the engagement contained in the paper, there was no such connection between A's promise or representation and the consent given by C as to sustain a claim against A's estate.

Dashwood v Jermyn (1879) 12 Ch D 776; 27 WR 868

350 How acceptance disproved — Positive dissent — Actual settlement before marriage

Luders v Anstey no 339 ante

c Certainty

LAW See Halsbury's Laws (4th edn) vol 42 para 637 et seq

351 Necessity for reasonable certainty

Moorhouse v Colvin no 322 ante

352 Necessity for reasonable certainty

A father, on a treaty for his eldest son's marriage, promised by letter to settle a sum of money forthwith, and to recognise his son in common with the rest of his family in the future provisions of his will. The sum of money was settled, and the marriage took place on the faith of the representation in the letter. By his will testator made a substantial provision for his son, but much less than equal to those made for his other children: *Held* the promise was so vague as to the amount, that consistently with it testator might have given all his property to a stranger, and the promise was satisfied by the provision in the will and codicil.

Kay v Crook (1857) 3 Sm&G 407; 29 LTOS 10; 5 WR 220; 65 ER 715; sub nom

Kay v Crook, Kay v Kay (1857) 3 Jur NS 104

ANNOTATION **Consd** Re Allen, Hincks v Allen (1880) 49 LJ Ch 553

353 Necessity for reasonable certainty

Prole v Soady no 329 ante

354 Necessity for reasonable certainty

Synge v Synge no 333 ante

d The memorandum

LAW See Halsbury's Laws (4th edn) vol 42 para 637 et seq

CROSS REFERENCES See BILLS OF SALE vol 7(1) (2nd reissue) no 720 (whatever memorandum constitutes bill of sale); CONTRACT vol 12(1) (2nd reissue) no 240 et seq (generally)

355 What memorandum must contain — Parties

It is necessary that plaintiff should prove a memorandum of the agreement, and it must be, I take it, a memorandum showing on the face of it, or by construction, all the essential elements of a contract—that is, the parties, the subject-matter, the agreement, and the consideration (*Stirling J*).

Vincent v Vincent (1886) 55 LT 181; 35 WR 7; sub nom

Re Vincent, Vincent v Vincent (1886) 2 TLR 814; affd (1887) 56 LT 243, CA

356 What memorandum must contain — Subject-matter

Vincent v Vincent no 355 ante

357 What memorandum must contain — Agreement

Vincent v Vincent no 355 ante

358 What memorandum must contain — Consideration

Vincent v Vincent no 355 ante

359 Memorandum drawn up by agent — Solicitor

Thynne (Lady) v Glengall (Earl) no 442 post

e Correspondence

LAW See Halsbury's Laws (4th edn) vol 42 para 637 et seq

360 Correspondence

Moor v Hart (1683) 2 Rep Ch 284; 1 Vern 201; 21 ER 680

ANNOTATION **Apld** Wanchford v Fotherley (1694) 2 Freem Ch 201

361 Correspondence

One by letter under his hand promised £1,000, with his niece, but in the same letter dissuaded her from marrying plaintiff, but afterwards was present at, and gave her in marriage. The court would not decree the payment of the £1,000, but left plaintiff to his action at law.

Douglas v Vincent (1690) 2 Vern 202; 23 ER 731

362 Correspondence

One by letter says he will give £3,000 portion with his daughter. The daughter marries, and the father is privy to it, and seems to approve of it; daughter dies, and husband administers. Father decreed to pay the £3,000 portion.

Wankford v Fotherley (1694) 2 Vern 322; 23 ER 807; sub nom

Wanchford v Fotherley (1694) Frem Ch 201; affd sub nom

Fotherley v Wankford (1695) 15 Lords Journals 531, HL

363 Correspondence

Promising by letter to give so much as a portion, sufficient to bring the agreement out of Statute of Frauds.

Seagood v Meale & Leonard (1721) Prec Ch 560; 22 ER 43

364 Correspondence

Luders v Anstey no 339 ante

365 Correspondence

A father, after having expressed an intention of making a larger provision for his younger children than he had before done, dies without having executed the intention. The son and heir-at-law, apprised of his father's intentions, enters into a correspondence, in which he states a resolution on his part to make a further provision for the younger members of the family. His sister's allowance being £4,000, she marries on the faith of this correspondence: *Held* a good marriage settlement, and the son was bound to pay the £4,000.

Montgomery v Reilly (1827) 1 Dow&Cl 62; 1 Bli NS 364; 6 ER 448, HL

366 Correspondence

A gentleman, the day before his marriage, wrote to the lady's solicitor as follows: "In the event of my marriage with Miss W taking place before the settlements are ready, I agree to her fortune being settled on herself, subject, of course, to certain conditions, chiefly relating to myself and the children of our marriage, if any." The marriage took place without a settlement. The husband's evidence verified a writing containing the conditions referred to: *Held* the marriage must be presumed to have taken place on the faith of the agreement contained in the letter; and there must, therefore, be the usual reference to chambers to approve of a proper settlement.

Viret v Viret (1880) 17 Ch D 365n; 50 LJ Ch 69; 43 LT 493

ANNOTATIONS **Consd** Re Badcock, Kingdon v Tagert (1880) 17 Ch D 361; Re Spicer, Spicer v Spicer (1901) 84 LT 195

f Part performance

LAW See Halsbury's Laws (4th edn) vol 42 para 637 et seq

367 What are acts of part performance — Surrender in accordance with agreement

A being tenant for life under a settlement, with remainder to his wife for her jointure; remainder to the issue male of the marriage; remainder over, with a power to revoke all the uses, except those to his wife and her issue; agrees, that in consideration of her surrendering her jointure estate, so as to enable him to suffer a recovery, and raise £6,000 to pay his debts, he would resettle his whole estate to particular uses. The surrender was made, and the money raised, but no resettlement made according to the agreement: *Held* this agreement having been in part performed, the parties were entitled to a specific execution, and decreed accordingly.

Herbert v Winchelsea (Earl) (1714) 1 Bro Parl Cas 145; 1 ER 475, HL

g Enforcement of contract

LAW See Halsbury's Laws (4th edn) vol 42 para 637 et seq

CROSS REFERENCE See EXECUTORS vol 24 (2nd reissue) no 10160 et seq (liability of executor for promise by testator in consideration of marriage)

368 Estate for life to wife — Condition that she should settle her own lands — On husband and children — Protection of wife's life interest

Trust created, by which the wife was to have an estate for life, on condition she settle her own lands on her husband and her children by such a time, which she was willing to do, but not unless her estate for life was confirmed.

Wallop v Shaftsbury (Earl) (1673) Cas Temp Finch 67; 23 ER 36

369 Against whom enforceable — Devisee

Ramsden v Oldfield & Appleyard (1720) Eq Cas Abr 390; 4 Vin Abr 453 pl 5; 22 ER 333

370 Against whom enforceable — Husband

Tyrrell v Hope no 523 post

371 Against whom enforceable — Assignees of husband

Tyrrell v Hope no 523 post

372 Against whom enforceable — Persons claiming as volunteers

Synge v Synge no 333 ante

373 By whom enforceable — Wife — For benefit of children

A promise to a woman about to marry of a sum of money "to be settled for her benefit previous to the marriage," if communicated to her intended husband, entitled her to call for a settlement for the benefit of her children; but if she dies without exercising that right, her husband, as her administrator, is entitled absolutely, to the exclusion of the issue of the marriage.

Lovett v Lovett (1859) John 118; 33 LTOS 255; 7 WR 333; 70 ER 362

374 By whom enforceable — Husband — Wife dying without exercising her right — Husband acting as administrator

Lovett v Lovett no 373 ante

375 Power of court to decree conveyance after death

Synge v Synge no 333 ante

376 Damages for non-performance

Synge v Synge no 333 ante

377 Action to enforce covenant — Power of court to sanction compromise reached by trustees

DE having covenanted in 1932 in consideration of the proposed marriage of his daughter to settle a certain sum in her favour and that of her husband and children, failed to do so, and in 1939 the person intended to benefit, including two infant children of the marriage, brought an action against him to enforce the covenant and obtained judgment, the order of the court providing for payment of the sum in question to trustees when they had been appointed. The NP Bank having been appointed, negotiated with DE, who had not satisfied the judgment, and reached a compromise of the claim against him. On a summons taken out by the trustees seeking the sanction of the court thereto, the husband, the wife and the guardian *ad litem* of the infants, respondents to the summons, opposed the compromise, but the judge, being of opinion that its terms were for the benefit of the infants, approved it. On a motion to set aside his order: *Held* the court had jurisdiction to exercise the discretion on behalf of the trustees and to sanction the compromise.

The court, when assisting trustees in such a case, pays full attention to the views put before it on behalf of beneficiaries, but, in essence, it is deciding what the trustees ought to do having regard to the interests of everybody concerned, including those of infants with regard to which the court is not only entitled, but bound to make up its own mind.

Re Ezekiel's Settlement Trusts, National Provincial Bank Ltd v Hyam (on Re Ezekiel's Agreement) [1942] Ch 230; 166 LT 137; 86 Sol Jo 76; sub nom

National Provincial Bank Ltd v Hyam [1942] 2 All ER 227; 111 LJ Ch 155, CA

Scottish, Irish and Commonwealth Cases

378 What memorandum must contain — Parties
Abbott v Geraghty (1854) 4 I Ch R 15 (IR)

379 Liability to make representation good — Representation by third party — Necessity for proving definite representation — And that representation has been acted upon
Kirwan v Burchell (1859) 10 I Ch R 63 (IR)

380 Liability to make representation good — Representation intended to influence another's conduct — Of intention to act
Where a representation was made by a father on the occasion of his son's marriage of the amount of property he intended to leave his son, and on the faith of his representation his son contracted the marriage: *Held* the father had by this representation entered into a contract with his son which he was bound to perform specifically.
Keays v Gilmore (1874) 22 WR 465 (IR)

381 What amounts to offer — Representation of intention to do something in future — Amounting to positive undertaking
Keays v Gilmore (1873) 8 LR Eq 290 (IR)

382 What amounts to offer — Representation of intention to do something in future
Madox v Nowlan (1824) Beat 632 (IR)

383 What amounts to offer — Representation of intention to do something in future
Quinlan v Quinlan (1814) Hayes&Jo 785 (IR)

384 What amounts to offer — Representation of intention to do something in future
M'Askie v M'Cay (1868) 2 LR Eq 447 (IR)

385 What amounts to offer — Representations intended to influence the conduct of another
Saunders v Cramer (1842) 3 Dr&War 87 (IR)

B Effect of completed settlement

LAW See Halsbury's Laws (4th edn) vol 42 para 638

386 Verbal promise to settle — Insanity of promisor — Settlement in pursuance of promise — Subsequent ratification in lucid interval
Testator having left his son £10,000 by his will, expressed an intention, verbally, of settling £10,000 stock on the son's marriage, and then became insane. The marriage took place, and the £10,000 stock was purchased out of testator's moneys, and settled accordingly. Testator then had a lucid interval, and on being told of the transaction did not disapprove thereof. He afterwards became irrecoverably lunatic: *Held* testator confirmed the settlement upon his son by not expressing any disapprobation during this lucid interval.
Browne v Browne (1841) 11 LJ Ch 57; 5 Jur 1053

387 Effect of subsequent settlement — Previous promise by letter
(1) A father, prior to the marriage of his daughter, in a correspondence with her intended husband, stated that all his property would be equally divided amongst his children at his decease; but in a settlement executed prior to the marriage there was no expression of any such intention: *Held* all that was intended to be binding on the father was embodied in the settlement.

(2) "The deed of settlement raises a presumption that it constituted or expressed the whole of the marriage contract so far as property was concerned; a presumption capable certainly of being rebutted or displaced by evidence sufficient for the purpose" (*Knight Bruce LJ*).
Loxley v Heath (1860) 1 De GF&J 489; 29 LJ Ch 313; 2 LT 44; 6 Jur NS 436; 8 WR 314; 45 ER 451, LC&LJJ

ANNOTATIONS As to (1) **Folld** Sands v Soden (1862) 31 LJ Ch 870; Re Badcock, Kingdon v Tagert (1880) 17 Ch D 361

388 Effect of subsequent settlement — Previous promise by letter
Upon negotiations taking place previous to a marriage, the father of the lady wrote to the gentleman's father in these words: "When my eldest daughter married, I gave her £1,000 settled on herself, with a promise of sharing with my other daughters what I may be able hereafter to leave them; and this I can do for A," the intended bride. A settlement was then prepared in the Scotch form, and executed, whereby the father assigned £1,000 to trustees for his daughter, and also all other means and estate whatsoever which she would be entitled to succeed to on his death. The father afterwards transferred a sum of £3,333 to the trustees of his daughter A's settlement, and he made his will, whereby he gave more property to his other daughters than to A. Upon a bill filed by the daughter and her husband claiming to be entitled to an equal share with the other children of testator: *Held* the settlement was a final instrument, and the estate of the father could not be bound by his letter, and the daughter had no right to come upon his assets for an equal share with his other children.
Sands v Soden (1862) 31 LJ Ch 870; 10 WR 765

389 Effect of subsequent settlement — Previous promise by letter
The father of a lady wrote to her intended husband that he and his wife had determined to settle on their daughter £2,000, and that in addition she would have £2,000 on her mother's death, and at least as much on her father's death. Eleven months afterwards the marriage took place; and on that occasion

a formal agreement for a settlement of £2,000 was executed, the letter not being in any way referred to. The mother died sixteen years and the father died twenty-five years after the marriage. The husband then claimed from the father's estate £4,000 under the promises contained in the letter: *Held* the letter had, under the circumstances, been superseded by the agreement for a settlement.

Re Badcock, Kingdon v Tagert (1880) 17 Ch D 361; 43 LT 688; 29 WR 278

390 Effect of subsequent settlement — Ante-nuptial agreement

A post-nuptial settlement of money recited an ante-nuptial contract. By the settlement, those children who survived their parents alone took, but by the contract, as recited, all the children took vested interests at their birth. The recital being the only proof of the contract: *Held* the court must act on the settlement.

Mignam v Parry (1862) 31 Beav 211; 31 LJ Ch 819; 7 LT 88; 8 Jur NS 634; 10 WR 812; 54 ER 1119

Scottish, Irish and Commonwealth Cases

391 Effect of subsequent settlement — Ante-nuptial agreement

White v Anderson (1850) 1 I Ch R 419 (IR)

392 Effect of subsequent settlement — Ante-nuptial agreement

Blake v Blake [1913] 1 LR 343 (IR)

393 All terms must be settled

When a settlement is being negotiated which is to be concluded by a formal agreement, all the terms of that settlement must be clear and unequivocal before it can be found that a binding settlement has been made before the formal agreement has been entered into. If all the terms have been clearly settled it would be unjustifiable for one of the negotiators to refuse to enter into the formal agreement.

Re Lennox Estate (No 2) [1948] 3 DLR 45; 1 WWR 903 (CAN)

3 Enforcement of contracts to settle property on marriage

A Where specific performance decreed

a By and against whom enforceable

i By whom

LAW See Halsbury's Laws (4th edn) vol 42 para 639

CROSS REFERENCES See BANKRUPTCY vol 4(2) (2nd reissue) nos 6050, 7575 (assignee in bankruptcy)

394 Grandson of covenantor — Father with power to bar entail — Enforcement not granted

A on the marriage of his son covenants to settle lands to the use of the son for life, then to the wife for life, remainder to the heirs male of the body of the son. A dies and makes his son executor, who dies and makes a second wife executrix. The grandson brings a bill against the executrix to have satisfaction on the covenant, or that he might sue it in the trustees' names. Bill dismissed, plaintiff's father being tenant in tail, and might have barred plaintiff if a settlement had been made.

Cann v Cann (1687) 1 Vern 480; 23 ER 605, LC

395 Remainderman

Chancery will not compel a purchase for the benefit of a remainder, or an estate tail.

Anon (1701) 12 Mod Rep 521; 88 ER 1493

396 Trustees for infants — Infants volunteers

A voluntary settlement executed by a spinster contained a covenant in the usual form to settle any after-acquired property, with certain exceptions. The settlor afterwards married and had three children. Having become entitled under a will to a legacy and a share of residue which fell within the covenant, and a share in an appointed fund, she was asked by the trustees of the settlement to settle this property, but refused to do so: *Held* on an application by the trustees for directions, the children, being volunteers, had no right to enforce the covenant, and therefore the trustees ought to be directed not to take any proceedings to enforce the covenant, by action for damages for breach, or otherwise.

Re Kay's Settlement, Broadbent v Macnab [1939] Ch 329; [1939] 1 All ER 245; 108 LJ Ch 156; 60 LT 172; 55 TLR 332; 83 Sol Jo 55

ANNOTATIONS **Distd** Cannon v Hartley [1949] 1 All ER 50; **Apld** Re Cook's Settlmt Trusts, Royal Exchange Assce v Cook [1964] 3 All ER 898

ii Against whom

LAW See Halsbury's Laws (4th edn) vol 42 para 639

397 Death of covenantor — Enforcement against heir

Haymer v Haymer (1678) 2 Vent 343; 86 ER 476

398 Death of covenantor — Enforcement against heir

Downes (Countess) v Moreton (1681) 2 Cas in Ch 68; 22 ER 850, LC

399 Death of covenantor — Enforcement against heir — Heir bound by articles
Gell v Vermedun (1694) Freem Ch 199; 22 ER 1158

400 Death of covenantor — Enforcement against heir
Marriage articles were, that within a month after marriage the husband would surrender a copyhold to the wife for life, remainder to the issue, remainder to the heirs to the wife, and if he should neglect or refuse to make such surrender, then he would leave the wife £500 at his death. No surrender is made; the husband dies after the month without assets. The judge decreed that the heir-at-law should surrender to plaintiff and her heir, and till surrender he was a trustees for her. Here was no election; if done after the month the £500 was not to be paid; those are two express covenants, and it is not put in the alternative, and here is to purchaser to be defeated; it is a charge in equity.
Wood v Pesey (1718) 2 Eq Cas Abr 55; 22 ER 48, LC

401 Person taking inheritance — With notice of articles
A person deemed a trustee, if he takes an inheritance after notice of articles to settle the estate.
Skirme v Meyrick (1739) 2 Com 700; 92 ER 1275

Scottish, Irish and Commonwealth Cases

402 Death of covenantor — Enforcement against executors
Gordon v Murphy (1867) 4 WW&A'B 120 (AUS)

b Mutual covenants not performed

LAW See Halsbury's Laws (4th edn) vol 42 para 639

CROSS REFERENCES See BANKRUPTCY vol 4(2) (2nd reissue) no 6139 (covenant unperformed by party seeking enforcement where husband becoming bankrupt and enforcement sought by assignees); ESTOPPEL vol 21(2) (2nd reissue) no 1013 (enforcement sought by third party: beneficiary of wife under settlement: covenant unperformed by wife, and husband estopped by delay); CONTRACT vol 12(2) (2nd reissue) no 5923 et seq

403 Covenant unperformed by party seeking enforcement
(1) *Semble*: a partial performance of a marriage contract will not be enforced by the court.

(2) Where the whole right of plaintiff depends on the execution of a contract which he has entered into, that right must be first established by him before he can make it a foundation for proceedings to enforce a right against another person.
Fryer v Cooke (1843) 12 LJ Ch 487; 1 LTOS 408

404 Covenant unperformed by party seeking enforcement
By articles made previously to a marriage, the wife's father covenanted to make certain payments during his life, and to settle three-tenths of his real and personal estate at his death upon the husband and wife during their respective lives, and after their death on their issue; and the husband covenanted to insure his life and to settle the policy, and also other property, in like manner. In default of issue, the property settled by the husband was to revert to him. The marriage took place, and the wife died without issue, and afterwards the father died. The husband did not insure his life or settle his property as agreed, and refused to execute the settlement which had been drawn in pursuance of the articles. A suit having been instituted for the administration of the father's estate, the husband claimed to prove for the value of his life interest in three-tenths of the father's real and personal estate: *Held* it was no answer to the husband's claim that he had refused to perform his part of the agreement, inasmuch as the contract between the parties had been partly performed by the marriage, and the performance by the husband was not a condition precedent to the performance by the father.
Jeston v Key (1871) 6 Ch App 610; 40 LJ Ch 503; 25 LT 522; 19 WR 864, LJJ

405 Covenant unperformed by party seeking enforcement — Covenant for jointure not performed — Portion payable to husband
By marriage articles a portion was agreed to be paid, and a jointure settled; the marriage took effect, and the wife died without issue before either was done; the husband sued for the portion, though no jointure was made and it was decreed for him.
Hollis v Carr (1676) Cas temp Finch 261; Freem Ch 3; 2 Mod Rep 86; 3 Swan 638; 23 ER 143, LC

ANNOTATIONS **Consd** Saltoun v Houston (1824) 1 Bing 433 **Distd** Young v Smith (1865) LR 1 Eq 180

406 Covenant unperformed by party seeking enforcement — Jointure payable to wife — Husband's portion unpaid — Wife entitled to husband's estate as administratrix
Meredeth v Jones (1687) 1 Vern 463; 23 ER 589, LC

407 Covenant unperformed by party seeking enforcement — Jointure payable to wife — Settlement by wife not made
Wood v Ingram (1710) 2 Eq Cas Abr 211; 22 ER 180

408 Covenant to covenantor unperformed — Settlement conditional on payment of portion — Enforcement withheld pending payment

Baskerville v Baskerville (1703) 2 Vern 448; 23 ER 886; affg SC sub nom
Baskerville v Gore (1701) Prec Ch 186

409 Covenant unperformed by third party — Portion unpaid by wife's father — Jointure payable to wife

Agreement to settle a jointure in consideration of a portion by the father. Though the portion was never paid, yet the wife shall have her jointure.
Perkins v Thornton (1741) Amb 502; 27 ER 325, LC

ANNOTATION **Consd** Pyke v Pyke (1750) 1 Ves Sen 376

Scottish, Irish and Commonwealth Cases

410 Covenant unperformed by party seeking enforcement

Wallace v Wallace (1842) 2 Dr&War 452 (IR)

411 Covenant unperformed by party seeking enforcement

Re Smith's Trusts (1890) 25 LR Ir 439 (IR)

412 Covenant unperformed by party seeking enforcement — Right of wife to retain sum assigned to husband unqualified by marriage contract

Held a wife was not entitled, in a question with an executor-creditor of her deceased husband, to retention of a fund assigned to her husband, without qualification by marriage contract, upon the ground of non-implement of the husband's counter obligation under the contract to make payment of a certain provision to her.
Boswell v Miller (1846) 8 Dunl (Ct of Sess) 430; 18 Sc Jur 210 (SCOT)

c Grounds for refusal

LAW See Halsbury's Laws (4th edn) vol 42 para 639

CROSS REFERENCE See no 403 et seq ante (non-performance of mutual covenants)

413 Unreasonableness

Anon (1679) 2 Cas in Ch 17; 22 ER 825, LC

414 Uncertainty

A on the marriage of his daughter to B covenants that B should have his land called C for £1,500 less than any other would give for it, and afterwards devises this estate to his grandson for life, with remainders over and dies. The court refused to decree specific executions of this agreement, by reason of the uncertainty of it, and it not being mutual.
Bromley v Jefferies (1700) 2 Vern 415; 1 Eq Cas Abr 18; Prec Ch 138; 23 ER 867; sub nom
Bromley v Fettiplace (1700) Freem Ch 245

ANNOTATION **Distd** Cave v Cave (1762) 2 Eden 139

415 Ambiguity

Specific performance of marriage articles refused, on the ground of their being inconsistent, uncertain and unintelligible.
Franks v Martin (1760) 1 Eden 309; 5 Bro Parl Cas 151; 28 ER 704, HL

416 Adultery of wife

Where the wife sues the husband for a specific performance of her marriage articles, and that he may settle such and such lands on her for her jointure; it is no bar to her demand, that she has eloped with an adulterer; much less if this be not by the husband put in issue in the cause.
Sidney v Sidney (1734) 3 P Wms 269; 2 Eq Cas Abr 29; 24 ER 1060, LC

ANNOTATIONS **Consd** Clarke v Periam (1741) 2 Atk 333; Seagrave v Seagrave (1807) 13 Ves 439; Jee v Thurlow (1824) 2 B&C 547 **Apld** Duncan v Campbell (1842) 12 Sim 616; Evans v Carrington (1860) 2 De GF&J 481; Fearon v Aylesford (1884) 14 QBD 792

417 Adultery of wife

Blount v Winter, Winter v Blount (1781) 3 P Wms 276n; 24 ER 1063

ANNOTATIONS **Apld** Seagrave v Seagrave (1807) 13 Ves 439; Evans v Carrington (1860) 2 De GF&J 481; Fearon v Aylesford (1884) 14 QBD 792

418 Ante-nuptial incontinence — Not disclosed to husband

Non-disclosure of ante-nuptial incontinence on the part of a wife held not to be such a fraud upon the husband as to entitle him to set aside a settlement made upon the marriage.
Evans v Carrington (1860) 2 De GF&J 481; 30 LJ Ch 364; 4 LT 65; 25 JP 195; 7 Jur NS 197; 45 ER 707, LC

ANNOTATIONS **Consd** Fitzgerald v Chapman (1875) 1 Ch D 563; Wales v Wadham [1977] 2 All ER 125

419 Incapacity or parties — Infant

(1) Where a mother who was tenant for life, with remainder to her son in fee, who was under age, covenanted, on his marriage, that they would settle, within two years, an estate on the heirs male of the marriage; bill, for a specific performance by decreeing a strict settlement, dismissed: and even if it had appeared that there had been a sufficient covenant for that purpose, a great length of time having elapsed, and none of the parties having

asserted their rights, the court would not have interfered.

(2) Covenant in a marriage settlement that the husband shall, within one year, execute, he being then under age, does not show such an interest in him as to put a purchaser upon inquiry.

It appears that T [the son] was an infant, and neither did nor could covenant by that deed (*Northington, Lord Keeper*).

Howorth v Deem (1758) 1 Eden 351; 28 ER 720

420 Laches — Rights not asserted over long period

Howorth v Deem no 419 ante

421 Non-occurrence of contingency — Covenant to settle after death of third party — Covenantor survived by third party

In agreements no relief in equity where an action at law would not lie by reason of a substantial defect; such as a contingency not happening. Husband covenants in marriage articles, in six months after death of his mother, and that he should come to and be in possession of the estate in jointure, to settle, etc. He dies in mother's life, leaving no issue. The estate comes to his heir; who shall not be compelled by the wife to a specific performance.

Whitmel v Farrel (1749) 1 Ves Sen 256; 27 ER 1017, LC

422 Covenant contrary to public policy — Annuity on separation

By articles before marriage, the husband covenanted to settle an annuity on the wife after marriage to be paid in the event of his death or any separation taking place: *Held* such a covenant was contrary to public policy and morality, and could not be enforced by a court of equity.

Cocksedge v Cocksedge (1844) 14 Sim 244; 13 LJ Ch 384; 3 LTOS 374; 8 Jur 659; 60 ER 351; subsequent proceedings (1845) 5 Hare 397

ANNOTATIONS **Distd** Marlborough v Marlborough (1900) 83 LT 578 **Consd** Brodie v Brodie [1917] P 271

Scottish, Irish and Commonwealth Cases

423 Uncertainty

A, by marriage articles, agreed with trustees named therein, that he "should from time to time thereafter effect such assurances on his own life, at such periods and for such amounts respectively as his income would fairly admit of," and assign the same to the trustees on trusts in the articles specified: *Held* this agreement was so uncertain that a court of equity would not decree specific performance of it.

Tottenham v Townsend (1856) 5 I Ch R 225 (IR)

424 Article contrary to powers in settlement

Equity will not decree specific execution on an article, which is contrary to the powers in a settlement.

Stratford v Aldborough (Earl) (1786) 1 Ridg Parl Rep 281 (IR)

B Parties between whom contract is enforceable

LAW See Halsbury's Laws (4th edn) vol 42 para 640

425 Against contracting party — Throughout lifetime

Sidney v Sidney no 416 ante

426 Against contracting party — After death

Haymer v Haymer no 397 ante

427 Against contracting party — After death

Laver v Fielder no 324 ante

428 Against contracting party — After death

Jeston v Key no 404 ante

429 Against contracting party — After death

Coverdale v Eastwood no 325 ante

430 Against contracting party — At the suit of the issue of the marriage

Trevor v Trevor no 124 ante

431 Against contracting party — At the suit of personal representative of party intended to be benefited

Wankford v Fotherley no 362 ante

432 Against contracting party — At the suit of personal representative of party intended to be benefited

Lovett v Lovett no 373 ante

C Effect of covenant to settle or charge specified property

LAW See Halsbury's Laws (4th edn) vol 42 para 641

433 Death of covenantor before settlement — Contract binding on heir

Langton v North (1683) 2 Rep Ch 271; 21 ER 676

434 Remarriage of covenantor before settlement — Different settlement made on remarriage — Original covenant binding

C by articles on his marriage with his first wife, covenanted that all the lands which he should purchase during her life, should descend to, or be settled upon the heirs male of her body by him begotten. No settlement was made pursuant to these articles; but C upon his marriage with a second wife, settled his estate to different uses: *Held* the eldest and only son of the first marriage was entitled to a specific

performance of these articles, and a conveyance was decreed accordingly.

Cusack v Cusack (1714) 5 Bro Parl Cas 116; 2 ER 570, HL

435 Covenant to settle lands of specified value — Liability of estate for equivalent value — Payable to party entitled

A covenants by marriage articles that the estate agreed to be settled is worth £500 per annum clear of all incumbrances; and also to purchase other lands of £300 per annum and settle them to the same uses. The new purchase was never made, and the estate settled was incumbered beyond its value: *Held* out of the purchase-money of A's estate not settled, so much shall be paid to the eldest son, as is equivalent in value to £800 per annum computed at twenty-two years' purchase.

Barker v Ivers (1724) 5 Bro Parl Cas 127; 2 ER 578, HL

436 Covenant to settle lands of specified value — Liability of estate for equivalent value — Payable to party entitled — To be laid out in purchase of land

Covenant by husband, in consideration of the purchase-money of an estate of the wife, within two years to convey lands in the county of N of the value of such purchase-money, by way of settlement. The husband having died without performing the covenant, performance of the same decreed, against his representatives by laying out in the purchase of land so to be settled, a sum equal to the present value of estates in N, which, at the time when the covenant ought to have been performed, would have been worth the amount of the purchase-money, with interest at 4 per cent from the death of the covenantor.

Suffield (Dowager Lady) v Suffield (Lord) (1812) 3 Mer App 699; 36 ER 268

437 Covenant to settle lands of specified value — Covenant enforced

Covenant in consideration of a marriage to settle lands of £350 per annum on husband and wife and the issue male of the marriage, remainder to the brothers of the husband, equity will compel an execution of this covenant, and not put the party to an action of covenant in the trustee's name.

Vernon v Vernon (1731) 2 P Wms 594; 24 ER 875, LC; affd 1 Bro Parl Cas 267, HL

ANNOTATIONS **Consd** Goring v Nash (1744) 3 Atk 186; Stephens v Trueman (1747) 1 Ves Sen 73

438 Covenantor reserving option to convey — Or pay specified sum — Death before conveyance or payment — Conveyance ordered

Testator in a settlement of an estate, reserved to himself an election as to parcels, and afterwards, by indenture, he was to have an option of paying a certain sum within twenty-four calendar months; not having elected in his lifetime, and his personal estate being inadequate to payment of his debts, the estate covenanted shall be conveyed.

Tyssen v Benyon (1785) 2 Bro CC 5; 29 ER 3, LC

439 Covenant to settle part of specified estates — To provide specified income for wife — Life interest in one estate devised to wife — Contribution rateably from both

The owner of estates in the counties of Oxford and Berks covenanted on his marriage to convey such part of them to trustees as should be of annual value of £900, to the use of himself for life, with remainder to the use and intent that his intended wife should yearly receive for her jointure £800, to be charged upon the same hereditaments. The settlor, not having made any settlement in pursuance of the covenant, by his will, confirming the settlement, devised his estates in the counties of Oxford and Berkshire to his wife for life. He afterwards, by deed, revoked his will as to the estates in Oxfordshire, which, consequently on his death, descended to his heir-at-law. The jointress insisted that she was entitled to the Berkshire estate for her life, free from any contribution towards her jointure; and that the Oxfordshire estates were exclusively liable to satisfy the jointress to the extent for which she contended appeared on the face of the will, the two estates were liable to contribute rateably to the satisfaction of the covenant.

Eyre v Green (1846) 2 Coll 527; 7 LTOS 223; 10 Jur 384; 63 ER 846

iii CONTRACTS TO SETTLE LAND

1 Statutory requirements

A In general

LAW See Halsbury's Laws (4th edn) vol 42 para 642

440 Note or memorandum must have come into existence before the commencement of the action

A post-nuptial settlement to which the testamentary guardians of the wife, then an infant, were parties recited that previously to the marriage the husband agreed to make such a settlement of the wife's fortune as was thereinafter contained: *Held* the deed

constituted such a deed or memorandum of the recited parol ante-nuptial contract in consideration of marriage as satisfied Statute of Frauds s 4 (repealed).

Re Holland, Gregg v Holland [1902] 2 Ch 660; 71 LJ Ch 518; 86 LT 542; 50 WR 575; 18 TLR 563; 46 Sol Jo 483; 9 Mans 259, CA

ANNOTATION **Consd** Re Gillespie, Ex p Knapman, The Trustee v Gillespie (1913) 20 Mans 311

441 Note or memorandum must have come into existence before the commencement of the action — Must show essential terms

Vincent v Vincent no 326 ante

442 Necessity for existing complete agreement

A father having agreed to settle a certain sum for the benefit of his daughter and the children of her intended marriage with Lord G, a memorandum of the terms of the settlement was by his direction written by his solicitor, and approved of by him and Lord G, and he gave the solicitor instructions to prepare such settlement, but died before the same was ready for execution, having by his will given the daughter real estates and a moiety of the residue of his personal estate. Lord G married the daughter, and performed his part of the settlement, in conformity to the written memorandum: *Held* the memorandum was not a complete agreement, binding within Statute of Frauds (repealed); and of an incomplete agreement there could not be part performance.

Thynne (Lady) v Glengall (Earl) (1848) 2 HL Cas 131; 12 Jur 805; 9 ER 1042, HL; affg SC sub nom *Glengal (Earl) v Barnard* (1836) 1 Keen 769

ANNOTATION **Consd** Warden v Jones (1857) 23 Beav 487

443 Necessity for existing complete agreement

C proposing to marry H, wrote out a paper beginning thus: "In the event of a marriage between the undermentioned parties, the following conditions as a basis for a marriage settlement are mutually agreed upon." Then followed several sentences each in this form: "C to do so and so, H to have so and so." No name of either party was signed to the paper, which was delivered by C to H's solicitor for the purpose of drawing the settlement. No settlement was ever executed; it was dispensed with by H at C's request, upon C's verbal promise to give H certain advantages by his will. C died, and the will was not found to fulfil the promise: *Held* H was not entitled, independently of the question whether as a matter of fact there had been any waiver, to specific performance of the arrangements mentioned in the written paper as it did not constitute a contract within the meaning of Statute of Frauds (repealed).

Caton v Caton (1867) LR 2 HL 127; 36 LJ Ch 886; 16 WR 1, HL

ANNOTATIONS **Consd** Strahan v Graham (1867) 16 LT 87; Coles v Pilkington (1874) LR 19 Eq 174; Alderson v Maddison (1880) 5 Ex D 293; Viret v Viret (1880) 50 LJ Ch 69

444 Implication of lack of signature

I know no case where an agreement, though it is all written with the party's own hand, has been held sufficient, unless it has been likewise signed by the party, and the party's not signing it is an evidence that he did not think it complete; he has left it to an after consideration, and might afterwards make alterations or additions in it; therefore, unless it is either signed by him, or something equivalent done, to show that he looked upon it as complete and perfected, I think such writing by the party himself is not sufficient to bind him within that statue [Statute of Frauds] [repealed] (*Lord Cowper C*).

Bawdes v Amhurst (1715) Prec Ch 402; 1 Eq Cas Abr 21; 24 ER 180, LC

ANNOTATION **Distd** Welford v Beazely (1747) 3 Atk 503

445 Relevance of part performance

By a parol ante-nuptial agreement, it was agreed that the husband should take a certain portion of the wife's property, and that the residue should be settled for her separate use. This agreement was carried out so far as related to the husband; but no settlement was made on the wife. The wife subsequently to her marriage filed her bill by her next friend, stating these facts, and praying that her interests in certain property, consisting of real estate coming to her, might be declared accordingly. The husband by his answer, admitted the statements in the bill. A deed was then prepared, purporting to be a settlement on the wife, in pursuance of the agreement, and giving her a power to dispose of her property by will. This deed, though signed by the wife, was not acknowledged by her. She made a will, disposing of her property in favour of her husband and other parties, and died. The husband then filed a supplemental bill, praying, as against the heir of the wife, that the parol agreement might be carried into effect, that the want of an acknowledgment might, if necessary, be supplied, and that the will of the wife might be established as a valid execution of the power given to her by the deed: *Held* (1) in a suit thus framed there was no case established in point of proof as against the heir; (2) the contract so entered into before marriage, there being nothing but marriage following, could not be carried into effect under Statute of Frauds (repealed); (3) the court would not supply the want of the

acknowledgment, as tending to destroy the protection which the law throws around married women.
Lassence v Tierney (1849) 1 Mac&G 551; 2 H&Tw 115; 15 LTOS 557; 41 ER 1379; sub nom *Lassence v Tierney, Lassence v Lescher* (1849) 14 Jur 182

ANNOTATIONS As to (2) **Apld** Surcome v Pinniger (1853) 3 De GM&G 571; Re Marshall, Graham v Marshall [1928] Ch 661; Re Burton's Settlement Trusts, Public Trustee v Montefiore [1955] 1 All ER 433. Generally **Consd** Barrow v Barrow (1858) 4 K&J 409 **Distd** Re Goold's Will Trusts, Lloyds Bank Ltd v Goold [1967] 3 All ER 652 **Folld** Watson v Holland (Inspector of Taxes) [1985] 1 All ER 290

446 Relevance of part performance
A husband executed a post-nuptial settlement of railway stock, the property of the wife, in pursuance of a parol ante-nuptial agreement. The wife had been induced by the husband to marry him before the execution of the settlement, on the representation that the settlement would be as good after as before marriage. The husband was insolvent at the time of the marriage, although he had assured the wife and her family that he was solvent. On bill filed by creditor to set aside the settlement: *Held* the subsequent execution of the settlement was not such a part performance of the parol agreement as would avoid Statute of Frauds (repealed).

If marriage were to be held such a part performance as would take the contract out of Statute of Frauds [repealed], the effect in all such cases would be to make the statute absolutely ridiculous. It is another case where one of the parties agrees to do something more than marry, as, for instance, to settle an estate (*Lord Chelmsford C*).
Warden v Jones (1857) 2 De G&J 76; 27 LJ Ch 190; 30 LTOS 206; 4 Jur NS 269; 6 WR 180; 44 ER 916, LC

ANNOTATIONS **Apld** Trowell v Shenton (1878) 8 Ch D 318 **Consd** Holland, Gregg v Holland [1902] 2 Ch 360

447 Relevance of part performance
Johnstone v Mappin (1891) 60 LJ Ch 241; 64 LT 48

448 Relevance of part performance — Delivery of possession
A father, shortly before the marriage of his daughter, told her intended husband that he meant to give certain leasehold property to the couple on their marriage. After the marriage he gave up possession of the property to the husband, to whom he directed the tenants to pay the rents, and handed to the husband the title deeds. The husband expended money upon the property: *Held* sufficient part performance to take the case out of Statute of Frauds (repealed).

It has been held, in may cases, that if there be a written agreement after marriage, in pursuance of a parol agreement before marriage, this takes the case out of the statute, so also does part performance (*Turner LJ*).
Surcome v Pinniger (1853) 3 De GM&G 571; 22 LJ Ch 419; 20 LTOS 255; 17 Jur 196; 43 ER 224, LJJ

ANNOTATIONS **Consd** Re Gulliver, Stroughill v Gulliver (1856) 2 Jur NS 700 **Apld** Ungley v Ungley (1876) 4 Ch D 73 **Consd** Sharman v Sharman (1892) 67 LT 834

449 Relevance of part performance — Delivery of possession
A father verbally promised, in consideration of his daughter's marriage to give her a house as a wedding present, and immediately after the marriage he put the daughter and her husband into possession. The father was then the owner of the house, which was leasehold and was subject to a charge in favour of a building society, payable by instalments. The father paid the instalments which fell due during his lifetime, and at his death there remained a balance of £110, which fell due shortly afterwards: *Held* the verbal promise to give the house having been established, the possession took the case out of Statute of Frauds (repealed); the contract was to give the house free from incumbrances; and the £110 was payable out of the father's estate.
Ungley v Ungley (1877) 5 Ch D 887; 46 LJ Ch 854; 37 LT 52; 41 JP 628; 25 WR 733, CA

ANNOTATION **Folld** Sharman v Sharman (1892) 67 LT 834

450 Relevance of part performance — Delivery of possession
In 1889 defendant was married to plaintiff's son, and plaintiff gave to his son as a marriage present, but only by word of mouth, a certain business carried on at a certain house, and also as defendant contended but plaintiff denied, the lease of that house. Directly after the marriage, possession of the house was given up by plaintiff and was held by the son, he carried on the business there for his own benefit till his death, which occurred in April 1891. Soon after that event a family disagreement arose, and plaintiff brought an action of ejectment to recover possession of the house: *Held* the possession of the house given up to the son, equivalent to part performance, dispensed with the necessity of a writing, and as nothing was said to the contrary, the gift was free from incumbrances.
Sharman v Sharman (1892) 67 LT 833; 9 TLR 101; 37 Sol Jo 79; 4 R 124, CA

451 Relevance of part performance — Payments of interest on sum of money
T, in anticipation of the marriage of his daughter C, had conversations with her, in which he promised her that he would after her marriage pay her the interest on a certain sum of money during her life,

and he further said that the husband would have the principal after his death. T, as alleged, made several payments on account of the interest due on the principal sum, but the payments were not regular, and no settlement was ever come to during his life. In administering the estate of T, C and her husband claimed to be entitled to a certain sum as the balance of the interest due, but in consequence of dispositions in their favour made by testator in his will, the principal was not claimed. The chief clerk allowed the claim. On motion to vary the certificate: *Held* even admitting the payments by T during his life to have been made in pursuance of a virtual agreement, they did not constitute such a part performance as to take the case out of Statute of Frauds (repealed).

Re Gulliver, Stroughill v Gulliver (1857) 27 LTOS 258; 2 Jur NS 700; 4 WR 684

ANNOTATION **Expld** Williams v Williams (1868) 37 LJ Ch 854

452 Relevance of part performance — Agreement to settle

Warden v Jones no 446 ante

453 Relevance of part performance — Execution of settlement

Warden v Jones no 446 ante

454 Relevance of part performance — Funds left in wife's name — With husband's consent

On a marriage it was verbally agreed between the husband and the wife that a sum of money standing to the credit of the wife on deposit at a bank in her maiden name should be her separate property. Nothing further was done; but after the marriage the money, with the husband's consent, remained at the bank in the wife's maiden name, and she received the interest on it for two years after the marriage, when she drew the money out of the bank. The trustee in the subsequent liquidation of the husband having claimed payment of the money from the wife as part of her husband's property: *Held* there had been no such part performance by the husband of the parol contract to settle as to take the case out of Statute of Frauds (repealed), and, the trustee was entitled to the money subject to the wife's equity to a settlement, if any.

Re Whitehead, Ex p Whitehead (1885) 14 QBD 419; 54 LJQB 240; 52 LT 597; 49 JP 405; 33 WR 471, CA

B Estoppel

a By representation

LAW See Halsbury's Laws (4th edn) vol 42 para 642

CROSS REFERENCE See ESTOPPEL vol 21(2) (2nd reissue) no 1169 et seq

455 Liability to make representation good — Representation by third party — Necessity for proving definite representation — And that representation has been acted upon

Jameson v Stein no 343 ante

456 Relevance of part performance — Representation intended to influence another's conduct

De Manneville v Crompton no 340 ante

457 Relevance of part performance — Representation intended to influence another's conduct — Of intention to act

Upon a treaty of marriage, the father of the intended wife said to plaintiff, the intended husband, "I pledge you my word, that after the death of my wife and myself, my daughter will have £10,000 at the very least." Heads of articles, which were subsequently drawn up under the sanction of and approved by the father, and intended as instructions for a settlement, contained the following passage:—"A covenant is to be drawn up by which Sir WH, the father, guarantees that his daughter shall at the decease of both parents have a property of not less than £10,000." In the settlement which was afterwards executed before the marriage there was a recital to that effect, but there was no express covenant by the father to make good that sum. On a bill filed by the husband who had survived his wife, against the executor of the father: *Held* (1) although the settlement, if it stood alone, could not have been rectified, yet that having regard to the articles and representation made by the father, there was sufficient evidence of mistake to authorise the court to make the settlement conformable to the articles, and the estate of the father was bound to make up the portion of his daughter to the stipulated sum.

When a settlement purports to be in pursuance of articles entered into before marriage and there is any variance then no evidence is necessary in order to have the settlement corrected; and although the settlement contains no reference to the articles yet if it can be shown that the settlement was intended to be in conformity with the articles yet if there is clear and satisfactory evidence showing that the discrepancy has arisen from a mistake, the court will reform the settlement and make it comformable to the real intention of the parties (*Lord Cranworth C*).

(2) The representation of the father, though not afterwards fulfilled, yet being of intention merely and not fact, did not amount to such a misrepresentation as would entitle the husband to relief in equity on the ground of fraud.

The misrepresentation, to come within the doctrine, must be a misrepresentation at the time it was made. If it is made with the view of inducing a person to act, and such person has acted upon the faith of the representation, then the person making the representation would in equity be bound to fulfil it (*Lord Cranworth C*).

Bold v Hutchinson (1855) 5 De GM&G 558; 25 LJ Ch 598; 26 LTOS 229; 2 Jur NS 97; 4 WR 3; 43 ER 986, LC

458 Effect of innocent mistake

On a treaty of marriage the husband applied to the brother of the wife to know the amount of the fortune and the manner in which it was secured. The brother represented it fairly, as he then conceived it, and as being charged on a real estate under the father's will; and added that the husband need not examine the will or the family deeds, the fact being certainly as he represented. A recital to the same effect was made also in the settlement to which the brother was a party. It afterwards turned out that the father had no power to charge the estate by his will; but this fact was unknown to all the family at the time of the marriage. The representation of the brother under these circumstances will not bind him to make it good.

Merewether v Shaw (1789) 2 Cox Eq Cas 124; 30 ER 58, LC

459 Effect of innocent mistake — Common to all parties

Bill by a husband to have his wife's portion, part of which was invested in stock, make up money, on the ground, either of express contract, or representation, upon which the marriage took place, dismissed: the description by the articles, though generally "the sum of £4,000," referring to that sum as in settlement; and the representation under circumstances not amounting to a warranty; and proceeding upon a common mistake.

Ainslie v Medlycott (1803) 9 Ves 13; 32 ER 504

ANNOTATION **Follo** Evans v Wyatt (1862) 31 Beav 217

460 Effect of innocent mistake — Common to all parties

By a marriage settlement, it was recited that the husband was absolutely entitled to a sum of £7,000, part of the personal estate of a deceased person then being administered by this court. The husband settled £5,000 part of the £7,000, but the assets proved insufficient to pay even the £5,000: *Held* this was not a representation which the husband was bound to make good, and the deficiency did not constitute a debt payable out of his assets.

The facts are fairly stated, the mistake was common, and every one had a like opportunity to discover the mistake. It appears to me that this is exactly the case of *Ainslie v Medlycott* (no 459 ante) (*Romilly MR*).

Evans v Wyatt (1862) 31 Beav 217; 7 LT 86; 8 Jur NS 499; 10 WR 813; 54 ER 1121

b By conduct

LAW See Halsbury's Laws (4th edn) vol 42 para 642

CROSS REFERENCE See ESTOPPEL vol 21(2) (2nd reissue) no 1479 et seq

461 Standing by while own property settled

The mother who as tenant in tail was the absolute owner of a term, is present at a treaty for her son's marriage, and hears her son declare, that the term was to come to him at his mother's death, and is a witness to the deed, whereby the reversion of the term is settled on the issue of this marriage after the mother's death. The mother is compellable in equity to make good this settlement, and to settle the reversion of the term accordingly after her death.

Hunsden v Cheyney (1690) 2 Vern 150; 1 Eq Cas Abr 355; 23 ER 703

462 Bond by husband on marriage — Wife not a party — Subsequent acts of wife confirming bond

Bond by husband on marriage, reciting agreement to settle wife's estate on the issue, etc; the wife not an executing party. After the marriage a real estate of the wife came into possession. The husband dies. The wife marries B and dies; bill by a younger child against B and the heir of his mother. It seems that Statute of Frauds could not have been taken advantage of, on account of the wife not having been an execution party, since the marriage took place in consequence of the instrument executed by the husband. Here, however, the wife had proved and acted under her first husband's will, which recited the bond; from whence it was held she had bound herself at all events.

Archer v Pope (1754) 2 Ves Sen 523; 28 ER 334, LC

463 Bond by husband on marriage — Wife not a party — Subsequent acts of wife confirming bond

Estcourt v Estcourt (1760) 1 Cox Eq Cas 20; 29 ER 1043

464 Bond by husband on marriage — Wife not a party — Subsequent acts of wife confirming bond

Husband before marriage gives bond to enable his intended wife to dispose by deed or will of her freehold estate. She devises during coverture. Her heir-at-law is bound, and shall convey to the devisee.

Rippon v Dawding (1769) Amb 565; 27 ER 363, LC

ANNOTATIONS **Distd** Field v Moore, Field v Brown (1855) 7 De GM&G 691 **Consd** Dye v Dye (1884) 13 QBD 147

2 Covenants to settle land

LAW See Halsbury's Laws (4th edn) vol 42 para 643

vi CONSTRUCTION OF WORDS AND PHRASES IN SETTLEMENTS

1 In general

CROSS REFERENCES See CONFLICT OF LAWS vol 11(2) (2nd reissue) no 1258 et seq (according to what law presumed); DEEDS vol 17(1) (2nd reissue) no 1839 et seq (construction of deeds generally), no 2973 (construction by reference to articles)

465 Difference in construction of will and settlement

Though there may not be any different rule of construction applicable to wills and settlements, yet the different character of the instrument is a circumstance to be weighed in determining the effect of the disposition it contains: shares under a settlement being held not to be vested might create a resulting trust for the settlor whilst in a will the residuary legatee might take.

Farrer v Barker (1852) 9 Hare 737; 68 ER 712

ANNOTATIONS **Consd** Dalton v Hill (1862) 6 LT 446; Jackson v Dover (1864) 2 Hem&M 209

466 Difference in construction of will and settlement

Semble: the distinction between a settlement and a will is, that in the former case, a settlor must be assumed *a priori* to have a general intention to benefit husband, wife, and children impartially; whereas, in the latter, testator may have good reasons for making a distinction and an intention of equally benefiting all cannot be assumed.

Re Crosse's Will (1863) 32 LJ Ch 344; 8 LT 299; 9 Jur NS 429; 11 WR 396

467 Difference in construction of will and settlement — Marriage settlement

Marriage settlements, by their very existence, prove an intention to provide for children, and it is not to be supposed that the intention was limited to children who should survive their parents; but a will is arbitrary in its nature, and such may be the intention. True it is, that in the case either of a settlement or of a will, the question is one of intention, and a will may be so framed as to evince an intention to provide for children, and in the case of a will so framed, the principle may be reasonably applied (*Turner LJ*).

Bythesea v Bythesea (1854) 23 LJ Ch 1004; 24 LTOS 17; 2 WR 677, LC&LJ

468 Construction that makes interests of children independent of their surviving the parents

In putting a construction on a marriage settlement, the court always endeavours not to make the interest of the children depend on their surviving their parents.

Strutt v Braithwaite (1852) 5 De G&Sm 369; 21 LJ Ch 609; 19 LTOS 28; 16 Jur 882; 64 ER 1157

469 Construction irrespective of expediency of provisions

Smyth v Foley no 1308 post

470 Express estate given not enlarged by implication

Theebridge v Kilburne (1751) 2 Ves Sen 233; 28 ER 150, LC

ANNOTATIONS **Consd** Campbell v Harding (1831) 2 Russ&M 390; Verulam (Earl) v Bathurst (1843) 13 Sim 374

471 Expressed intention to provide for one event that has happened — Not controlled by provision for other events not happening

Where parties to a deed of settlement contemplate several states of circumstances, and there is found, on the face of the instrument, a clear and distinct expression of intention to provide for one event, which has precisely happened, the terms of gift so expressed are not to be superseded, nor their effect destroyed, by any ambiguity of terms used solely in reference to other events or states of circumstances which have not happened.

A husband by post-nuptial contract, after granting an annuity to his wife, bound himself, his heirs and executors to pay her, or any person appointed by her in writing, during her life, with or without the husband's consent, and whether she should survive or predecease him, and have issue or not, the sum of £3,000 or other lesser sum, as she should direct, at the first term of Whitsunday or Martinmas next after the husband's death, in case he should survive or predecease her without leaving issue of the marriage; or at the first of those terms after failure of the issue, in case she should survive leaving issue of the marriage; or at any of the said terms after any of these events; so that no part of the said sum should be raised during the life of the husband, or the joint existence of the wife, and the issue of the marriage; with proviso, that in case the wife should survive the husband and the issue of the marriage, and recover payment of the said sum or any part of it, her annuity should suffer restriction equal to the interest of the

sum recovered. The wife survived the husband, and died without having had issue, and without recovering or disposing of any part of the £3,000: *Held* in the event which happened, the £3,000 belonged to the wife's estate, and her personal representative was entitled to it against the husband's estate.
Dill v Haddington (Earl) (1841) 8 Cl&Fin 168; 8 ER 67, HL

472 Failure as to part — Remainder valid
Carrick v Errington (1726) 2 P Wms 361; Mos 9; 24 ER 766, LC; affd sub nom
Errington v Carrick (1728) 5 Bro Parl Cas 390, HL

ANNOTATION **Consd** Re Willis, Crossman v Kirkaldy [1917] 1 Ch 365

473 Marriage settlement — Whether benefits extend to children of subsequent marriage
Bond v Taylor no 2858 post

474 Division of specific fund — Accretion to fund
The doctrine of *Page v Leapingwell* (1812) 18 Ves 463, that, where various parts of a specific fund are disposed of in such away as to exhaust the fund, they are to be treated as aliquot parts of the fund, and must all abate if there is a deficiency, applies also to cases where the securities on which the fund is invested have increased in value, and there is a surplus.

A settlement of £10,000, by which £5,000 is given to A and the residue to B: *Held* on the true construction of the settlement, to be a division of the fund into moieties, so that the surplus funds arising from an increase in the value of investments must be shared equally between A and B.
Re Phillips, Eddowes v Phillips (1897) 66 LJ Ch 714, CA

475 Covenant to convey free from incumbrances — Estate subsequently incumbered by settlor
Troughton v Troughton (1748) 1 Ves Sen 86; 3 Atk 656; 27 ER 908, LC

476 Covenant to convey free from incumbrances — Rentcharge issuing out of hereditaments partly settled
By a voluntary settlement of 1868 husband and wife and each of them did "grant, release, dispose of and confirm" a moiety of the wife's hereditaments "and all the estate right title interest property claim and demand" of either of them, to, and out of the same to trustees and their heirs on certain trusts. The husband was entitled to a rentcharge issuing out of the hereditaments, but it was not mentioned in the settlement. The settlement contained no covenants for title: *Held* the settlement operated by way of release and not by way of grant of the rentcharge, and as the husband and wife, the owners of the unsettled moiety of the hereditaments had concurred, that moiety, by virtue of Law of Property Amendment Act 1859 (c 35) s 10 (repealed), remained subject to the entire charge.
Price v John [1905] 1 Ch 744; 74 LJ Ch 469; 92 LT 768; 53 WR 456

477 Covenant for further assurance — "Upon the request" of certain parties — Requests by others
A declaration on a covenant for further assurance set it out as a covenant to execute further assurances on request and at the expense of defendant, his heirs or assigns, and alleged a request by plaintiffs. The covenant itself was a covenant to assure upon the request, and at the expense of defendant: *Held* a fatal variance.
Whyte v Burnby (1846) 16 LJQB 156; 8 LTOS 411

478 Proviso for husband and wife to reside in property
Previously to his marriage a husband executed two deeds in England, by the first of which he transferred certain mortgages of freehold hereditaments in Sierra Leone, and granted certain freehold hereditaments in Australia to trustees, upon trust for himself until the marriage, and afterwards upon trust to sell same with the joint consent of himself and his wife, and to hold the proceeds of sale, and also the rents and profits until sale, upon the trusts declared concerning same by the second deed, which was of even date with the first. The first deed contained a proviso that until the premises were sold the settlor and his wife, during their joint lives, and their survivor, after the death of either, should be permitted to reside in and enjoy all or any of the premises rent free. The second deed recited the first, and declared that the trustees should invest the proceeds of the sale of the settled premises, and should, during the joint lives of the husband and wife, pay the interest, dividends, and annual produce thereof to the wife for her separate use, and after her death to the settlor for life, and then in trust for the issue of the marriage, but it contained no express trust of the rents and profits of the settled premises until sale. A separation took place soon after the marriage, and the wife filed a bill to have the trusts of the deed executed: *Held* as the husband and wife did not both elect to reside on the settled premises, the proviso did not enable the husband to do so.
Rainy v Ellis (1872) 27 LT 463, LJJ

479 Proviso against marriage without consent — First marriage with consent — Second marriage without consent
Lands settled on a daughter provided she marry by consent, and she marries by consent, after she marries

a second husband without consent, this second marriage is no breach of the proviso.

Fenwick v Woodroffe (1685) 2 Rep Ch 363; 21 ER 688

480 Gift followed by proviso against absolute vesting — Subsequent trusts not exhausting absolute interest

Where there was an absolute gift, followed by a proviso against absolute vesting and for retention of the funds by the trustees, and the subsequent trusts did not exhaust the absolute interest, but there was a failure of those trusts: *Held* the proviso only had the effect of cutting down the absolute interests to the extent to which it was necessary to give effect to the trusts and no further, and the absolute gift accordingly remained.

Re Cohen, Cohen v Cohen (1915) 60 Sol Jo 239

481 Condition for forfeiture on becoming Roman Catholic — Condition operating during minority — Invalid

A settlement made in 1910 provided that "If any grandchild of the said RHB shall at any time before attaining a vested interest under the trusts hereinbefore declared be or become a Roman Catholic or not be openly or avowedly Protestant such grandchild shall there upon forfeit and lose one moiety of all the share right or interest in the capital or income of the said trust premises and of all other benefits (if any) conferred upon him or her by these presents": *Held* the condition was bad because it operated to restrain the parents of the grandchildren from doing their duty in the matter of religious instruction, and it was also bad on the ground of uncertainty.

Re Borwick, Borwick v Borwick [1933] Ch 657; [1933] All ER 737; 102 LJ Ch 199; 149 LT 116; 49 TLR 288; 77 Sol Jo 197

ANNOTATIONS **Consd** Re Talbot-Ponsonby's Estate, Talbot-Ponsonby v Talbot-Ponsonby [1937] 4 All ER 309 **Distd** Blathwayt v Lord Cawley [1975] 3 All ER 625

482 Condition relating to adherence to Jewish faith and marriage to an "approved wife" — Provision for reference of questions of doubt for determination by specified authority

In 1910 a baronetcy was conferred on settlor. He wished to ensure that successors to the baronetcy were of the Jewish blood and faith. He therefore made a settlement in 1912 which provided that the trustees of the settled fund were to pay the income of the fund to the baronet for the time being so long as he should be of the Jewish faith "and shall be married to an approved wife", and for 18 months after any marriage to an approved wife had come to an end by death or otherwise. If there was a son born of the approved wife then, on the cesser of the marriage to her, the trustees were to continue to pay the income of the fund to the baronet after the expiration of the period of 18 months, during the minority of the son, if the baronet was maintaining and educating him out of the income. However, whenever the baronet for the time being was married to a person who did not qualify as an approved wife, he was to receive £400 per annum out of the income and the balance was to be applied as specified by the settlement. The settlement defined an "approved wife" as "a wife of Jewish blood by one or both of her parents and who has been brought up in and has never departed from and at the date of her marriage continues to worship according to the Jewish faith", and went on to provide that in case of dispute or doubt whether a person qualified as an approved wife, the decision of the chief rabbi in London of either the Portuguese or the Anglo-German community was to be conclusive. Settlor's grandson who had succeeded to the baronetcy married an approved wife and had sons by her but subsequently he divorced her and married a person who did not qualify as an approved wife. The question arose whether the trusts of the settlement were void for uncertainty, and the fund should therefore go to the residuary legatees of deceased settlor's estate, or whether they were valid, in which case the grandson and his sons would be entitled to the income of the fund. The executors of settlor's estate contended that the trusts were void because the concepts of "Jewish blood" and "Jewish faith" in the definition of approved wife were too uncertain to be applied by the courts, and the uncertainty was not cured by the provision that disputes or doubts whether a person qualified as an approved wife were to be decided by one of the chief rabbis: *Held* the trusts of the settlement were valid because: (1) the requirement of "Jewish blood" in an approved wife was a sufficiently certain concept when considered in the context of the definition of "approved wife" in the settlement, for the definition showed that settlor had intended only that an approved wife should have some Jewish blood, which was a matter capable of ascertainment by the court, and not that she should have 100 per cent Jewish blood. Furthermore, the requirement that an approved wife should have been brought up in "the Jewish faith" was a concept of sufficient certainty for the court to apply, for adherence to the Jewish faith was an intelligible concept since what the tenets of the Jewish faith were could be given in evidence and since, where the expression "Jewish faith" first appeared in the settlement it provided for reference in case of doubt to one of the chief rabbis, settlor had indicated that for the purposes of the settlement the definition of "Jewish faith" was to be the chief rabbi's definition

and, since the chief rabbi would know what he meant by "Jewish faith", there could be no doubt about its meaning; (2) (per *Lord Denning MR*) a testator or settlor was entitled to direct that any doubt or difficulty regarding the terms of the will or settlement were to be resolved by a third person, just as contracting parties could by agreement leave a doubt or difficulty regarding the contract for decision by a third person. Such a direction by a testator or settlor did not oust the jurisdiction of the court for if the appointed third person found difficulty in interpreting the will or settlement the executors or trustees could apply to the court for directions to assist him in his interpretation. Accordingly, even if there were conceptual uncertainty in the requirements as to the "Jewish blood" and "Jewish faith" of an approved wife, it was cured by the provision that any dispute or doubt was to be decided by the chief rabbi. The dichotomy between "conceptual uncertainty", which may avoid a condition subsequent but not a condition precedent, and "evidential uncertainty", which did not render the condition meaningless but required the court to resort to extrinsic evidence, is illogical and to be deplored. It serves in every case to defeat the intention of testator or settlor.

Re Tuck's Settlmt Trusts, Public Trustee v Tuck [1978] Ch 49; [1978] 1 All ER 1047; [1978] 2 WLR 411; 121 Sol Jo 796, CA

ANNOTATIONS **Folld** Re Barlow's Will Trusts [1979] 1 All ER 296 **Consd** Re Tepper's Will Trusts, Kramer v Ruda [1987] 1 All ER 970

483 Condition for execution and delivery of share transfers — Act of transfer not personal but exercisable by executors

In 1926 a settlement was made under which the trustees were to pay the income of certain stocks to the settlor's daughter during her life as from the time that she should have executed and delivered transfers of shares mentioned in the schedule into the name of the settlor, and until such transfer the income was to be paid to another beneficiary. The settlor died in 1942 up to which time no such transfer had been executed: *Held* the condition was capable of being performed by the daughter after her father's death, and if she executed the transfers she would become a beneficiary under the settlement the object of the condition being to secure that she should not enjoy the income of the settled stocks, without giving up the shares. The executors were entitled to accept the transfers, which would benefit the settlor's estate.

Re Sage, Lloyds Bank Ltd v Holland [1946] Ch 332; [1946] 2 All ER 298; 115 LJ Ch 305; 175 LT 175; 62 TLR 508; 90 Sol Jo 418

484 Correction of mistake by construction — Words supplied

Targus v Puget no 108 ante

485 Correction of mistake by construction — Words supplied

By a post-nuptial settlement reciting an intention to make further provision for the children of the marriage, certain sums of stock were vested in trustees in trust for the wife for life, and after her decease upon trust for all and every the child and children of the marriage who being a son or sons should attain the age of twenty-one years, equally to be divided between or among them and their respective executors and administrators; and if there should be but one such child, the whole to be in trust for such one or only child, his or her executors, and administrators. There followed a clause directing that the trustees should, during the minority of each of the said children, pay to the father, to be by him applied or not as he should think fit, and after his decease should apply, the income of the presumptive share of each such child for or towards his or her maintenance and education until his or share should become vested, or he or she should previously die: *Held* daughters who attained twenty-one were entitled to share in the fund.

Re Daniel's Settlement Trusts (1875) 1 Ch D 375; 45 LJ Ch 105; 34 LT 308; 24 WR 227, CA

ANNOTATIONS **Expld** Re Litchfield, Horton v Jones (1911) 104 LT 631

486 Correction of mistake by construction — Tail male construed as tail general

By a marriage settlement made in 1886 it was provided that if the eldest son of the settlor should become entitled to N's real estate under his will for an estate in tail male he should be excluded from all share in the trust funds subject to the settlement. A was the settlor's eldest son, and under the limitations of the will of M who died in 1868, he became entitled to testator's real estate for an estate in tail general. The trustees of the settlement took out a summons to determine whether he had lost his right to a share in the settlement funds: *Held* inasmuch as the intention of the settlor was clear and at the date of the settlement she must have known that if A came into testator's real estate it must be for an estate in tail general, not an estate in tail male, the insertion of the word "male" in the settlement must be treated as a misdescription, and the settlement construed as if the word were omitted; and A was excluded from sharing in the settlement moneys, without prejudice to his claims if the younger son died.

Re Alexander's Settlement, Jennings v Alexander [1910] 2 Ch 225; 79 LJ Ch 656; 102 LT 909; 45 Sol Jo 602

487 Correction of mistake by construction — Ambiguity
Garner v Garner (1860) 29 Beav 114; 3 LT 396; 7 LT 182; 54 ER 570

Scottish, Irish and Commonwealth Cases

488 Difference in construction of will and settlement
The rule of law applied in *Hancock v Watson* [1902] AC 14 to the interpretation of a testamentary document applies also to the interpretation of a settlement.
Re Thorne's Trusts, Crouch v Russel [1918] SRQ 34 (AUS)

489 Covenant to convey free from incumbrances — Estate subsequently incumbered by settlor
Re Barker's Estate (1879) 3 LR Ir 395 (IR)

490 Proviso against marriage without consent
Re Bennett's Estate [1898] 1 IR 185 (IR)

491 Mutual settlement by husband and wife for benefit of survivor — Husband predeceasing wife leaving personal property only — Right of heirs of wife
Baillie's Executors v Baillie (1899) 1 F (Ct of Sess) 974; 36 Sc LR 739; 7 SLT 54 (SCOT)

492 According to intention of parties
Re Blake's Estate (1871) 19 WR 765 (IR)

493 Assignment of policies to trustees to secure annuity for widow — Divorce — Reconveyance of policies
A husband by an ante-nuptial marriage-contract bound himself to pay an annuity to his wife in the event of her surviving him, but only so long as she remained his widow. He also undertook to maintain any children born of the marriage until they were able to maintain themselves. In security of these obligations he undertook to insure his life and to assign the policy to the marriage-contract trustees. It was further provided that, if the wife predeceased her husband without leaving lawful issue, the trustees should reconvey the policy to the husband, but, if she left such issue, the trustees should hold the policy as a provision for the children "while" they were unable to provide for themselves. The husband duly insured his life under two policies which he assigned to the marriage-contract trustees. Subsequently he divorced his wife on the ground of her incurable insanity. All the children of the marriage being self-supporting, the husband called upon the marriage-contract trustees to reconvey the policies: *Held* as the wife could never become her husband's widow, and as the children were self supporting, the policies were no longer attached in the hands of the trustees by rights under the marriage-contract, and they should be reconveyed to the husband.
Adamson's Trustees v Adamson's Curator Bonis [1940] SC 596 (SCOT)

494 Protection of settlor's children and grandchildren — Interpretation of deed as to method of distributing trust fund — Right of beneficiaries, trustees and executors to agree on another scheme
Re Ackland Trust [1944] 2 WWR 56 (CAN)

2 What passes under settlement

CROSS REFERENCES See no 531 et seq post (effect of recitals); HUSBAND & WIFE vol 27(1) (2nd reissue) no 2989 et seq (proviso as to future separation in marriage settlement)

495 Inclusion of every interest settlor can part with
Marshall v Frank (1717) Prec Ch 480; Gilb Ch 143; 24 ER 215, LC

496 Inclusion of every interest settlor can part with
Primâ facie when a person conveys or settles an estate, he means to include in the conveyance every interest which he can part with, and which he does not except.
Johnson v Webster (1854) 4 De GM&G 474; 3 Eq Rep 99; 24 LJ Ch 300; 24 LTOS 178; 1 Jur NS 145; 3 WR 84; 43 ER 592, LC

ANNOTATIONS **Consd** Re Somerset, Thynne v St Maur (1886) 55 LT 753 **Apld** Price v John [1905] 1 Ch 744

497 Inclusion of every interest settlor can part with — Except where against intention — Nature and purpose of deed
Moor (Lessee of) v Moor (1774) Lofft 398; 98 ER 714

498 Inclusion of every interest settlor can part with — Except where against intention — Nature and purpose of deed
K being solely seised, as trustee under a will, of real property thereby devised to him in trust for the benefit of testator's wife and children, of which latter he was one, and as such was beneficially interested in or entitled to two-sixteenth parts of such trust property, executed an indenture of settlement whereby "in consideration of natural love and affection" he conveyed unto S and his heirs "all and singular the real estate whatsoever and wheresoever now vested in K, to hold unto S, his heirs and assigns, for ever," upon trusts therein declared for the sale, and disposal of the proceeds thereof, by S among all K's children equally; and upon K's death: *Held* the legal estate in the property devised to K in trust by the will did not pass to S under the conveyance. Although the words of the conveyance are *primâ facie* sufficient to pass the legal estate in the whole property vested in K as trustee under the will, yet, when the surrounding circumstances, the nature and purpose of the conveyance, and the intention of the grantor, as gathered therefrom, are considered, a doctrine equally applicable to the construction of deeds as of wills, it is

manifest that he could not have intended to convey any property but that in which he was beneficially interested, and the deed operated only upon such parts of the trust property as belonged to him in his own right.

Sidebotham v Knott (1872) 26 LT 700; 20 WR 415

499 Inclusion of every interest settlor can part with — Omission of schedule

Vint v Vint (1888) 4 TLR 630, CA

500 Effect of absence of words of limitation

By a settlement, dated 4 November 1891, H assigned to A and B "all that the share and interest to which H is entitled under or by virtue of the will and codicils of E in his residuary estate and the investments representing the same, to hold the share and premises hereinbefore expressed to be hereby assigned unto A and B, their executors, administrators, and assigns, upon the trusts hereinafter declared concerning same". H was then absolutely entitled under the will to have conveyed to him in fee simple a share in certain real estate vested in trustees devised by the will upon trusts which, as the court held, did not amount to a conversion thereof; and also to a like share of testator's personal estate. H afterwards died, having by will given all his real and personal estate to his wife upon trust for the person or persons who would have been entitled thereto under Statutes of Distribution of the effects of intestates if H had died seised or possessed thereof intestate. On a summons taken out by the wife against the trustees of the settlement and her children: *Held* the reference in the settlement to the will of E was not sufficient to supply the want of words of limitation, and the trustees took, in the share of real estate under the will to which H was entitled at the date of the settlement, only an estate for their joint lives and the life of the survivor.

Re Hudson, Kühne v Hudson (1895) 72 LT 892; 39 Sol Jo 468; 13 R 546

ANNOTATIONS **Folld** Re Irwin, Irwin v Parkes [1904] 2 Ch 752 **Consd** Re Hughes, Loddiges v Jones [1916] 1 Ch 493

501 Effect of absence of words of limitation

By a post-nuptial settlement made in 1884 between I of the one part, and trustees "whom and their executors or administrators are intended to be hereafter included in the designation of the trustees" of the other part, it was recited that I was absolutely entitled to freehold hereditaments, "which said freehold property" he was desirous to settle in favour of his wife and children. It was then witnessed that in pursuance of such desire he assigned the "said freehold hereditaments" to the trustees, without the words "heirs," upon trust for sale and investment and to pay the income to Mrs I for life and then to the settlor for life and then for their children. The settlement contained a proviso that if any present or future trustee died or wished to retire it should be lawful for the surviving or continuing trustee or, if there should be no continuing trustee, for the retiring trustee to appoint another trustee in his place, and that the trust funds and premises should thereupon be vested in the new trustees. Amongst the settlor's freeholds were some in which he only had an equitable estate: *Held* by reason of the absence of words of limitation there passed to the trustees merely an estate in the settlor's equitable freeholds for the lives of the trustees named in the deed and the survivor of them.

Re Irwin, Irwin v Parkes [1904] 2 Ch 752; 73 LJ Ch 832; 53 WR 200; 48 Sol Jo 640

ANNOTATIONS **Folld** Re Monckton's Settlmt, Monckton v Monckton [1913] 2 Ch 636 **Consd** Re Nutt's Settlmt, McLaughlin v McLaughlin [1915] 2 Ch 431

502 Effect of absence of words of limitation

Bridge v Ficklin (1906) 50 Sol Jo 343

503 Effect of absence of words of limitation

By a settlement made in 1908 the settlor, being then entitled for a contingent reversionary equitable estate in fee simple to freehold hereditaments and for a corresponding estate to copyhold hereditaments and investments in personalty directed to be held upon the same trusts as capital money arising under the Settled Land Act 1882 (c 38) (repealed), from the freehold hereditaments granted unto a trustee, first, the freehold and copyhold hereditaments, and secondly the investments, to hold the same as to the freehold hereditaments and the investments "to the use of the trustee according to the customs of the several manors of which they are respectively held"; and it was thereby agreed that the trustee, his executors, or administrators, or other the trustee or trustees for the time being, should stand possessed of the freehold hereditaments, upon trust for the settlor during his life, and after his death upon such trusts in favour of his widow, children, or remoter issue, or the respective husbands or wives of such children, as he should appoint, and subject thereto, in trust for his sons and daughters in tail as therein mentioned, with an ultimate trust for the settlor, his heirs and assigns. The copyhold hereditaments were to be held on corresponding trusts and the investments were to be applied, first, in discharging an incumbrance created by the settlor, and as to the residue, if any, in the purchase of freehold hereditaments to be assured to the trustee or trustees in fee simple upon the same trusts as were thereby declared of the freehold hereditaments thereby assured. On the death of the trustee in 1913: *Held* (1) as to the freehold and copyhold hereditaments the trustee took a life interest only,

and the trusts of the settlement came to an end on the death of the trustee; (2) as to the investments no words of limitation appropriate to real estate were necessary to pass an absolute interest to the trustee, Settled Land Act 1882 (c 38) s 22(5) (repealed) having made no alteration in the law in this respect, and the trusts of the settlement did not come to an end on the death of the trustee.

Words of limitation are unnecessary in disposing of the equitable interest either in personal property subject to a trust for conversion into land or in the prospective proceeds of sale of land which is under a trust for conversion into money. The conveyancer can have regard to either the interest in the existing property or the interest in the property which is ultimately to represent the existing property after conversion; and, if either the existing property or the ultimate property is of the nature of personalty, he can properly deal with the equitable interests in that property without using the word "heirs" or its equivalent "in fee simple."

Re Monckton's Settlement, Monckton v Monckton [1913] 2 Ch 636; 83 LJ Ch 34; 109 LT 624; 57 Sol Jo 836

ANNOTATIONS As to (2) **Apld** Re Nutt's Settlmt, McLaughlin v McLaughlin [1915] 2 Ch 431 **Consd** Re Dickson's SE [1921] 2 Ch 108

504 Effect of absence of words of limitation

By a settlement land was assured to the use of trustees and their heirs upon certain trusts during the life of A and after her death to the use of her children as she should by deed appoint. By a deed poll A appointed that the trustees should after her death hold "the trust funds and property" in trust for her four sons in equal shares without words of limitation. At the date of the appointment some of the land had been sold and the property consisted partly of land and partly of money subject to a trust for investment in land: *Held* (1) the appointees took equitable and not legal estates; (2) though the gift by deed of an equitable estate in land without words of limitation passed only a life estate, the fee might pass if there was to be found in the construction of the deed as a whole an intention that it should pass, and such an intention was shown by the fact that a gift of land was coupled with a gift of money subject to a trust for investment in land which would pass absolutely without words of limitation.

Re Nutt's Settlement, McLaughlin v McLaughlin [1915] 2 Ch 431; 84 LJ Ch 877; 113 LT 914; 59 Sol Jo 717

505 Effect of absence of words of limitation

Re Bostock's Settlement, Norrish v Bostock no 1690 post

506 Settlement by tenant in tail — Entail not barred

Settlement by lease and release, the settlor being tenant in tail, and covenanting to suffer a recovery which was never suffered: *Held* ineffectual to carry out intentions in favour of younger children as against the remainderman in tail.

Stanhouse v Gaskell (1852) 20 LTOS 139; 17 Jur 157; 1 WR 77

507 Settlement of leaseholds — Limitation giving absolute interest

A on his marriage assigns a term for one thousand years, in trust for himself for life, remainder to his wife for life, remainder to the heirs of the bodies of the husband and wife, remainder to the husband's right heirs; the wife dies leaving issue; the whole term vests in the husband and he may assign it.

Webb v Webb (1710) 1 P Wms 132; 2 Vern 668; 2 Eq Cas Abr 363 pl 12; 23 ER 1036

ANNOTATIONS **Distd** Hodgeson v Bussey (1740) 2 Atk 89 **Consd** Villiers v Villiers (1740) 2 Atk 71 **Apld** Garth v Baldwin (1755) 2 Ves Sen 646 **Consd** Lyon v Mitchell (1816) 1 Madd 467 **Folld** Bardett v Green (1842) 13 Sim 218

508 Settlement of leaseholds — Limitation giving absolute interest

Lease for three lives to A her executors, etc A assigns all right to the use of B for life, and afterwards of his issue; and for want of such issue to the use of A her executors, etc. The whole vests in the issue of B; and issue means children; and A's executor, who was a special occupant, cannot claim against it.

Words construed according to nature of the estate.

Williams v Jekyl, Elliot v Jekyl (1755) 2 Ves Sen 681; 28 ER 434, LC

509 Settlement of leaseholds — Limitation giving absolute interest

By indenture of settlement made upon the marriage of A and B, A assigned a term of two thousand years in certain premises to a trustee to be held upon the trusts of the settlement. The settlement recited that it was agreed that the premises should be settled "upon A for life, then to B for her life; and after their several deceases, on the issue of the marriage, and in default of such issue, then to the brother of A and his heirs, executors, and administrators." The trusts declared in the deed were "to permit and suffer A to receive the rents, issues, and profits, etc, for so many years of the term as should expire in his lifetime"; then to B for life "and from and after the several deceases of A and B, to permit and suffer the heirs of the body of A begotten of B, to receive the rents, issues, and profits of the premises for so many years of the term as should expire in the life or lives of him, her, or them, etc," and in default of such

issue, then to the brother of A for the residue of the term: *Held* the words "heirs of the body, etc," were words of limitation and not of purchase; and the effect of the settlement was to give the absolute interest in the term to A, and which if undisposed of by his will, would go to his next of kin and not to his heir-at-law.

Bartlett v Green (1842) 13 Sim 218; 12 LJ Ch 148; 6 Jur 1099; 60 ER 85

510 Mixing funds with settled funds

By a post-nuptial settlement a wife settled savings of her separate estate upon trusts for herself and her husband successively for life, with remainder to their two sons, with a proviso that in the event of the death of either under twenty-five without issue, his share should go to the survivor. There was also a proviso that the husband or wife should be at liberty to add any part of the dividends to the sum invested, and that the sum to be so added should be subject to the like trusts as the original fund. The wife invested in the names of the trustees, but without communicating the fact to them, various sums, arising partly from accumulations of the dividends and partly from funds derived from other sources; and after the death of the husband, and of both of the sons, without issue, the executor of the survivor of the sons instituted a suit to have the trusts of the settlement executed: *Held* it was not a sufficient defence on the part of the settlor as to the additions to the fund that she had invested them under a misapprehension as to the effect of the settlement, and all the additions were subject to the trusts of it.

Muggeridge v Stanton (1859) 1 De GF&J 107; 1 LT 144; 8 WR 69; 45 ER 300, LC&LJJ

511 Fund divided into unequal shares — Accruer on failure of any share

The terms of a settlement directed the division of the trust fund into unequal shares to be held in trust for named persons and their children. In the event of failure of the trusts declared concerning any share, it was to accrue by way of addition to the other shares: *Held* in the absence of words indicating the contrary, the accruer should be to the other shares in equal proportions.

Re Bower's Settlement Trusts, Bower v Ridley Thompson [1942] Ch 197; [1942] 1 All ER 278; 111 LJ Ch 225; 58 TLR 137; 86 Sol Jo 48

ANNOTATION **Consd** Re Steel, Public Trustee v Christian Aid Soc [1978] 2 All ER 1026

512 Property coming to settlor by appointment — "Expectant interests"

A testator by his will and a subsequent codicil gave his residuary trust fund to trustees on trust for his two daughters in equal shares, to hold each share on trust to pay the income of it to the daughter for life and, after the death of either daughter, to hold the corpus of her share on trust for her children or issue as she should appoint and in default of appointment as in the will directed. By a settlement made some years after his death, a granddaughter (being a daughter of the donee of the power of appointment) assigned on her marriage to the trustees thereof "all that the share and interest of" the granddaughter "of and in the residuary trust fund under the will of" testator "upon trust . . . after the marriage . . . that the trustees shall as to those parts of the premises to which" the granddaughter "is entitled in possession immediately and as to the residue of the premises when her expectant interests therein respectively shall or may fall into possession call in or procure the transfer or payment thereof to them . . ." and trusts of the premises were declared. The daughter by deed appointed that the will trustees should stand possessed of her share on trust after her death to hold five twenty-fourth parts of it for the granddaughter absolutely. On a summons issued after the daughter's death to determine whether those five twenty-fourth parts were comprised in the property assigned to the marriage settlement trustees or went to the granddaughters absolutely: *Held* in deciding that they were payable or transferable to the marriage settlement trustees, (1) a settlor under a marriage settlement was not rationally to be expected to wish to settle property coming from a particular source in default of appointment but not to wish to settle property coming from the same source by appointment, and that any differentiation in a settlement between those two types of property was to be expected to be found in plain language; (2) in the face of the words "expectant interests," the assignment could not be construed as limited to interests which were present interests at the date of the assignment; (3) the word "expectant" was not demonstrably a mistake; but was wholly consistent with what was to be expected to be found in the circumstances and quite appropriate to an interest under an appointment not yet made; and the court would not therefore read it as though it were "reversionary" just to exclude that construction; (4) accordingly, the interest coming to the daughter under the appointment after the marriage settlement was, at the date of the marriage settlement, an expectant interest in the residuary trust fund under the will.

Re Dowie's Will Trusts, Barlas v Pennefather [1949] Ch 547; [1949] 1 All ER 968; [1949] LJR 1340; 93 Sol Jo 338

Scottish, Irish and Commonwealth Cases

513 Effect of absence of words of limitation
Sexton v Horton (1927) 38 CLR 240; 27 SRNSW 340; 44 NSWWN 24 (AUS)

514 Effect of absence of words of limitation
By an indenture of settlement dated 3 July 1897, certain lands were conveyed to trustees, to hold in trust for persons named as tenants in common. There were no words of limitation of the respective estates of the persons named: *Held* the court was at liberty to look at the intention of the settlor, as evidenced by the whole deed, and there being a sufficient indication of intention, the persons named were entitled to equitable estates in fee simple.
Rodgers v Houston [1909] 1 LR 319 (IR)

515 Effect of absence of words of limitation
Re Colles' Estate [1918] 1 IR 1 (IR)

516 Effect of absence of words of limitation
Sim v Duncan (1900) 2 F (Ct of Sess) 434; 37 Sc LR 332; 7 SLT 360 (SCOT)

517 Settlement by tenant in tail — Pur autre vie — Quasi-entail barred
Bonynge v Finucane (1857) 10 Ir Jur 141 (IR)

518 Settlement by tenant in tail — Pur autre vie
Re Cruise & Cruise (Owners) Burke, Burke & Burke, Petitioners (1871) 19 WR 769 (IR)

519 Settlement of conditional purchase — Instalments partly paid up to death of settlor — Instalments paid treated as advancements
Re Anderson (1901) 1 SRNSW 223 (AUS)

520 Settlement of renewable freeholds — Limitations purporting to give absolute interest
A marriage settlement conveyed renewable freeholds to trustees and their heirs, upon trust to permit and suffer the lands to be enjoyed for ever by the issue male of the marriage. The settlement contained expressions affording some evidence of an intention to grant a perpetual interest: *Held* the sons of the marriage took only estates for life.
Barron v B (1858) 8 I Ch R 366; Drury temp Nap 384 (IR)

521 Covenant to settle residue under will accruing to settlor during marriage
Armit v Bredin (1866) 17 I Ch R 165 (IR)

522 Mutual settlement of life interest with power to alter during respectives lives — Property reinvested on terms conveying absolute title on survivor — Whether predeceasing settlor's property still bound by mutual settlement
Renton's Trustees v Alison (1876) 3 R (Ct of Sess) 1142; 13 Sc LR 696 (SCOT)

3 Conflicting deeds or clauses

CROSS REFERENCE See DEEDS vol 17(1) (2nd reissue) no 3480 et seq

523 Conflict between settlement and subsequent document — Settlement controls
The Master of the Rolls of opinion, that a note under the hand of the husband ought to be looked upon as part of the marriage agreement, and consequently as part of the settlement; and as the wife would have been relieved if she had brought a bill against the husband, equally so, as brought against the assignees, who stand in his place.

A settlement will control a writing executed after, but the parties refusing to execute the settlement without it, they must be construed as one entire agreement and both consistent.
Tyrrell v Hope (1743) 2 Atk 558; 26 ER 735

524 Conflict between settlement and subsequent document — Refusal to execute settlement without subsequent document — Construed as one instrument
Tyrrell v Hope no 523 ante

525 Conflict between voluntary settlement and subsequent marriage settlement — Marriage settlement prevails so far as it revokes voluntary settlement
A father by a voluntary deed conveyed certain estates to trustees upon trust to allow him the rents and profits for life; then to the use of his son, his executors, administrators and assigns. Subsequently he makes another settlement of the same premises on the marriage of the son, by which he gives up the immediate rents and profits to the son, and after some further limitations reserves the ultimate reversion to himself: *Held* the voluntary deed remained in force, in as far as it was not revoked by the subsequent marriage settlement; and the reversion belonged to those claiming under the son, and not to those claiming under the father.
Croker v Martin (1827) 1 Dow&Cl 15; 1 Bli NS 573; 6 ER 430, HL

526 Conflict between settlement and subsequent appointment — Necessity for clear intention to alter limitations
By a deed of settlement, lands were conveyed, subject to certain uses, to such use as WR and his wife should appoint; and in default of such appointment, to WR the younger. WR and his wife appointed several times, by way of mortgage, with provisos for reconveyance to the former uses; and at length appointed, with a power of sale and a proviso for reconveyance to WR and his wife in fee. WR survived his wife, and sold his supposed equity of redemption.

On a bill filed by parties claiming under the trusts of the original settlement against the representatives and other persons claiming under WR, the husband, for redemption: *Held* under the last mortgage deed

WR and his wife did not take an absolute fee in the equity of redemption; and, therefore, plaintiffs were entitled to redeem against the representatives of the purchaser, the intention to alter the original devolution of the estate not being sufficiently apparent.

Declaration, or clear intention equivalent to it, necessary to change the use.

Whitbread v Smith (1854) 3 De GM&G 727; 2 Eq Rep 377; 23 LJ Ch 611; 23 LTOS 2; 18 Jur 475; 2 WR 177; 43 ER 286, LC&LJJ

ANNOTATION **Consd** Heather v O'Neil (1858) 2 De G&J 399

527 Conflicting clauses in settlement — Rejection of one clause only if absolutely necessary

Where a deed contains inconsistent clauses, the court very reluctantly rejects one altogether, and never, unless it is absolutely impossible to reconcile the inconsistencies.

Bush v Watkins (1851) 14 Beav 425; 51 ER 350

528 Conflicting clauses in settlement — Presumption that child takes vested interest at twenty-one

When clauses in a settlement are conflicting, the rational presumption is that a child attaining twenty-one takes a vested interest.

In a settlement, the limitation was to the children "who should be living at the time of the decease of the father"; this was controlled by the gift over: *Held* a child who died in the life of her father, having attained twenty-one, was held entitled to a share.

Dixon v Barkshire (1865) 34 Beav 537; 55 ER 742

529 Conflicting clauses in settlement — Omission of words — "Only" or "no more"

Pott v Lee (1714) 1 Eq Cas Abr 157; 21 ER 956

530 Conflicting clauses in settlement — Estates in tail male and female for successive life tenant — Priority of estate

Randall v Daniel no 148 ante

4 Recitals

CROSS REFERENCES See no 880 et seq post (covenants to settle after acquired property); DEEDS vol 17(1) (2nd reissue) no 3715 et seq (recitals controlling operative part); ESTOPPEL vol 21(2) (2nd reissue) no 920 et seq (recital operating as estoppel); MISTAKE vol 34 (reissue) no 3676 (recitals controlling operative part: mistake of parties)

531 Binding effect governed by intention — Recital by father — Whether binding on daughter's property

Seamer v Bingham, Strode v Strode no 8 ante

532 Binding effect governed by intention — Interest to vest only on son surviving both parents

By the recitals contained in a settlement, the intention of the settlor was plain that a son, then *in esse*, should only take absolutely in the event of his surviving both his parents, and also attaining twenty-one; by the subsequent limitations, an absolute interest vested in such son on his attaining twenty-one, though dying in the lifetime of one of such parents: *Held* the intention must prevail, and no vested interest passed under such limitations.

Law v Davey (1833) 2 LJ Ch 82

533 Operation as covenant to pay

Graves v White (1680) 2 Eq Cas Abr 652; Freem Ch 57; 22 ER 548, LC

5 Particular words and phrases

LAW See Halsbury's Laws (4th edn) vol 42 para 934

CROSS REFERENCES See nos 125, 126 ante ("issue" in marriage articles)

534 "Attempt to impeach the settlement" — Action to determine rights thereunder

Sterling (Earl) v Levingston (1672) 2 Rep Ch 75; 15 Sim 619n; 21 ER 620

535 "Begotten" or "to be begotten"

The words begotten and to be begotten are the same as well on construction of wills as settlements, and take in all the issue after begotten, and although upon the death of testator there was then only a daughter born, yet upon the birth of another child, the estate shall open and take in the afterborn son (*Wright Lord Keeper*).

Cook v Cook (1706) 2 Vern 545; 23 ER 952

ANNOTATION **Consd** Doe d James v Hallett (1813) 1 M&S 124

536 "Begotten" or "to be begotten"

A settlement of money to be paid to such children "as shall be begotten, etc" but "that if the husband shall die without any children, then the said money shall be paid to A" extends to a child *in esse* at the time the settlement was made.

Slingsby v — (1718) 10 Mod Rep 397; 2 Eq Cas Abr 658; 88 ER 780, LC

537 "Begotten" or "to be begotten"

Provision for daughters to be born shall extend to daughters then begotten.

Hewet v Ireland (1718) 1 P Wms 426; 2 Coll 344n; Gilb Ch 145; Prec Ch 489; 24 ER 456, LC

ANNOTATIONS **Consd** Doe d James v Hallett (1813) 1 M&S 124; Early v Benbow (1846) 2 Coll 342; Barnes v

Jennings (1866) LR Eq 448; Locke v Dunlop (1888) 39 Ch D 387

538 "Cattle and stock"

Cattle and stock upon a plantation or penn in Jamaica are, by the law of the island, personal estate, and not affixed to the freehold.

A, by bond, in consideration and contemplation of marriage, bound himself in a certain sum, for the purposes of his intended marriage settlement, to mortgage certain estates "and properties and the lands thereto belonging, and their respective appurtenances" in the island of Jamaica, of which he was seised in fee, and to raise a certain sum by way of settlement. By a mortgage by way of settlement, in pursuance of such bond, A mortgaged (*inter alia*) the said estates and penns, and appurtenances, and "all and every the cattle, stock, and plantation implements": *Held* cattle and stock upon the estate and penns were not included in the bond, and though the mortgage deed, made in pursuance of such bond, was by way of marriage settlement, yet it could not enlarge the provisions of the bond.

Turner v Barclay (1854) 9 Moo PCC 264; 14 ER 297, PC

539 "From and after the decease of A" — "Or other sooner determination of the term" supplied

Goodtitle d Weston v Burtenshaw (1772) 1 Fearne on Contingent Remainders 10th ed App I 570

540 Issue

Grandchildren and great-grand-children included by the term "issue" and the word "children" following it, explained as meaning "issue" likewise.

Wyth v Blackman (1749) 1 Ves Sen 196; 27 ER 979; sub nom

Wythe v Thurlston (1749) Amb 555, LC

ANNOTATIONS **Expld** Davenport v Hanbury (1796) 3 Ves 257 **Consd** Harley v Mitford (1855) 21 Beav 280; Re Hopkins' Trusts (1878) 9 Ch D 131 **Apld** Re Warren's Trusts (1884) 26 Ch D 208

541 Issue

Williams v Jekyl, Elliot v Jekyl no 508 ante

542 Issue

A bond given by a father on the marriage of his daughter was conditioned for payment of interest of a certain sum to the husband or his executors during the obligor's life, and also for payment of the principal to the husband or his executors within a limited time after the the obligor's death, if any of the issue of the marriage should be living at that time; there were children of the marriage who all died before the obligor, leaving grandchildren; the grandchildren were deemed to be issue of the marriage within the meaning of the condition; and consequently the husband's executors are entitled to recover on the bond.

Haydon v Wilshire (1789) 3 Term Rep 372; 100 ER 627

543 Issue

The word "issue" unconfined by any indication of intention, includes all descendants. Intention necessary to restrain it to children.

Leigh v Norbury (1807) 13 Ves 340; 33 ER 321

ANNOTATIONS **Consd** Pruen v Osborne (1840) 11 Sim 132; Re Manly's Will Trusts, Burton v Williams [1969] 3 All ER 1011

544 Issue

Issue, construed to mean issue living at the death, under the circumstances.

Tucker v Harris (1832) 5 Sim 538; 2 LJ Ch 18; 58 ER 440

545 Issue

By a marriage settlement a sum of money was settled upon trusts for the husband for life, then for the wife for life, and, after the death of the survivor, upon trust to pay the principal among all the children and issue of the intended husband, to be by him begotten on the body of the intended wife; and if there should be no child or issue of the marriage, or, being such, they should all die in the lifetime of the survivor of the husband and wife, upon other trusts: *Held* the children of the marriage, including those dying in the lifetime of the survivor of the husband and wife, took the fund, and no other issue were entitled.

Gordon v Hope (1849) 3 De G&Sm 351; 18 LJ Ch 228; 12 LTOS 551; 13 Jur 382; 64 ER 512

546 Issue

"Issue" in a deed held to include grandchildren.

J, by deed, assigned certain leasehold premises to trustees for the residue of a term of years, upon trust to pay the rents and profits to his daughter M for life for her separate use, and upon the decease of her the said M leaving issue of her body by her husband, upon trust to stand possessed of the assigned premises for such issue respectively, to be a vested interest and assigned to them at twenty-one, for an absolute estate and interest to them, their executors, administrators and assigns, as tenants in common. M survived J and died leaving several children and two grandchildren, children of a deceased daughter living at her death: *Held* the grandchildren were entitled to share in the gift to the "issue" of M.

South v Searle (1856) 27 LTOS 118; 2 Jur NS 390; 4 WR 470

547 Issue

Certain estates were vested in trustees in trust for sale, and after the death of B to pay the proceeds amongst the twelve children of B as described in the

settlement, or such of them as should be living at the time of the decease of D and J, and the issue of such as might be then dead to be equally divided between them, the issue to take the parent's share; but if any of such twelve children should die in the lifetime of D and J, or the survivor of them, without leaving issue living at the decease of such survivor, then in trust to pay the share of the child who should die without such issue unto the survivors and survivor of them, and the issue of such as should be dead. Ten of the children survived D, but died in the lifetime of J. G, one of the ten children, left six children, one of whom, by this bill, prayed that the trusts might be carried into execution. W, another of the ten children, left two children, one of whom died four months previously to J, leaving four children, and the question was, whether these four children were entitled to the share of their deceased parent: *Held* the word "issue" being used in conjunction with that of "parent," more remote descendants than children were not included in the word "issue" and therefore the grandchildren were not entitled to their parent's share.

Anderson v St Vincent (Viscount) (1856) 2 Jur NS 607; 4 WR 304

548 Issue

By a settlement, a trust fund was settled after the death of husband and wife upon the children equally who should survive them. But if any child should die in the life of the husband and wife, and leaving "issue" then living, his share should go equally between the issue of such child, when and at such time as the respective shares of such child would have become due and payable: *Held* the "issue" of "children" took *per stirpes*, and that the successive generations of "issue" took their respective shares by substitution, and not concurrently, so that grandchildren and great-grandchildren could not take together as a class.

Robinson v Sykes (1856) 23 Beav 40; 26 LJ Ch 782; 28 LTOS 114; 2 Jur NS 895; 53 ER 16

549 Issue

By a marriage settlement, a fund was settled, after the death of the survivor of the husband and wife, in trust for the "children then living," to be paid at twenty-one, and in case the parents should die "without leaving any lawful issue," then as the husband should appoint, and in default, "in case there should be no child or children as aforesaid," over. Children attained twenty-one, but they all died in the life of their parents, leaving issue, who survived the parents: *Held* the gift over took effect.

Re Heath's Settlement (1856) 23 Beav 193; 53 ER 75

550 Issue

Under a marriage settlement after-acquired property of the wife was to be held in trust for the wife for life, and at her decease upon trust for all the "issue" of the marriage upon the same or the like trusts as were thereinbefore declared concerning certain specified settled property. Under the last-mentioned trusts the property was given after the deaths of the tenants for life "to the children" of the marriage, with a provision for the substitution of the "issue" of such children for their parents, in the event of the latter dying under twenty-one. There was also a maintenance clause confined to "children," and the gift over in both parts of the settlement was to take effect in default of "children" attaining twenty-one without leaving lawful "issue" living at their death: *Held* on the construction of the settlement it was obvious that the issue of children were only to take in substitution for, and not concurrently with their parents and that the word "issue" in the clause relating to the after-acquired property must be read "children."

Marshall v Baker (1862) 31 Beav 608; 7 LT 303; 9 Jur NS 396; 11 WR 78; 54 ER 1275

551 Issue

By a marriage settlement property was vested in trustees upon trust, after the death of the wife, to pay the rents and profits to the husband for life, or until he married again, and in case he married again and there was issue of the intended marriage, then to pay him one-half of the rents and profits, and out of the other half to levy and raise for the maintenance and education of one child one-fourth, of two or three children one-third, and of four or more children the whole income of such other half, and subject thereto to pay the whole income thereof to the husband for his life, and if there should be no issue, then to pay the whole of the rents and profits to the husband. The husband married again, and at the date of the decree there were four children of the first marriage, two daughters and one son, who had attained twenty-one, one son under age, and a child of a deceased daughter: *Held* the word "issue" was restricted to the first generation, and therefore, the child of a deceased daughter took no interest.

Frewen v Hamilton (1877) 47 LJ Ch 391

552 Issue

There is no absolute rule that, because the word "issue" is used in one or more clauses of a settlement as meaning "children" only, it must receive the same construction in every other clause.

By a marriage settlement certain funds were assigned to trustees upon trust, after the death of the husband and wife, for the issue of the marriage as the wife should by deed or will appoint, and, for want

of such appointment, upon trust for the issue of the marriage, if more than one, in equal shares, the sons at twenty-one, and the daughters at twenty-one or marriage, and in case there should be but one child issue of the marriage, or, if more than one, and all but one should die without having be entitled, then in trust for such only or surviving child at the time thereinbefore limited or appointed; and, in case there should not be any issue of the intended marriage, upon certain trusts therein mentioned. The wife by will appointed part of the trust fund to the five children of her late son A: *Held* the word "issue" in the power of appointment must be construed in its strictly technical meaning, and therefore the appointment was valid.

Re Warren's Trust (1884) 26 Ch D 208; 53 LJ Ch 787; 50 LT 454; 32 WR 641

ANNOTATION **Consd** Re Birks, Kenyon v Birks [1899] 1 Ch 703

553 Issue

The doctrine that issue when collocated with parent is used in the restricted sense of meaning children applies to a deed as well as a will.

Barraclough v Shillito (1884) 53 LJ Ch 841; 32 WR 875

554 Issue

Re Milling's Settlement, Peake v Thom no 593 post

555 "Male issue"

A settlement provided by clause 5(iii) that the trustees should hold the remaining six-twentieth parts of the trust fund (*a*) as to one-half of the income thereof on trust to pay and divide the same between "such of the brothers of the settlor of the first part as shall for the time being be living and the male issue for the time being living of such of the said brothers of the settlor of the first part as shall be dead . . ." and (*b*) as to the remaining one-half of the income thereof "to pay and divide the same among" "such of the male descendants of Harvey du Cros the founder of the Harvey Company as shall for the time being be responsible for the active management of the business of the Harvey Company . . ." The questions arose whether (1) the expression in paragraph (*a*) of clause 5(iii) included only the sons for the time being living of deceased brothers of the settlor of the first part; or included only the sons and remoter male issue in the exclusively male line for the time being living of the deceased brothers of the settlor of the first part; or included all the male children and remoter issue for the time being living of deceased brothers of the settlor of the first part; and whether (2) the expression in paragraph (*b*) included only the sons and remoter male issue in the exclusively male line of Harvey du Cros or included all his male children and remoter issue: *Held* (1) the expression "male issue" in paragraph (*a*) of clause 5(iii) was a legal term of art and, as there was no context in the settlement to the contrary, the expression denoted only the sons and remoter male issue in the exclusively male line for the time being living of the deceased brothers of the settlor of the first part; (2) "male descendants" was an expression of ordinary speech wherein it normally meant male descendants of the propositus whether through males or females; if, however, in law the court were bound to give to the expression *primâ facie* a meaning limiting it to male descendants of males, yet that meaning would yield to small indication to the contrary in the context; in the present case the use of two different expression "male issue" and "male descendants" in successive paragraphs provided such a context and indicated that the expression "male descendants" was intended to include male descendants whether through the female or male line.

Re Du Cros' Settlement, Du Cros Family Trustee Co Ltd v Du Cros [1961] 3 All ER 193; [1961] 1 WLR 1252; 105 Sol Jo 630

556 "Male descendants" — Whether limited to descent through males

"Male descendants" is not a legal term of art but a descriptive phrase; accordingly, in the absence of a context to the contrary, a disposition in favour of "male descendants of" a named person has its natural meaning of males however descended, whether through males or females, from the person named.

Re Drake's Will Trusts (or Re Drake), Drake v Drake [1971] Ch 179; [1970] 3 All ER 32; [1970] 3 WLR 228; 114 Sol Jo 399, CA

557 Whether issue confined to children

A testator, who died in 1913, gave his residuary estate to his trustees on trust as to one moiety for his sons equally and as to the other moiety for his daughters equally provided that the daughters' shares of the residue or any other interest which they should derive under the will "by failure of the issue of any daughter or otherwise" should be held by the trustees and the income thereof paid to each daughter and after the decease of each daughter he directed that her trust estate should be held on trust "for all and every issue of such daughter respectively" who should attain the age of 21 in such shares as such daughter should by will appoint and in default of appointment equally; and he declared that "in the case of the death of any daughter . . . and on failure of her issue then the others of my sons and daughters shall take such deceased daughter's share equally but in the event of any of them being dead leaving the issue shall take their deceased parent's share . . ." One son, A, died in 1963 without issue; another son J

died in 1963 having had four children all of whom attained 21 and one of whom died in 1938 leaving three children who all attained 21. A daughter E was still living, aged 90, without issue. A daughter M died a spinster in 1964. On a summons to determine in what manner the share of testators' daughter M in the residuary estate should be held, the court held part of her share should be held on trust for the issue of testator's son J under the substitutional gift. The questions then arose: (1) were J's issue entitled to take limited to his children? (2) whether those entitled to take were limited to those who survived their parent; (3) whether they took as joint tenant or tenants in common: *Held* (1) the rule in *Sibley v Perry* (see WILLS vol 51 (reissue) no 9490) does not now constitute any exception to the general principle that a will has to be construed as a whole and is devoid of any significance that on the proper construction of the will as a whole "issue" in the substitutional gift was not limited to children of J and should be construed stirpitally, because the references to "issue" in the accruer provisions, in the power of appointment, and in the words introducing the gift over of the deceased daughter's share all indicated that the draftsman and testator had in mind that "issue" in those contexts bore its ordinary meaning of descendants generally, and the provision in the gift over that "such issue shall take their deceased parent's share", meant that they were to take what their deceased parent, whether comprehended in issue or not, would have taken if not dead at the relevant time; (2) on the construction of the will as a whole, including the particular wording of the residuary gift over, *ie*, "leaving issue who shall live to attain the age of twenty-one years", the issue to take on a substitutional gift must survive their own parent; (3) as the issue took the property on living to attain 21 years, and therefore took at different times, they took stirpitally as tenants in common and not as joint tenants.

Re Manly's Will Trusts (or Re Manly), Burton v Williams [1969] 3 All ER 1011; [1969] 1 WLR 1818; 113 Sol Jo 941

558 Whether issue confined to children

T, who died in 1913, left half his residuary estate on trust for his three daughters for life. He then provided: "and I declare that in the case of the death of any daughter . . . and on failure of her issue then the others of my sons and daughters shall take such deceased daughter's share equally, but in the event of any of them being dead, leaving issue who shall live to attain the age of 21 years, such issue shall take their deceased parent's share." In 1922 the first daughter died, without issue, and her share was divided, on the order of the court between her surviving brothers and sisters subject, in the case of the sisters, to the settlement provisions of the will. Testator's son, J, the only child who had had any issue, died in 1963; a second daughter, M died in 1964, without issue. In 1969, in proceedings to determine the destination of M's share, the court held that the word "issue" meant issue of all degrees, and that distribution should be *per stirpes*. After the death of M none of J's issue died, but five more of his great-grandchildren were born. In 1972 the third daughter, E, died, also without issue. The trustees of T's will applied to the court to determine the destination of E's share. Three of J's grandchildren contended that the previous proceedings raised an issue estoppel which prevented the question being argued again. One of J's great-grandchildren contended that, on a true construction of the phrase "their deceased parent's share", distribution should be *per capita*, while two of J's children claimed that the true construction was that the only persons entitled to a share were children of people who would have taken if they had not died, *ie* T's grandchildren: *Held* (1) the doctrine of estoppel could apply only if the question in issue in proceedings was precisely the same as the question in prior proceedings and between precisely the same parties as were parties to the original suit or their privies. In the instant case, the question in issue in the prior proceedings was the destination of the share taken by M, whereas the issue in the instant proceedings was the destination of E's share. Although the same points of construction were raised in the two matters, the issues were different, as were the parties, some of whom had not been in existence at the time of the earlier proceedings. The doctrine did not therefore operate; (2) reading the will as a whole, the word "issue" was to be construed as meaning issue of all degrees and the words "their deceased parent's share" were not sufficient to negative that conclusion. Furthermore, since one could only have a deceased parent's share to the exclusion of that parent, that was a sufficient indication that distribution was to be *per stirpes*; if distribution was *per capita* the situation could arise where children would take more than their deceased parent's share. The will would therefore be construed accordingly.

Re Manly's Will Trusts (No 2), Tickle v Manly [1976] 1 All ER 673

559 Issue then in being

By a settlement made on his marriage, the settlor granted freehold lands to trustees upon trust for himself for life and after his death to convey the lands and pay the rents and profits "unto or for the benefit of all and every or any one or more child or children,

or any grandchild or grandchildren or other issue then in being of the said intended marriage," for such estate or interest and in such shares and subject to such conditions as the settlor should by deed or will appoint. There was issue of the marriage several children, who all attained twenty-one. The settlor appointed a portion of the lands to his eldest son, then of age, his heirs and assigns, and joined with him in mortgaging this portion. The son having died in his father's lifetime: *Held* upon the true construction of the settlement the words "then in being" governed only the words "grandchild or grandchildren or other issue," and not the words "child or children."
Leader v Duffey (1888) 13 App Cas 294; 58 LJPC 13; 59 LT 9, HL

560 "For default of such issue"
Doe d Lees v Ford (1853) 2 E&B 970; 2 CLR 654; 23 LJQB 53; 22 LTOS 184; 18 Jur 420; 118 ER 1029

561 "Children or child or remoter issue"
In a settlement where property is given in default of appointment to "the children or any the child or remoter issue" of A on the happening of certain contingencies, a child living at the happening of such contingencies will take to the exclusion of his issue.
Re Lund's Settlement, Stanfield v Keene (1903) 89 LT 606

562 "Children and grandchildren"
Construction of a will and settlement, as not comprehending great-grandchildren under the description of children and grandchildren.
Orford (Earl) v Churchill (1814) 3 Ves&B 59; 35 ER 401

ANNOTATION **Distd** Re Hall, Hall v Hall [1932] 1 Ch 262

563 "All and every or any child or children" — Construed as one to exclusion of others
A power of appointment in a marriage settlement was to be exercised in favour of "all and every or any child or children": *Held* those words conferred a right of appointing the whole fund to one or more, in exclusion of the others of such children.
Bland v Plummer (1864) 9 LT 825

564 All property devised under a will — Construed as much as remained at date of settlement
A settlement of "all and singular the two-third parts of all and every the whole of my property, goods, etc, belonging to me in the empire of Great Britain and the East Indies, lately willed and devised unto me by M," held to pass only two-thirds of such property as then remained, and did not extend to such parts of the property as had been spent previous to the settlement.
Cotteen v Missing (1815) 1 Madd 176; 56 ER 66

565 "Next of kin or personal representatives"
In a marriage settlement moneys belonging to the wife were settled in default of appointment by her, in trust for her "next of kin or personal representatives," subject as to part to a trust for the husband for life: *Held* on the wife's death without exercising her power the husband was not entitled under the ultimate trust.
Bailey v Wright (1818) 1 Wils Ch 15; 1 Swan 39; 37 ER 7, LC

ANNOTATION **Apld** Bulmer v Jay (1834) 3 My&K 197

566 "Nearest of kin of the name of B"
By deed an estate was settled, after several preceding estates tail, to the use of all and every the nearest of kin, in equal degree, to D, at the time of her decease without issue of the name of B: *Held* a person, who at the time of D's death was her nearest of kin, born with the name of B, but who was not her nearest of kin, and who had, previous to D's death, married and assumed her husband's name, was not entitled to take under this clause in the deed.
Doe d Wright v Plumptre (1820) 3 B&Ald 474; 106 ER 736

567 "My own heirs whatsoever"
Gordon v Gordon (1882) 7 App Cas 713, HL

568 Household goods, furniture, etc
A *feme sole* trader who kept a horse and chaise to visit her customers, before marriage, by deed conveyed to trustees "all her household furniture, goods, and chattels," specified in a schedule in which the horse and chaise were not included, and "all her stock-in-trade, materials and other articles belonging to her, in and about her said business." After marriage, she used the horse and chaise as before: *Held* the horse and chaise passed to the trustees by the deed, and were not liable to be taken in execution for the debts of her husband.
Dean v Brown (1826) 5 B&C 366; 8 Dow&Ry KB 95; 108 ER 125

569 Household goods, furniture, etc
A marriage settlement, reciting that it had been agreed that the intended husband should settle and assign all the household goods, furniture, plate, etc, belonging to him, and to which he would become entitled on the solemnisation of the said marriage, and set forth in an inventory; witnessed, that in pursuance, etc, and in consideration, etc, the husband did assign all the household goods, furniture, etc, belonging to him, set forth in the inventory, to a trustee upon trust, after the marriage, to assign the same to such person as the wife should by deed or will appoint, and, in default of appointment, to permit her to retain possession and enjoy the said household goods, etc, thereinbefore described, and

to sell the same for her sole use and benefit, exclusive of the husband, and not subject to his debts, etc, and after the death of the wife upon trust for the husband, and after the death of the husband, in case the wife should survive him, in trust for the wife, but in case she should die, during his life, then upon trust for him. The goods mentioned in the inventory were in a house in the possession of the husband; a part of them belonged to the father of the wife, which he had agreed to give her, a part to the wife, and the remainder to the husband. The marriage was solemnised, the parties enjoyed the use of the furniture for five years, when they removed, and the husband, at the desire of the wife exchanged some articles, and sold some, and with the proceeds bought others. The trustee was informed of this, and approved, and ever since the husband and his wife continued to use and enjoy the furniture: *Held* looking at the whole scope of the deed, the husband joined in conveying the whole of the goods to the trustee for the sole and separate use of his wife; the exchanging part of the goods, and the selling other parts and buying fresh goods, were acts done by the husband as the agent of the trustee, and therefore the substituted goods must be considered as belonging to the trustee, and subject to the trusts of the deed.

Lane v Grylls (1862) 6 LT 533

570 Fixtures and fittings up

Suit instituted by husband against his wife, from whom he is separated, and the trustees of their marriage settlement, to enforce his claim in the marital right to certain furniture and tenant's fixtures, alleged not to have been comprised in the settlement; the furniture being in a house which is let ready furnished, plaintiff claims two-thirds of the rent, in respect of the furniture, and also two-thirds of the rent received already by his wife: *Held* the furniture in question was not comprised in the marriage settlement.

The fixtures mentioned in the settlement are exclusively landlord's fixtures, and I also think it clear that the furniture in question was not included in the settlement. . . . Tenant's fixtures were not comprised in the expression "fixtures" and "fittings up" did not include furniture (*Wigram V-C*).

Simmons v Simmons (1847) 6 Hare 352; 10 LTOS 106; 12 Jur 8; 67 ER 1202

571 "Survivor" or "survivors"

Lands, held in fee simple, were, by settlement made in 1752, conveyed to trustees, to the use of the settlor for life; remainder to the use of his three daughters for their lives, as tenants in common; remainder of the use of trustees to preserve; remainder as to the share of each daughter, to the use of her first and other sons successively in tail male; remainder, in case of the death of any one or more of the daughters without issue male, to the use of the survivors or survivor, during their or her respective lives or life, as tenants in common in case of two survivors, with remainder, in like manner as to the original share, to the use of the first and other sons of such surviving daughters or daughter in tail male; remainder, in case all the daughters should die without issue male, as to the share of each, to the use of their daughters as tenants in common in tail; and in case one or two of the settlor's daughters should die without issue, the share or shares of such daughter or daughters, to go to the use of the daughters of the survivors or survivor, as tenants in common in tail general; and in case all three should die without issue, then remainder over, with ultimate remainder to the use of the settlor in fee. He died soon after without disposing of the reversion: *Held* the words "survivors or survivor" were to be read "others or other," and, consequently, the limitation over to the daughters of one of the settlor's daughters, who had issue, was not defeated by the death of that daughter in lifetime of another, who subsequently died without issue, but that limitation took effect as a good cross-remainder.

Cole v Sewell (1848) 2 HL Cas 186; 12 Jur 927; 9 ER 1062, HL

ANNOTATIONS **Folld** Re Palmer's Settlmt Trusts (1875) LR 19 Eq 320; Re Friend's Settlmt, Cole v Allcot [1906] 1 Ch 47

572 "Survivor" or "survivors"

The word "survivor" in one of the clauses of a settlement may be read "other" in order to effectuate the clear intention of the parties, notwithstanding that the same word may require to be read in its natural sense in other clauses of the same settlement referring to the same fund.

Re Palmer's Settlement Trusts (1875) LR 19 Eq 320; 44 LJ Ch 247; 32 LT 9; 23 WR 478

ANNOTATION **Consd** Cross v Maltby (1875) LR 20 Eq 378

573 "Survivor" or "survivors"

In 1836 real estate was by deed settled upon trust for the six daughters and one son of A for their respective lives as tenants in common, with remainder as to the share of each tenant for life to his or her child or children who being a son should attain the age of twenty-one, or being a daughter should attain that age or marry, and if more than one as tenants in common in fee; provided that if any one or more of the seven tenants for life should die, without issue, or leaving issue and such issue being a son should die under the age of twenty-one, or being a daughter should die under that age without having been married, then the original as well as the accrued share of

any such tenant for life should go and be equally divided between "the survivors and survivor" of them the seven tenants for life and their, her and his issue respectively for such estates and interests and in such shares and proportions in all respects as the original shares of the seven tenants for life were directed to be divided; and there was an ultimate limitation to the settlor in fee if all the seven tenants for life died without leaving issue who should live to attain twenty-one or marry as aforesaid. Four of the tenants for life died without issue. Another married and died leaving one child who attained twenty-one and afterwards died. Another married and died leaving several children, all of whom attained twenty-one, and some of whom were still living. One tenant for life was still living: *Held* the words, "survivors and survivor" must be construed "others and other," and all the children of tenants for life who respectively attained twenty-one acquired absolute vested interest, irrespective of whether they did or did not survive deceased tenants for life or the tenant for life who was still living.
Re Friend's Settlement, Cole v Allcot [1906] 1 Ch 47; 75 LJ Ch 14; 93 LT 739; 54 WR 295

ANNOTATIONS **Consd** Re James' Will Trusts [1960] 3 All ER 744

574 "Any husband who might survive her" — Whether applicable to divorced husband
A woman beneficiary under a settlement was given a power of appointment "for the benefit of any husband who might survive her." The beneficiary married, and she exercised the power of appointment in favour of her husband in the event of his surviving her. Afterwards she divorced her husband, and she died without having been remarried, leaving her divorced husband surviving her: *Held* the power could be exercised only in favour of a person who was the beneficiary's husband at the time of her death, and therefore the divorced husband did not take under the exercise of the power.
Bosworthick v Clegg (1929) 45 TLR 438

ANNOTATION **Apprvd** Re Williams' Settlement, Greenwell v Humphries [1929] 2 Ch 361

575 "Any husband who might survive her" — Whether applicable to divorced husband
Under a marriage settlement made in 1902 of property belonging to the wife, power was reserved to her in the event, which happened, of these being but one child of the then intended marriage, to revoke the trusts of the settlement as to three-quarters of the settled funds and to resettle the same for the benefit of any husband who might survive her, but so that he should not take more than a life interest therein, and any child or other issue of a future marriage. The wife, having been divorced, remarried in 1908, and exercised the power in favour of her second husband. In 1923 the second marriage was dissolved upon the husband's petition, and the wife again remarried. She died in 1928, leaving her first, second and third husbands surviving her: *Held* the second husband, although he survived his former wife, was not entitled to any interest under the appointment of 1908, as he had ceased to be her husband on the dissolution of the marriage.
Re Williams' Settlement, Greenwell v Humphries [1929] 2 Ch 361; 98 LJ Ch 358; 141 LT 579; 45 TLR 541; 73 Sol Jo 384, CA

ANNOTATIONS **Apld** Bosworthick v Clegg (1929) 45 TLR 438 **Folld & Apld** Re Slaughter Trustees Corpn Ltd v Slaughter [1945] Ch 355; Re Allan, Allan v Midland Bank Executor & Trustee Co [1954] 1 All ER 646

576 "Any wife who might survive him" — Whether applicable to divorced wife
A testator, who settled a share of his estate in favour of a son and his children, gave his son a power by deed or will to appoint a life or lesser interest in the fund to or for the benefit of any wife of his who might survive him. The son married, and three years later exercised the power by deed and irrevocably appointed a life interest in the fund after his death to his wife. Three years later the marriage was dissolved on the wife's petition, and shortly afterwards the son died: *Held* the appointee, at the date when she survived the appointor, being no longer the latter's wife, was not a proper object of the power, and the appointment in her favour was ineffective.
Re Slaughter, Trustees Corpn Ltd v Slaughter [1945] Ch 355; [1945] 2 All ER 214; 115 LJ Ch 1; 173 LT 81; 61 TLR 453; 89 Sol Jo 350

577 "Die intestate and unmarried"
Re Norman's Trust no 2959 post

578 "Die intestate and unmarried"
Re Saunders' Trust no 2960 post

579 "Die intestate and unmarried"
Stoddart v Saville no 2946 post

580 "Die intestate and unmarried"
Re Mare, Mare v Howey no 2947 post

581 "Die intestate and unmarried"
A wife, who had obtained a divorce from her first husband, by whom she had one son, by a settlement made in contemplation of a second marriage, settled a fund, upon the death of the survivor of herself and the intended husband, upon the usual trusts for the issue of the intended marriage, and if there should be no child who should become entitled thereunder a general power of appointment over the fund was reserved to her; and in default of appointment the fund was to be held, in the event of her predeceasing

her husband, in trust for such person or persons as under this Statute of Distribution would have become entitled thereto at her death, had she died possessed thereof intestate and "without having been married." There was no issue of the second marriage and the wife predeceased her husband without having exercised her power of appointment. On the death of the husband the question arose whether the son of the former marriage was entitled to the fund as next of kin: *Held* the son was excluded by the terms of the ultimate trust, there being nothing in the context or in the circumstances of the case to modify the natural meaning of the words "without having been married."

Boyce v Wasbrough [1922] 1 AC 425; 91 LJ Ch 369; 38 TLR 483; sub nom

Re Ellis's Settlement, Wasbrough v Boyce (1922) 127 LT 161, HL

582 "Stock-in-trade"

A, a widow, who carried on business as a licensed victualler, previously to her second marriage, executed a settlement, whereby she assigned "her household goods, furniture, plate, linen, china, books, stock-in-trade, brewing utensils, and all other her effects," and all her interest therein to trustees, upon trust for her separate use for life, and after her decease to sell the same, and divide the clear proceeds amongst her three children. The husband of the second marriage carried on the business, and substituted, from time to time, stock-in-trade, in the place of that previously consumed in carrying on the business: *Held* the substituted stock-in-trade, as well as the original stock-in-trade, was contemplated by the settlement, and the same and the good-will of the business passed under the above words.

England v Downs (1842) 6 Beav 269; 12 LJ Ch 85; 6 Jur 1075; 49 ER 829; previous proceedings (1840) 2 Beav 522

583 "Sole"

The word "sole" in a will, has not a fixed technical meaning, throwing on the person who contests that meaning the necessity of showing, by implication, that it is not used in the particular instrument in its strict technical sense. In a marriage settlement it may, from the circumstances of the case, have a particular and exclusive meaning attached to it.

Massy v Rowen (1869) LR 4 HL 288; 23 LT 141, HL

584 "Part share and interest"

Re Henrique's Trusts [1875] WN 187

585 "Eldest son" — Younger son becoming in fact eldest

A sum of money was settled upon trust for the husband and wife, and the survivor of them, for life, and after the death of the survivor, upon trust to transfer the same to all the children of the marriage equally, except an eldest or only son; the shares to vest at the age of twenty-one, and the share of any son who died before the period of vesting to accrue for the benefit of the others, except an eldest or only son. There were six sons, of whom the first and last born died in infancy; the second attained twenty-one, and succeeded his father in the title, but died without issue; the third and fourth born attained twenty-one and died without issue; the fifth born attained twenty-one and succeeded his brother in the title: *Held* the second son was the "eldest son" within the meaning of the settlement, and as such to be excluded from participation in the settled fund.

Re Rivers's Settlement Trust (1870) 40 LJ Ch 87; 24 LT 253; 19 WR 318

586 "Eldest son" — Younger son becoming in fact eldest

By a marriage settlement made in 1861 real estate was limited to uses under which A became tenant for life with remainder to his first and other sons in strict settlement. On the same day was executed a settlement of personalty by which it was declared that after the death of A and his intended wife the trustees should stand possessed of the trust funds in trust for the children of the marriage "other than an eldest or only son or other son who before attaining the age of twenty-one years shall be or become the heir male or heir made apparent of" A as A and his wife should appoint. Each of the settlements was made in consideration of the marriage, but neither of them contained any express reference to the other. A had five children, a son W, who attained twenty-one, disentailed and resettled the estate, and died a bachelor in 1899; a son V, who attained twenty-one, became eldest son on the death of W, and took a life interest under the resettlement; B, who died an infant; and two others who were still living. A died in 1910, and V thereupon became entitled to the settled real estate for his life: *Held* the two settlements must be read together, but V was not excluded from a share in the settled personalty.

I think it is equally clear that, in considering whether children who are in fact younger children have become eldest sons, the court will not hold that a child who does not take the bulk of the estate has become an eldest son within the meaning of the clause though at the time of the distribution he is in fact the eldest child (*Parker J*).

Re Wrottesley's Settlement, Wrottesley v Fowler [1911] 1 Ch 708; 80 LJ Ch 457; 104 LT 281

587 "Eldest son" — Younger son becoming in fact eldest

The estate of an eldest son who attained the age of twenty-one years, but died a bachelor and intestate,

in the lifetime of his father, and without having executed any disentailing assurance of the family property, was held entitled to share in the funds of the personalty settlement which were held by the trustees, in default of appointment, "upon the trusts following, that is to say, if there shall be but one child of the said intended marriage, other than such eldest or only son as aforesaid, in trust for that one child to be an interest vested in such child being a son at the age of twenty-one years or being a daughter at the age of twenty-one years or day of marriage which shall first happen, and if there shall be two or more children of the intended marriage other than such eldest or only son as aforesaid then in trust for such two or more children in equal shares."

Re Cavendish's Settlement, Grosvenor v Butler (1912) 106 LT 510; 56 Sol Jo 344

588 "Or"

Re Coley, Gibson v Gibson [1901] 1 Ch 40; 70 LJ Ch 153; 83 LT 671; 49 WR 165; 45 Sol Jo 164

589 "Uterine" brothers and sisters

A gift to "uterine" brothers and sisters is a gift to brothers and sisters by the same mother but by a different father.

Re Vincent, Public Trustee v Vincent (1926) 70 Sol Jo 1220

590 "Live and dead stock"

A settlor who had resettled his estate, made by a subsequent deed a declaration of trust that the trustees should be entitled to "the whole of the live and dead stock" to be found at his death on certain farms, and he afterwards removed to these farms a stud of thoroughbred racehorses. At the time of his death certain thoroughbred stock was on the farms: *Held* the racehorses did not pass under the deed, as it must be construed as relating only to stock found in the ordinary way on the farms carried on as agricultural holdings.

Re Cadogan Settled Estates, Richmond & Gordon (Duke) v Cadogan (1915) 31 TLR 536

591 "First and other sons"

By a strict settlement of real estate made in 1876 the property was limited to the use of the settlor's eldest son for life with remainder to his first and other sons successively according to seniority in tail male. Similar limitations were created in favour of the second and other sons, and then the daughters of the settlor successively for their lives, and their issue in tail male, but in the limitation to the first and other sons of the second and other younger daughters of the settlor the word "successively" did not occur: *Held* the expression "first and other sons" when used in creating an estate in tail male, whether in a will or in a deed, implied that they were to take successively according to seniority, and therefore, when on the death of the last tenant for life the only male issue entitled in remainder were two sons of a young daughter, the elder became entitled in possession.

Re Gosset's Settlement, Gribble v Lloyds Bank Ltd [1943] Ch 351; [1943] 2 All ER 515; 112 LJ Ch 291; 169 LT 172; 59 TLR 386; 87 Sol Jo 282

592 "Any child, children or issue of any child or children"

A testator gave a share of his residuary estate to his infant daughter to be paid to her on her attaining the age of twenty-five years or on her marriage under that age with the consent of her guardians and provided that in the latter event the share was "to be property secured by settlement for my said daughter's benefit and that of any children she may have." The testator next provided that, in the case of his daughter marrying under twenty-five years of age without the consent of the guardians, her share was to be held by the trustees upon trust for her for life. He then dealt with the capital of the share in the case of the daughter dying under twenty-five years of age without having married with the consent of the guardians and gave it to his widow, and he continued: "In the event of my said daughter leaving any child, children or issue of any child or children whether married with her guardians' consent or otherwise then the said share to vest absolutely in such child, children or issue . . . equally as *per stirpes* and not *per capita*." In 1869 the testator's daughter, then aged sixteen, was married to T with her guardians' consent, and immediately before the marriage a settlement, to which the guardians were parties, was executed settling the daughter's share on her for life and then on the children of the marriage as she should appoint and in default to the children in equal shares. T died in 1875, leaving his widow and two children surviving him. No appointment in exercise of the power contained in the settlement was made, and in 1884 the testator's daughter married B. She died in 1940. There were two children of the second marriage, and they claimed that the settlement ought to have provided for them equally with the children of the first marriage: *Held* (1) the clause of the will dealing with the event of the daughter "leaving any child children or issue of any child or children whether married with her guardians' consent or otherwise" was reconcilable with the direction for a settlement in favour of the daughter and any children she might have; (2) the settlement ought to have been made in conformity with the clause; and (3) in the clause the word "any" must be given its full meaning, with the result that the daughter's share was distributable among the

children of both marriages who survived their mother.

Re Potter's Will Trusts, Re Thomson's Settlement Trusts, Eckford v Thomson [1944] Ch 70; [1943] 2 All ER 805; 113 LT Ch 173; 170 LT 26; 60 TLR 155, CA

593 "Without leaving issue"

By a settlement, made in 1877, M settled property in favour of his six daughters by name, upon such trusts as he should by deed or will appoint, and, in default of appointment, the trustees were, after M's death, to pay the income of one-sixth part of the property to each daughter for her life and subject thereto to hold the capital for her children who should attain twenty-one or marry. In 1887, by a codicil to his will, M exercised the power and appointed that the share of any daughter dying unmarried or, if married, "Without leaving issue" should be divided equally among his other daughters who should be living at his death and the issue of any of them who should be then dead. In 1942 a daughter died who had been married and had two sons both of whom attained twenty-one and predeceased her: *Held* the object of the appointment, property construed, was clearly to supply the lack of an accruer clause in the settlement, and prevent a resulting trust to M of the share of any daughter which would be undisposed of by her death without issue, and, therefore, the expression "without leaving issue" must be construed "without having had a child who attained a vested interest," with the result that the estates of the two sons who predeceased their mother were entitled to her share between them.

Re Milling's Settlement, Peak v Thom [1944] Ch 263; [1944] 1 All ER 541; 113 LJ Ch 167; 171 LT 92; 60 TLR 317; 88 Sol Jo 179

594 Provision for death leaving wife and child or children — Death leaving widow but not children

Re Rogozinski's Settlement Trusts, Public Trustee v Palmer (1947) 205 LT Jo 37

Scottish, Irish and Commonwealth Cases

595 Issue

By a marriage settlement land was vested in trustees upon trust for X for life, and from and after the decease of the said X upon trust to the use of the issue of X's body, her surviving, their heirs and assigns for ever as joint tenants: *Held* issue meant descendants not children.

Byrne v Byrne (1904) 4 SRNSW 373; 21 NSWWN 124 (AUS)

596 Issue

Re Howard's Trusts (1858) 7 I Ch R 344 (IR)

597 Issue

Re Bromhead's Trusts, Public Trustee v Bromhead [1922] 1 IR 75 (IR)

598 Issue

Where "issue" are declared in a settlement to take the deceased parents' share the primary rule is that the word "issue" should be given its ordinary meaning of "descendants," unless the context shows that it is used in a restricted sense to mean children of the parent only; and there is no rule of construction that in such a case the word is *primâ facie* restricted to children, particularly so when the gift to "issue" is independent and original and not substitutionary.

Guardian Trust & Executors Co of New Zealand Ltd v Ramage [1927] NZLR 288 (NZ)

599 Children — Children legitimated by adoption — Whether entitled

(1) The children born at the date of execution of the deeds of settlement were "children" within the meaning of the settlements notwithstanding that they were illegitimate children. (2) The illegitimate child, EJR, was entitled to take an interest under the settlements only if a child legitimated by adopted was entitled to take such an interest. The Victorian Adoption of Children Act 1964 recognises foreign adoptions as being effective in relation to dispositions of property whether made before or after the commencement of the Act but so as not to affect the disposition of property that has taken effect in possession before the commencement of the Act. Here the dispositions in favour of the children had not yet taken effect in possession. Accordingly, as the Act provides that the adopted child becomes a child of the adopter as if born to the adopter in lawful wedlock, EJR must be deemed, for the purposes of the deeds of settlement, to be a child born in lawful wedlock and as such entitled to take.

Perpetual Exors & Trustees Assocn of Australia Ltd v Roberts [1970] VR 732 (AUS)

600 "Survivor" or "survivors"

Smith's Trustees v Smith's Trustees (1905) 7 F (Ct of Sess) 815; 42 Sc LR 657; 13 SLT 190 (SCOT)

601 To the same uses

Kingsbury v Martin (1901) 1 SRNSW 272; 18 NSWWN 158 (AUS)

602 "After his death" — Not limited to upon his death

Re Moore's Settlement (1888) 9 NSWLR (Law) 54; 4 NSWWN 165 (AUS)

603 The right heir

A settlement provided that in certain events the settled lands should revert to "the right heir of (the settlor) and his or her heirs and assigns for ever" *Held* the words "the right heir" designated the next of kin of settlor.

Re MacDonald's Settlement, O'Callaghan v O'Callaghan (1928) VLR 421; [1928] Argus LR 148 (AUS)

604 "Plantation"

Jackman v Walsh (1882) 6 Nfld LR 367 (NFLD)

605 "After the decease of E" — Whether constituting a contingency

Jones v Smythe (1899) 32 NSR 95 (CAN)

606 "Roman Catholic"

A condition subsequent in a re-settlement provided that if any person thereby made tenant for life or tenant in tail by purchase should "become a Roman Catholic or profess that he or she is of the Roman Catholic religion" then both such person and his issue should forfeit all interest thereunder. It was contended (i) that the condition was void for uncertainty in that the term "Roman Catholic" was ambiguous; that it was not possible to ascertain with certainty how or at what time a person "became" a Roman Catholic; and that it was not certain what acts or conduct would amount to "profess," or whether "religion" meant religious organisation or a system of belief, (ii) that the condition was void as contrary to public policy as tending to fetter the parents of any infant entitled under the settlement in discharging their parental duty with regard to the religious instruction of such child: *Held* (1) the term "Roman Catholic" was unambiguous and meant a member of any church which acknowledged the supremacy of the Pope, and who accepted the authority of the Roman Catholic church in religious matters; the question whether a person professed that he or she was of the Roman Catholic religion was whether such person had accepted the authority of the Roman Catholic church in religious matters, and this was a question of fact which was capable of being precisely ascertained; all persons who have become Roman Catholics must have made such an acceptance as aforesaid, and accordingly the condition was not void for uncertainty; (2) where the choice of religion may involve a forfeiture the court will not hold an infant to a binding choice until he is old enough to choose his religion for himself and can be regarded as released from his father's right to determine in what religion he should be brought up, and accordingly the condition did not interfere with the father's right and was not void as contrary to public policy.

McCausland v Young [1948] NI 72; affd [1949] NI 49 (IR)

607 "Unmarried"

A settlor, by each of two deeds of gift, made in 1912, declared certain trusts for the benefit of his daughter, J, under which the trust funds would devolve on her surviving brother and sister and the issue of her deceased mother and sister, "in the event of the death of [J] unmarried". At the date of the deeds, J had not been married. She married in 1918. There was no issue of the marriage. Her husband died in 1946, and she died in 1949, without having remarried. If the word "unmarried" were construed as meaning "never having been married" there would be a resulting trust in favour of the settlor, so that the property comprised in the trusts would form part of his estate with the usual exigencies as to revenue in favour of the Crown. On originating summons asking whether J, having no issue and having been predeceased by her husband, died "unmarried" within the meaning of the deeds: *Held* the intention of the settlor as expressed in the deeds of gift was that the word "unmarried" therein in the context therein meant "is not in a state of marriage at the relevant time."

Cameron v Gray [1954] NZLR 1050 (NS)

608 "Wholefree proceeds" of lands — Thinnings of woods included

Breadalbane's (Marquis) Trustees v Buckingham (Duchess) (1854) 16 Dunl (Ct of Sess) 359 26 Sc Jur 170 (SCOT)

609 "Conquest or acquire"

The word "conquest" when used as a verb active, and not as a noun substantive, has a wide and flexible signification. Where a lady had, by ante-nuptial settlement, assigned and conveyed to trustees whatever she might "conquest or acquire" during the marriage: *Held* the words "conquest" and "acquire," so used, were sufficient to pass to the trustees property of every kind which during the marriage had come to her by succession.

Diggens v Gordon (1867) LR 1 Sc&Div 136 (SCOT)

610 Household furniture etc, including heirship movables — Greenhouse not included

Tod's Trustees v Finlay (1872) 10 Macph (Ct of Sess) 422 (SCOT)

611 Nearest of kin

Gregory's Trustees v Alison (1889) 16 R (Ct of Sess) (HL) 10; 26 Sc LR 787 (SCOT)

612 Nearest of kin

Hood v Murray (1888) 14 App Cas 124 (SCOT)

4 Covenants for settlement of after-acquired property

i IN GENERAL

LAW See Halsbury's Laws (4th edn) vol 42 para 644 et seq

CROSS REFERENCES See no 904 et seq post (operation of covenants); BANKRUPTCY vol 5(2) (2nd reissue) no 13670 et seq; INFANTS vol 28(3) (2nd reissue) nos 1324 et seq, 1346, 1401, 1415 (covenants by infants)

613 Necessity for express covenant

Settlement in consideration of the fortune of the wife confined to her fortune at the time; unless expressed to comprehend future accessions.

Mitford v Mitford (1803) 9 Ves 87; 32 ER 534

614 Whether "usual clause"

Re Maddy's Estate, Maddy v Maddy no 183 ante

615 What amounts to — Assignment of interest in settled funds

By marriage articles dated in 1845 certain funds were settled upon trust for the husband, Sir RW, for life, then for the wife, Lady W, for life, then for the children of the marriage as the husband should appoint, or in default of appointment by the husband as the wife should appoint. In 1876 Sir RW died without having exercised his power of appointment except as to a specific portion of the funds appointed in trust

for a daughter. In 1879 Lady W appointed that after her decease the trustees should stand possessed of the trust funds for the time being subject to the trusts of the articles, other than the sum appointed by Sir RW in trust for the remaining six children of the marriage in equal shares. In 1893 one of the sons, William, by his marriage settlement assigned to trustees his one-sixth share of the trust funds, which he specified in a schedule, to which he was entitled on the death of his mother, and all other, if any, his estate and interest of and in all other the trust funds for the time being, subject to the trusts of the articles of 1845. By a codicil dated in 1878 Mrs B directed that the property which she had left by her will to Sir RW should be transferred to the trustees of the marriage articles and be held upon the trusts thereof, and she died in 1900. Subsequently, in 1900, Lady W appointed this property in trust for certain of her children, including William: *Held* (1) the appointment of 1879 did not operate as an appointment of any moneys not then subject to the trusts of the marriage articles; (2) William's marriage settlement passed only such estate as he then had in the trust funds; and, therefore, his share of the property bequeathed by Mrs B's codicil was not included in that settlement.

Re Walpole's Marriage Settlement, Thomson v Walpole [1903] 1 Ch 928; 72 LJ Ch 522; 88 LT 419; 51 WR 587

ANNOTATION As to (2) **Distd** Re Beaumont, Re Trusts of Indenture of 29th April 1904, Beaumont-Nesbitt v Packer (1913) 57 Sol Jo 283

616 What amounts to — Agreement to execute settlement — Of property to which covenantor "may be entitled"

By an ante-nuptial agreement the husband agreed that he would forthwith execute a settlement "of all my share, property or interest, as well vested or accruing, to which I may be entitled under any will or settlement." The settlement was never made, but many years after the agreement had been executed the husband became entitled to residue under the will of his father: *Held* such residue was not caught by the words of the agreement.

Re Ridley's Agreement, Ridley v Ridley (1911) 55 Sol Jo 838

617 Powers included in settlement — Powers of sale and exchange

Williams v Carter (1818) Sugden on Powers 8th ed App 945

ANNOTATION **Distd** Home v Barton (1822) Jac 437

618 Powers included in settlement — Power of sale

A settlement of personal estate contained a power to alter and vary, and a covenant to settle future acquired real and personal estate on similar trusts: *Held* a power of sale might be introduced into a settlement of subsequently acquired real estate.

Elton v Elton (No 2) (1860) 27 Beav 634; 54 ER 252

619 Powers included in settlement — Power to grant mining leases — Covenant to settle subject to same powers

In a settlement of personal property, the parties covenanted to settle all future acquired property upon the same trusts, etc, and subject to the same powers, etc, or as near thereto the nature and tenure of the property would admit of: *Held* this authorised the insertion of a power to grant mining leases in the settlement of subsequently acquired freeholds, the prior owner having granted such leases, though the mines had never been effectually worked under them.

Scott v Steward (1859) 27 Beav 367; 54 ER 144

620 Effect of subsequent settlement on different trusts — Original settlement not superseded

Two ante-nuptial settlements were executed; each contained a covenant to settle after-acquired property of the intended wife, but upon different trusts. In the absence of evidence of reasons for making the second settlement, the court, without deciding whether the first settlement in point of time could have been superseded as to after-acquired property, refused to hold that the first settlement was superseded by the second.

Re Gundry, Mills v Mills [1898] 2 Ch 504; 67 LJ Ch 641; 79 LT 438; 47 WR 137

621 Remedy for breach of covenant — Measure of damages

Trustees can recover substantial damages for a breach of a covenant to settle after-acquired property, and the measure of damage is the value of the property which would have come to the hands of the trustees if the covenant had been duly performed.

Re Cavendish Browne's Settlement Trusts, Horner v Rawle (1916) 61 Sol Jo 27

622 Property already in settlement — Not affected by covenant

By a pre-nuptial settlement the intended husband settled a fund on the usual trusts to pay the income to the husband for his life and after his death to the intended wife if she survived him for life, and after the death of the survivor to pay the capital to such issue of the marriage as the husband should appoint or in default of appointment among the children equally. The intended wife covenanted to bring into the settlement property above a certain value subsequently acquired by her. There were two children of the marriage, a daughter who attained twenty-

one but died intestate and a spinster, and a son. The husband by a revocable appointment made after the daughter's death appointed that after the death of the husband and the wife, but subject to their life interests, the fund and its income should be held in trust for the son absolutely. In the lifetime of both his parents the son died an infant and intestate. Later the husband died without having revoked the appointment, leaving the wife surviving him. On the question whether the wife's interest in the moiety of the son's appointed fund was caught by her covenant to settle after-acquired property: *Held* such a covenant operates only on property which has never been the subject-matter of the settlement, and therefore property which was already in the settlement and on which the settlement operated was not caught by the covenant.

By his will (which was recited in the settlement) the father of the intended wife settled a fund upon trust for her for life and after her death in trust for all or any of her issue as she should by deed or will appoint, with a proviso enabling her to appoint a life or less interest in favour of a surviving husband. She appointed a life interest in favour of the husband, and after the death of the daughter of the marriage appointed the fund, subject to the life interests of herself and the husband, in trust for the son absolutely. On the question whether her interest in the moiety of that fund was caught by her covenant to settle after-acquired property: *Held* as the fund had never been the subject-matter of the settlement, it was so caught.

Re Rogers' Settlement, Arnott v Rogers [1951] Ch 450; [1951] 1 All ER 236

623 Reversionary interest — Incomplete gift

At all material times H was the legatee under her father's will of one half of his residuary estate subject to her mother's life interest. Her mother died on 19 January 1961. By clause 7 of H's marriage settlement, dated 31 January 1924, she covenanted with the trustees that she would assign after-acquired property to the trustees to be held on the trusts therein declared which, as events happened, were after H's death, for the benefit of children of her sister. This clause extended to H's reversionary interest in one half of the testator's residuary estate but did not operate as an assignment of it. Clause 8 provided, among other things, that all the property comprised within the terms of the covenant should be subject in equity to the settlement, but that the trustees should not be bound to take steps to enforce the covenant. H never executed any assignment of her share in the testator's residue to the trustees of the settlement, nor was any notice of the settlement ever given to the trustee of testator's will. In 1946 plaintiff was appointed a trustee's will and he became the sole surviving trustee both of the will and of the settlement. On 6 September 1956, H died childless and a widow. Plaintiff sought to maintain that H's vested reversion in half of testator's residue was held on the trusts of the settlement. Defendants, who were H's legal personal representatives, contended that the covenant to settle the property was executory and unenforceable for the benefit of the children of H's sister, they being volunteers outside the marriage consideration: *Held* (1) clause 8, on its true construction, was distinct from clause 7 and constituted an independent declaration of trust by H of any property falling within the ambit of the covenant in clause 7, which declaration operated while clause 7 remained unperformed; and accordingly pending transfer to the trustees of the settlement of H's equitable interest in one half of the testator's residue that interest of hers was subject in equity to the trusts of the settlement by virtue of her declaration of trust contained in clause 8; (2) plaintiff, by virtue of having been appointed trustee of the will, was at law the owner of the investments constituting the one half of testator's residue, and the capacity in which he became possessed of the investments was irrelevant in considering whether an imperfect gift was completed; in the present case, as plaintiff was the trustee both of the will and of the settlement, he did not need to invoke the help of a court of equity in order to perfect the alleged trusts, and the legal personal representatives of H could not successfully assert in equity a claim disentitling him to stand on his legal rights, because they were in no better position than that in which H would have been, and she could not have asserted such a claim as she had covenanted to assign the investments to be held on the trusts of the settlement.

Re Ralli's Will Trusts, Calvocoressi v Rodocanachi [1964] Ch 288; [1963] 3 All ER 940; [1964] 2 WLR 144; 108 Sol Jo 74

Scottish, Irish and Commonwealth Cases

624 What amounts to

A, on his marriage, charged £2,000 specifically, not only on the real estates then in his possession, but also on all his after-acquired real and personal estate. A afterwards incurred large debts. On a bill filed to raise that sum: *Held* it was a valid charge affecting the after-acquired property, if the lands named in the settlement, which were declared the primary fund, proved insufficient. Priority was given accordingly.

Gubbins v Gubbins (1825) 1 Dr&Wal 160n (IR)

ii CONSTRUCTION

1 In general

LAW See Halsbury's Laws (4th edn) vol 12 para 645

CROSS REFERENCES See no 647 et seq post (construction of particular expressions); DEEDS vol 17(1) (2nd reissue) no 1859 et seq (construction, generally)

625 Instrument construed by itself
Cowper-Smith v Anstey [1877] WN 28

626 Terms strictly construed
Re Van Straubenzee, Boustead v Cooper no 905 post

627 How far controlled by recitals
Parkinson v Dashwood no 634 post

628 How far controlled by recitals
Burn-Murdoch v Charlesworth no 815 post

2 Covenants to settle particular interests

629 Restriction of general words — "Or otherwise"
Covenant, in an infant's marriage settlement, that whatever should come to the wife from the mother or otherwise, shall be bound by the settlement, restrained to what shall come from the mother, not to property coming unexpectedly from other quarters.
Williams v Williams (1782) 1 Bro CC 152; 28 ER 1048, LC

630 Restriction of general words — "Or otherwise"
Upon the marriage of one of several residuary legatees under her father's will, the intended husband and wife assigned to trustees all and every the sum and sums of money legacy and legacies, and other personal property then due and payable, or belonging to, or to become due and payable to the intended wife under or by virtue of her father's will, "or otherwise howsoever," upon trusts for her separate use for life, without power of anticipation, with trusts in remainder in favour of the children of the marriage. By the next witnessing part of the same settlement, it was agreed, that in case any real or personal property should, during the coverture, be given or bequeathed to the wife, the husband should settle it upon trust so that the wife should have the sole power of disposing of the same: *Held* a legacy bequeathed by another will to the wife after the marriage was not subject to the trusts for the children, the latter witnessing part of the settlement showing that the former must be read in a restricted sense.
Re Stephenson's Trusts, Ex p Stephenson (1853) 3 De GM&G 969; 43 ER 379, LJJ

ANNOTATION **Distd** Re Mainwaring's Settmt (1866) LR 2 Eq 487

631 Restriction of general words — "Or otherwise"
By the marriage settlement of O, dated in 1821, a sum of money was settled upon the children of the marriage as O should by deed or will appoint, and in default of appointment, to be divided among all the children at twenty-one equally. By his will, O did not validly appoint the fund, but he gave certain legacies to his children of whom A was one, at twenty-one. By the marriage settlement of A dated in 1851, she being then an infant, after reciting that A was entitled to certain sums and to other interests, and that it had been agreed that the intended husband should covenant to assign to trustees all the property which "under the will or otherwise of the said O," A might become entitled to, the husband covenanted to assign to trustees all the property which "under the will or otherwise of the said O or otherwise howsoever," A might become entitled to. A attained twenty-one, and a share of the unappointed fund, under the settlement of 1821, becoming therefore payable to her: *Held* as between the trustees of the settlement of 1851 and the husband of A the former were entitled.
Re Owen's Trust (1855) 1 Jur NS 1069

632 Restriction of general words — "Or otherwise"
H, being entitled under her father's will to a share of a fund, such share is settled on her marriage, the words of the settlement referring to all the parts or shares, possible or contingent, to which H was then or might thereafter be entitled to under the will "or otherwise." H then became entitled to a share of her brother's residuary estate as one of his next of kin; and the question was, whether such share was included in her marriage settlement: *Held* it was not.
Re Newbolt's Trust (1856) 4 WR 735

633 Restriction of general words — "Or otherwise"
A marriage settlement recited the treaty to be, to settle all property which may come to the wife from H by will, or codicil or codicils, or otherwise. The husband subsequently covenanted to settle all property which thereafter might come to the wife by any will or codicil or codicils of H, or otherwise: *Held* a gift to the wife by the will of one of the trustees of this marriage settlement, not being H, was not bound by this covenant; and the covenant only bound the husband to settle such property as should be derived by the wife from H.
Re Neal's Trusts (1857) 4 Jur NS 6

634 Restriction of general words — "Or otherwise"

The words "or otherwise" construed as relating to a mode of acquisition *ejusdem generis* with survivorship and accruer previously mentioned.

By a marriage settlement, after reciting that the intended wife was entitled to a one-sixth part or share of and in certain specified funds, subject to the trusts of the will of W, and might become thereafter entitled to other shares under the trusts of such will, and that it had been agreed that all her shares in such trust funds under such will should be settled, it was witnessed that she assigned to trustees to hold upon the trusts of the settlement all the one-sixth part or share and all other the parts or shares vested or contingent to which she was then or might become entitled by accruer, survivorship, or otherwise, in such specified trust funds, and also all the share and interest, whether vested or contingent, or in expectancy, and of which she was then or might become entitled to in any property whatsoever under the will of W. The wife afterwards became entitled to a further share in the specified trust funds under the will or codicil, or as one of the next of kin of the person entitled thereto: *Held* as she did not take the last-mentioned interest under the will of W, it was not comprised in or subject to the trusts of the settlement.

Parkinson v Dashwood (1861) 30 Beav 49; 4 LT 41; 7 Jur NS 854; 9 WR 493; 54 ER 807

ANNOTATION **Follď** Edwards v Broughton (1863) 3 Beav 667

635 Restriction of general words — "Or otherwise"

The five children of testator were absolutely entitled to his residue. One of them, on her marriage settled her fifth of such residue, and all other her share by survivorship or otherwise, and all her right, contingent, reversionary or otherwise, possibility, etc, therein. She afterwards became entitled to a further share, by the death of a brother intestate: *Held* it was not included in the settlement.

Edwards v Broughton (1863) 32 Beav 667; 2 New Rep 476; 9 LT 41; 11 WR 1038; 55 ER 262

636 Restriction of general words — "Or otherwise"

Re Stratten's Settlement, Hope v Morley (1905) 49 Sol Jo 651

637 Whether restricted to particular interest — Land to be purchased in particular parish — Conveyance taken in name of son

A by marriage articles covenanted, that all the lands which he should afterwards purchase in the parish of K should be to the uses of the articles. He purchased lands in K and took a conveyance in fee in the name of his youngest son, but there was no declaration of trust: *Held* the son was a trustee for his eldest brother, who was entitled to these lands by virtue of the covenant.

Blake v Blake (1721) 7 Bro Parl Cas 241; 3 ER 157, HL

638 Whether restricted to particular interest — Property to accrue under particular settlement

A being, under the marriage settlement of her father and mother, tenant in tail in remainder of certain lands, expectant on the failure of male issue of her only brother, there is made on her marriage a settlement containing a covenant, by which, after reciting that it was possible that she might, under and by virtue of the limitations contained in the former settlement eventually become entitled to a certain estate, or a part of certain lands, it is agreed, that, in case she shall in her lifetime become entitled to any such estate as aforesaid, the same shall be conveyed to the uses and for the trusts therein mentioned; the brother afterwards suffers a recovery, and dies intestate without issue, whereupon the fee simple of one-fourth part of the lands comprised and referred to in the settlements descends upon her as one of his coheiresses: *Held* the covenant does not affect the fee simple so coming to her by descent.

Tayleur v Dickenson (1826) 1 Russ 521; 38 ER 201

ANNOTATION **Consd** Smith v Osborne (1857) 6 HL Cas 375

639 Whether restricted to particular interest — Property to accrue under particular will

A covenant to settle land which the covenantor should succeed to under a will, does not bind him to settle whatever interest he might derive *aliunde* in the same land.

In a marriage settlement there was a recital that A, a party thereto, had a contingent remainder in land under a will, and he covenanted when the said remainder became vested in him in possession to convey the land to the uses of the settlement. A was not in fact so entitled, but was entitled as expectant heir in tail. The tenant in tail in possession barred the entail and afterwards devised the land to A: *Held* not having taken the land under the will, but *aliunde*, A was not bound by his covenant to settle it.

Smith v Osborne (1857) 6 HL Cas 375; 30 LTOS 57; 3 Jur NS 1181; 6 WR 21; 10 ER 1340, HL

640 Whether restricted to particular interest — Property to accrue under particular will

Re Neal's Trusts no 633 ante

641 Whether restricted to particular interest — Property to accrue under particular will

Parkinson v Dashwood no 634 ante

642 Whether restricted to particular interest — Property to accrue under particular will — To wife or husband in her right

A husband covenanted to settle the share of his wife and of himself "in her right" in the stocks comprised in her great uncle's will. Under the will the fund was limited to the husband, in case of his surviving his wife and her father, and of there being no issue: *Held* the husband's interest was not comprised in his covenant.

Ibbetson v Grote (1858) 25 Beav 17; 53 ER 541

643 Whether restricted to particular interest — Property to accrue under particular will — Property appointed by testator

A covenant in a marriage settlement to settle property to be acquired "under or by virtue of" the will of the wife's father: *Held* not to comprise property, over which the father had by will exercised a power of appointment amongst his children, given to him by an earlier settlement.

Evans v Jennings (1862) 1 New Rep 178

644 Whether restricted to particular interest — Property to accrue under particular will — Property appointed by testator

Re Pryce, Nevill v Pryce no 955 post

645 Whether restricted to particular interest — Property to accrue on particular contingency

General words in the operative part of a deed controlled by the recitals. A mother had an exclusive power of appointment over a fund, in favour of her children, and which, in default, was divisible equally, the share of the daughters to vest at twenty-one or marriage. She had a son and a daughter, and she appointed £10,000 to her son on his marriage. His marriage settlement recited that he was entitled to the £10,000 and was also contingently entitled to the other moiety, in the event of his sister dying unmarried under twenty-one, and it recited an agreement to settle the £10,000 and "all other his part, share and interest, as well vested as contingent" in the trust funds. He then assigned his interest in the same terms. The daughter attained twenty-one and died, and the mother afterwards appointed the residue of the fund to her son: *Held* such residue did not pass under his settlement.

Childers v Eardley (1860) 28 Beav 648; 3 LT 166; 6 Jur NS 690; 8 WR 698; 54 ER 515

Scottish, Irish and Commonwealth Cases

646 Whether restricted to particular interest — Property to be acquired under will or as heir or next of kin of father — Interest in residue bound

A covenant by a woman in her marriage settlement to do all things necessary for transferring and vesting in the trustees thereof all property she may become entitled to under the will, or as one of the heirs or next-of-kin, of her father will bind her interest in the residue of her father's estate where no contrary direction appears, yet directions contained in the will, as to the application and investment of her interest, may overrule such covenant.

Re Nordheimer (1914) 30 OLR 327; 18 DLR 591; 5 OWN 748 (CAN)

iii EFFECT OF THE COVENANT ON PARTICULAR INTERESTS IN PROPERTY

1 What interests are included

A In general—expression of contrary intention

LAW See Halsbury's Laws (4th edn) vol 42 para 646 et seq

647 Whether property included

An assignment by an intended wife of her future property, followed by a covenant by the intended husband to settle the after-acquired property of the wife, will not extend to property given to the wife in terms which are inconsistent with the trusts of the settlement. Therefore, where an intended wife, by an ante-nuptial settlement, assigned all the personal estate to which she might at any time thereafter become entitled in any way howsoever upon the trusts of the settlement; and the deed contained a covenant by the intended husband to settle any real or personal estate whatsoever that should descend to, devolve upon, or vest in the wife; and where a legacy was, after the marriage, bequeathed to the wife, with a direction to the executors to pay such part of the legacy to the wife as she might require for her separate use independent of her husband, and to be free in all respects from his debts and engagements: *Held* the settlement had no operation upon such part of the legacy as was required by the wife to be paid to her upon her separate receipt.

Re Mainwaring's Settlement (1866) LR 2 Eq 487; 14 WR 887

ANNOTATIONS **NF** Re Allnut, Pott v Brassey (1882) 22 Ch D 275 **Expld** Scholfield v Spooner (1884) 26 Ch D 94

648 Whether property included
Scholfield v Spooner no 741 post

649 Whether property included
By an ante-nuptial indenture of settlement made in 1898, the husband covenanted to settle all property to which during the continuance of the marriage he should become entitled not exceeding in the aggregate £1,000, upon trusts under which the wife and husband were entitled to successive life interests with remainder over in favour of the children of the marriage.

Under the trusts of the will, made in 1920, of his father who died in 1926, the husband became entitled during his life to receive the income of certain property, until any event should happen in consequence of which he would cease to be so entitled; and after the determination of the trusts in his favour, there was a gift over of that property. The will contained an expression of testator's intention that the benefits accruing to the husband under his will were not to be affected by his covenant to settle after-acquired property: *Held* the equitable assignment of the husband's life interest under his father's will at the moment of testator's death would have constituted an event within the meaning of the will, if the covenant applied to it; but, as the effect of the covenant would thus be to destroy that interest at the moment of its creation, the husband's covenant had no application to it; with the result that his life interest was not forfeited, but continued to subsist under the trusts of his father's will.
Re Smith, Franklin v Smith [1928] 1 Ch 10; 97 LJ Ch 1; 138 LT 81; 71 Sol Jo 744

B Accumulations of income and property purchased therewith

LAW See Halsbury's Laws (4th edn) vol 42 para 646 et seq

650 Income laid up as capital
Effect of a contract on marriage by bond to devise, convey or assure, all such goods, personal estate and effects, that the husband should at any time during the joint lives of him and his wife be possessed of, to the use of them and the survivor; attaching on capital; not income, unless laid up as capital; admitting therefore expenditure, and debts, in a fair application of income, not liable to a minute account. On that principle an estate purchased by the husband with money, partly his own, partly borrowed on his personal security, and some paid off by him, was after his death held to belong not to the trust, but to the heir, charged for the benefit of the trust with the money, that was his own, the debts paid on account of that purchase, and expenditure in repairs, improvements, etc.
Lewis v Madocks (1810) 17 Ves 48; 34 ER 19, LC; previous proceedings (1803) 8 Ves 150, LC

ANNOTATIONS **Consd** St Aubyn v Humphreys (1856) 22 Beav 175; Williams v Thomas (1862) 2 Drew&Sim 29 **Expld** Re Clint, Ex p Bolland (1873) LR 17 Eq 115 **Consd** Re Bendy, Wallis v Bendy [1895] 1 Ch 109; Churston v Buller (1897) 77 LT 45 **Expld** Finlay v Darling [1897] 1 Ch 719 **Consd** Re Dowding's Settlmt Trusts, Gregory v Dowding [1904] 1 Ch 441 **Apld** Re Reis, Ex p Clough [1904] 2 KB 769 **Distd** Re Clutterbuck's Settlmt, Bloxam v Clutterbuck [1905] 1 Ch 200 **Expld** Mackenzie v Allardes [1905] AC 285

651 Income laid up as capital — Income not originally included in covenant
If income not originally included in a covenant in a marriage settlement to settle other and after-acquired property is so invested as to indicate a permanent intention on the part of the owner to turn it into capital, such investment becomes subject to the covenant, provided the terms are sufficiently large to include it as capital. The same result follows in the case of a sale of capital property not originally included in the covenant, where the proceeds are laid out in the purchase of other property coming within the terms of the covenant.

A wife during coverture purchased property partly out of the proceeds of property subject to a covenant to settle, partly out of accumulations of her income under the settlement, and partly out of a loan subsequently repaid by herself and her husband: *Held* the property so purchased belonged to her absolutely, but subject to a charge in favour of the settlement trustees for the amount (*a*) of the income accumulations, (*b*) of her contribution towards repaying the loan.
Re Bendy, Wallis v Bendy [1895] 1 Ch 109; 64 LJ Ch 170; 71 LT 750; 43 WR 345; 13 R 95

ANNOTATIONS **NF** Finlay v Darling [1897] 1 Ch 719 **Consd** Re Dowding's Settlmt Trusts, Gregory v Dowding [1904] 1 Ch 441 **NF** Re Clutterbuck's Settlmt, Bloxam v Clutterbuck [1905] 1 Ch 200 **Dbtd** Mackenzie v Allardes [1905] AC 285

652 Income laid up as capital — Income not originally included in covenant
If income not originally included in a covenant in a marriage settlement to settle other and after-acquired property is invested by the wife during the coverture, the investments so made do not become subject to the covenant.
Finlay v Darling [1897] 1 Ch 719; 66 LJ Ch 348; 76 LT 461; 45 WR 445; 41 Sol Jo 405

ANNOTATIONS **Consd** Re Dowding's Settlmt Trusts, Gregory v Dowding [1904] 1 Ch 441 **Folld** Re

Clutterbuck's Settlmt, Bloxam v Clutterbuck [1905] 1 Ch 200 **Apprvd** Mackenzie v Allardes [1905] AC 285

653 "Savings out of income" — Expressly included in settlement — Portion of annuity unpaid on death of annuitant

By an ante-nuptial settlement an annuity was assigned to trustees in trust for the lady for her sole and separate use for her life, with a provision that all savings arising from her income should be held by the trustees subject to her appointment, and in default of appointment in trust for her next of kin. The lady died in May 1847, without having made any appointment, and the last payment to her, in respect of the annuity, had been made in the December preceding her death: *Held* the portion of the annuity remaining in the hands of the trustees between the last payment to and the death of the lady constituted "savings out of income" within the meaning of the settlement, and her administrator was not entitled to it as against the next of kin.

Re Rosenthall's Settlement (1857) 6 WR 139

654 Property purchased with savings — From separate estate of wife

By a marriage settlement, dated in 1838, real estate was conveyed to such uses as MBN, the intended wife, should by deed or will appoint, and in default of appointment to certain uses for the benefit of the children of the marriage, with an ultimate remainder to the use of MBN in fee, and it was provided that all property which during the coverture should come to or vest in the husband in right of said MBN, or in the said MBN by descent, devise, limitation, gift, or otherwise, should be settled to the same uses, trusts and intents, etc, as were thereinbefore expressed concerning the hereditaments thereby granted and released. MBN by her will, made shortly after the settlement, devised and bequeathed all the residue of her property, except such real and personal estate as might remain subject to the trusts of her marriage settlement by reason of no specific disposition thereof having been made by her under the power for that purpose therein contained, and of which that general devise and bequest was not to be taken as in execution, for the benefit of her children. If no children then over. In 1854 MBN purchased real estate out of the savings of her separate property, and it was conveyed to the same uses and trusts as those declared by the settlement of 1838, omitting only the uses in favour of children: *Held* (1) the exception in the will referred only to the property subject to the trusts of the marriage settlement at the date of the will and the real estate subsequently purchased by MBN passed under her will; (2) a covenant to settle after-acquired property would not affect property purchased by a married woman out of the savings of her separate estate.

Hughes v Jones (1863) 1 Hem&M 765; 2 New Rep 417; 32 LJ Ch 487; 9 LT 143; 11 WR 898; 71 ER 335

655 Property purchased with savings — From income of settled property

Re Bendy, Wallis v Bendy no 651 ante

656 Property purchased with savings — From income of settled property

Property purchased with the savings of a wife's income under settled property is not within a covenant by her in her marriage settlement to settle property to which she may thereafter became entitled.

Re Clutterbuck's Settlement, Bloxam v Clutterbuck [1905] 1 Ch 200; 73 LJ Ch 698; 53 WR 10; 48 Sol Jo 621

657 Property purchased with savings — From income of settled property — Effect of change of investment

By ante-nuptial marriage contract executed in 1848 the wife bound herself to convey to trustees the whole funds and estate real and personal which she might hereafter "conquest and acquire by purchase succession or otherwise." The trustees were directed to pay the income of the trust estate to the wife during her life for her own separate benefit and use exclusive of the *jus mariti*, and by a clause in the contract the provisions in favour of children were to bar any claim they might make under the head of *legitim*: *Held* (1) the clause of conquest did not extend to estate which at the dissolution of the marriage by the death of the husband consisted of or was purchased with accumulations of the wife's separate income; (2) the only child of the marriage was not entitled to *legitim* out of his mother's estate.

There are some considerations which it is as well to bear in mind as aids to the construction of such clauses. These considerations may, of course, be excluded either designedly or accidentally by the language used, but unless they are so excluded they are, I think, of general, if not universal, application. One is that change of investment—mere alteration in the outward form of property—is not "acquisition" within the meaning of a provision of this sort. Another is that property which has reached its destination through the medium of the trust, or property which, in accordance with the declarations of the parties to the contract, comes to be at the absolute disposal of one of those parties, does not again fall under the operation of the trust unless there is a clear direction to that effect (*Lord Macnaghten*).

Mackenzie v Allardes [1905] AC 285, HL

ANNOTATION **Consd** Re Rogers' Settlement, Arnott v Rogers [1951] Ch 450

658 Property purchased with proceeds of sale — Of capital not originally included in covenant

Re Bendy, Wallis v Bendy no 651 ante

C Estates tail

LAW See Halsbury's Laws (4th edn) vol 42 para 646 et seq

659 General rule — Not included

A marriage settlement contained an agreement and declaration by the parties that, if the wife then was, or if, during the coverture, she, or her husband in her right, should become seised or possessed of or entitled to any real or personal property, of a specified value, for any estate or interest whatsoever, in possession, reversion, remainder, or expectancy, then and in every such case, the husband and wife, and all necessary parties, should, as soon as circumstances would admit, convey, assign, and assure the real and personal property to, or otherwise cause same to be vested in the trustees of the settlement, upon the trusts thereof: *Held* an estate tail in possession to which the wife became entitled during the coverture was not bound by this agreement, and she could not be compelled either to execute a disentailing deed, and to convey the estate in fee thus acquired by her to the trustees, or to execute a conveyance of the property to the trustees, so that they could by enrolling the deed acquire an estate in fee simple.

Hilbers v Parkinson (1883) 25 Ch D 200; 53 LJ Ch 194; 49 LT 502; 32 WR 315

ANNOTATIONS **Distd** Re Anstis, Chetwynd v Morgan, Morgan v Chetwynd (1886) 31 Ch D 596 **Apprvd** Re Dunsany's Settlmt, Nott v Dunsany [1906] 1 Ch 578

660 General rule — Not included

By a marriage settlement the husband and wife covenanted that if during the coverture the wife, or the husband in her right, should not at one and the same time and from the same source become seised or possessed of or entitled to any real or personal property, except as therein mentioned, for any estate or interest in possession, remainder, or expectancy, then and in every such case he and she would convey, assign, settle, and assure the real and personal estate unto or otherwise cause same to be vested in the trustees of the settlement upon the trusts thereof. The wife during the coverture became entitled in possession as tenant in tail to certain estates: *Held* the covenant was not applicable to an estate tail.

Re Dunsany's Settlement, Nott v Dunsany [1906] 1 Ch 578; 75 LJ Ch 356; 94 LT 361; 50 Sol Jo 324, CA

ANNOTATION **Apld** Re Pearse's Settlmt, Pearse v Pearse [1909] 1 Ch 304

661 Contingent reversionary estate tail

(1) In a marriage settlement was contained a covenant by husband and wife that all the estate, property, and effects exceeding a certain value, which the husband and wife, or either of them in her right were or was then, or should at any time during the intended coverture, become seised or possessed of, or entitled to as therein mentioned, should be settled upon the trusts of that settlement. The wife was at the time entitled to a contingent reversionary estate tail, which remained contingent during the coverture: *Held* this was not subject to the covenant to settle.

(2) *Quaere*: whether under the covenant the wife could have been compelled to execute a disentailing deed, if during the coverture she had acquired an indefeasibly vested estate tail.

Dering v Kynaston (1868) LR 6 Eq 210; 18 LT 346; 16 WR 819

ANNOTATIONS As to (1) **NF** Agar v George (1876) 2 Ch D 706 **Distd** Commell v Keith (1876) 3 Ch D 767 **Expld** Re Jackson's Will (1879) 13 Ch D 189. As to (2) **Consd** Bankes v Small (1887) 36 Ch D 716

662 Indefeasibly vested estate tail

Dering v Kynaston no 661 ante

D Gifts from husband to wife

LAW See Halsbury's Laws (4th edn) vol 42 paras 646 et seq, 653

CROSS REFERENCE See no 756 et seq post (gifts under will of husband)

663 Whether included

An assignment by the intended wife in a marriage settlement of her property and fortune, both present and expectant or future, held not to comprise a sum of money of which the husband made a present to the wife long afterwards.

Coles v Coles [1901] 1 Ch 711; 70 LJ Ch 324; 84 LT 142

ANNOTATION **Distd** Re Ellis's Settlmt, Ellis v Ellis [1909] 1 Ch 618

664 Whether included

There is no general rule of construction of covenants, in marriage settlements, to settle after-acquired property of the wife that a gift from the husband to the wife during coverture is to be excluded from the covenant.

A marriage settlement made in 1882 contained several covenants by the husband and wife to settle "all the real and personal estate whatsoever and wheresoever, if any, to which the wife or the husband in her right should upon the solemnisation of the

intended marriage, or at any time afterwards during the intended coverture, be or become absolutely entitled for any estate or interest whatsoever in possession or reversion." In 1908 the husband transferred into his wife's name, as an absolute gift, stocks and shares of the value of £50,000: *Held* they were bound by the covenant.
Re Ellis's Settlement, Ellis v Ellis [1909] 1 Ch 618; 78 LJ Ch 375; 100 LT 511; 26 TLR 166

ANNOTATIONS **Follld** Re Plumptre's Marriage Settlmt, Underhill v Plumptre [1910] 1 Ch 609; Re Pryce, Nevill v Pryce [1917] 1 Ch 234

665 Whether included
By a marriage settlement made in 1878 certain funds coming from the wife's father were settled upon the usual trusts of a wife's fund, with an ultimate trust, in the events which happened, for the wife's statutory next of kin; and it was also agreed that all real and personal property to which the wife was entitled at the date of the marriage, or to which she, or her husband in her right, at any time during the coverture, should be or become entitled, whether in possession, reversion, or otherwise, should be assured and transferred by the husband and wife respectively to the trustees to be held upon the trusts of the settlement.

In August 1884, a sum of £1,018 15*s* was invested by the husband in the purchase of certain stock in the name of the wife. This was subsequently sold by the wife and reinvested in the purchase of £1,215 Grand Trunk Railway of Canada 4 per cent debenture stock, which remainded registered in her name down to the date of her death, intestate and without leaving any issue, on 2 February 1909. The stock was now standing in the name of the husband, to whom letters of administration to his wife's estate had been granted: *Held* (1) the stock in question, which was a gift by the husband to the wife, was caught by the agreement to settle the wife's after-acquired property; (2) the next of kin of the wife being volunteers and strangers to the marriage consideration, could not enforce the contract to settle as against the administrator of the wife, and that therefore the trustees were not bound to take any steps to obtain a transfer of the stock.
Re Plumptre's Marriage Settlement, Underhill v Plumptre [1910] 1 Ch 609; 79 LJ Ch 340; 102 LT 315; 26 TLR 321; 54 Sol Jo 326

ANNOTATIONS As to (1) **Follld** Re Pryce, Nevill v Pryce [1917] 1 Ch 234. As to (2) **Consd** Pullan v Koe [1913] 1 Ch 9; Cannon v Hartley [1949] Ch 213

Scottish, Irish and Commonwealth Cases

666 Whether included
Ferguson v Benyon (1886) 17 LR Ir 212 (IR)

667 Whether included
Kingan v Matier [1905] 1 IR 272 (IR)

668 Whether included
There is no general rule that a covenant in a marriage settlement to settle after-acquired property cannot capture gifts from the husband to the wife.
Leigh-White v Ruttledge [1914] 1 IR 135 (IR)

E Interests existing at date of covenant

a In general

LAW See Halsbury's Laws (4th edn) vol 42 para 648

CROSS REFERENCE See no 840 et seq post (property expressly excepted)

669 Not included
(1) A bond, conditioned to settle lands, "if the obligor shall become seised" will not affect lands of which he is seised at the date of the bond.

(2) Bond entered into by one on his marriage, to trustees conditioned to be void, if his intended wife should survive him, and if his heirs, etc, should pay to the obligees for her benefit £1,000; and also if the obligor should survive his intended wife, and there should be children of her by him living at his death and his heirs, etc, should pay to the obligees £1,000 in trust for the children; "and further, if the obligor should at any time during his natural life become seised of any messuages, etc, in possession and should settle the same upon his intended wife, and the issue of the marriage by such good conveyances in the law as counsel should advise in such parts and proportions and to such use and uses as should be thought requisite, the better to make a provision for her in case she should survive the obligor." The obligor survived his wife, had several children by her, but did not during that coverture acquire any land in possession; after her death he married a second wife, acquired lands in possession and died without making any settlement of such lands: *Held* the words of the condition were not confined to such lands as he should acquire during the continuance of the first marriage, but a settlement was decreed on the children of the first marriage as tenants in common in fee of the lands the obligor had acquired after the death of his first wife.
Prebble v Boghurst (1818) 1 Swan 390; 1 Wils Ch 161; 36 ER 402, LC

670 Not included — Collateral agreement
By a settlement made on the marriage of a widow, all the property to which she was then known to be entitled was settled specifically in the usual way. The

settlement did not, however, contain a covenant for the settlement of after-acquired property.

By an agreement of even date, made between the intended husband and wife, after reciting that by the settlement "certain moneys, shares and other property" belonging to the intended wife had been settled, and that "it has been agreed that any property that the intended wife may be entitled to, other than that included in the settlement should be settled" it was agreed that in case the intended wife "shall be entitled to any property, other than that contained in the said settlement, the same shall be settled" upon similar trusts.

Some years after the marriage the husband became bankrupt, and a little later the wife became entitled to about £8,000 under an intestacy: *Held* the collateral agreement was intended, and must be deemed to apply not to any other property to which she was entitled at the date of the agreement, and which was not included in the settlement, but to any property to which she might afterwards become entitled and the £8,000 was therefore declared to be subject to the trusts of the settlement.

Re Blockley, Blockley v Blockley (1884) 49 LT 805; 32 WR 385

671 Property not mentioned in settlement

Testator made two wills, one of his English, the other of his American, property. Neither of the wills referred to the other. His daughter, who was entitled to personal property under both wills, executed, previously to her marriage, a settlement of various descriptions of personal property, including specifically her property under the English will, but not mentioning or referring to her property under the American will. The settlement contained a clause providing that such further personal estate, if any, as should during her life become vested in or accrue to or be assignable by her and her husband, should be assigned upon the trusts of the settlement: *Held* this clause did not affect her American property.

Hoare v Hornby (1843) 2 Y&C Ch Cas 121; 12 LJ Ch 151; 7 Jur 434; 63 ER 53

ANNOTATIONS **Consd** Otter v Melvill (1848) 2 De G&Sm 257 **Distd** Re London Dock Co, Ex p Blake (1853) 16 Beav 463 **Apld** Wilton v Colvin (1856) 3 Drew 617 **Consd** Archer v Kelly (1860) 1 Drew&Sm 300; Williams v Mercier (1884) 10 App Cas 1

672 Property not mentioned in settlement

A covenant in an ante-nuptial settlement, that all the personal estate "to which the wife shall become entitled" should be subject to the trusts of the settlement: *Held* not to extend to property to which, without the knowledge of the intended husband or the trustees, she was then absolutely and immediately entitled.

Otter v Melvill (1848) 2 De G&Sm 257; 17 LJ Ch 345; 11 LTOS 307; 12 Jur 845; 64 ER 115

ANNOTATIONS **Consd** Re London Dock Co, Ex p Blake (1853) 16 Beav 463 **Apld** Wilton v Colvin (1856) 3 Drew 617

673 Property not mentioned in settlement

In a settlement made before marriage there was an agreement to settle upon certain trusts all real and personal property to which the wife or the husband "in her right at any time during her now intended coverture shall become entitled, except jewels and" certain other articles "which it is hereby declared shall belong to" the wife "for her separate use." The trusts included a power of sale, the moneys arising from the sale to be held upon the trusts agreed and declared concerning such part of the personal estate of or to which the wife "now is or she or" the husband "in her right shall become possessed or entitled as aforesaid": *Held* on the true construction of the agreement, read in conjunction with the context, it included property to which the wife was entitled before marriage; and therefore jewels given to the wife before marriage were within the exception and belonged to the wife for her separate use.

Williams v Mercier (1884) 10 App Cas 1; 54 LJQB 8; 52 LT 662; 49 JP 484; 33 WR 373, HL

ANNOTATION **Expld** Re Garnett, Robinson v Gandy (1886) 33 Ch D 300

674 Property not mentioned in settlement

Where a lady, at the date of her marriage, was entitled to a contingent interest in remainder in real estate and was also entitled in possession to two sums of stock, and in the settlement executed on her marriage no mention was made of her interest either in the real estate or in the stock, but the settlement contained a covenant to settle upon the trusts declared by the settlement any real or personal property to which the husband and wife, or either or them in right of the wife, should, "by gift, descent, succession or otherwise howsoever, become entitled" during the coverture; and the wife's contingent interest in remainder on the real estate fell into possession during the coverture: *Held* the words "become entitled" imported a change of condition in the property, and the parties contemplated the wife's becoming entitled during the coverture, and did not intend to include property to which she was entitled at the time of the coverture; and, therefore, the wife's interest in the real estate having changed during the coverture, it fell within the covenant; but the wife having been absolutely entitled to the two sums of stock at the date of the marriage, and there having been no subsequent

change in her interest, those sums of stock did not come within the terms of the covenant.

Archer v Kelly (1860) 1 Drew&Sm 300; 29 LJ Ch 911; 2 LT 796; 6 Jur NS 814; 8 WR 684; 62 ER 394

ANNOTATIONS **Consd** Re Worsley's Trusts (1867) 16 LT 826 **Folld** Re Browne's Will (1868) LR 7 Eq 231 **Apld** Re Clinton's Trust, Holloway's Fund, The Same, Weare's Fund (1871) LR 13 Eq 295; Lane v Oakes (1874) 30 LT 726 **Expld** Re Michell's Trusts (1878) 9 Ch D 5 **Apld** Re Garnett, Robinson v Gandy (1885) 31 Ch D 648 **Folld** Re Williams' Settlmt, Williams v Williams [1911] 1 Ch 441; Re Peel's Settlmt, Millard v Peel [1964] 3 All ER 567

675 Property not mentioned in settlement — Covenant by husband to settle property acquired in right of wife

On the marriage of a lady, who was possessed of funded property and shares in water works, the funded property alone was settled; the settlement, however, contained a recital of an intention, that all property which the wife or her husband, in her rights, should after the marriage become entitled to, should be settled on similar trusts and a covenant by the husband and by the wife, that all property which she or her husband, in her right, should after the settlement become entitled to should be settled: *Held* the shares were subject to the trusts of the settlement.

James v Durant (1839) 2 Beav 177; 48 ER 1147; sub nom

James v James (1839) 9 LJ Ch 85

ANNOTATIONS **Distd** Otter v Melvill (1848) 2 De G&Sm 257 **Consd** Re London Dock Co, Ex p Blake (1853) 16 Beav 463 **Distd** Wilton v Colvin (1856) 3 Drew 617 **Apld** Re Hughes' Trusts (1863) 4 Giff 432 **NF** Re Clinton's Trust, Holloway's Fund, The Same, Weare's Fund (1871) LR 13 Eq 295

676 Property not mentioned in settlement — Tontine debenture

Though the tontine existed at the date of the settlement, and these four debentures were then existing, they are not mentioned in, or assigned by, the settlement; and I am of opinion that they are not comprised within the terms of the covenant. It is clear that the covenant points to after-acquired property; that is, property which the lady, or her husband in her right, should afterwards become possessed of or entitled to. The lady was at that time, both possessed of and entitled to this property. The fact that from the nature of the property and the accident of the long life of the *cestui que vie*, it became more valuable year by year, does not, in my opinion, affect the question any more than if she had been possessed of a mine at the time of the settlement which subsequently became of very great value (*Romilly MR*).

Re Browne's Will (1869) LR 7 Eq 231; 38 LJ Ch 316

677 Stock-in-trade and effects — Covenant to settle first capital moneys

By an ante-nuptial settlement, a trader covenanted with the trustees of it to pay them £3,000 out of the first capital moneys or real or capital personal estate, or capitalised income, of or to which he should be or become possessed or in anywise entitled after the solemnisation of the marriage within six months after he should "have become" so possessed or entitled. The trader was at the time possessed of stock-in-trade and effects exceeding in value £3,000, and so continued for more than six months after the date of the settlement, but did not after the marriage acquire additional property to that amount. He became bankrupt after the expiration of the six months: *Held* the event contemplated by the covenant had happened before the bankruptcy, and there was a breach of the covenant entitling the trustees to prove.

Re Wass, Ex p Evans (1852) 2 De GM&G 948; 22 LJ Bcy 5; 20 LTOS 149; 1 WR 69; 42 ER 1143, LJJ

678 Vested interest not in possession — Leaseholds

By a marriage settlement the husband covenanted to settle all the estates, etc, of or to which the wife should at any time become seised, possessed or entitled. She had at the time of the marriage a vested estate in a moiety of a leasehold house; and a vested interest in certain moneys, the amount of which was not ascertained and distributed till some years after: *Held* the settlement contemplated future acquired title; these were present titles, and not included in the covenant to settle.

Wilton v Colvin (1856) 3 Drew 617; 25 LJ Ch 850; 27 LTOS 289; 2 Jur NS 867; 4 WR 759; 61 ER 1039

ANNOTATIONS **Expld** Archer v Kelly (1860) 1 Drew&Sm 300 **Apld** Re Browne's Will (1868) LR 7 Eq 231; Churchill v Denny (1875) LR 20 Eq 534

679 Vested interest not in possession — Money

Wilton v Colvin no 678 ante

680 Vested interest not in possession — Money — Share of estate — Subsequent distribution

By a settlement made in June 1842, property of the wife was settled, and the husband covenanted that if, during the coverture, any real or personal estate should "descend or devolve to or vest" in his wife, or in him in her right, he would settle it. In August 1842, a sum, part of the distributive share of the wife in the estate of her father, who died in 1821, and which had been overlooked, was recovered and paid to the trustees of the settlement, and the husband received the income for twelve years: *Held* it was not within the covenant to settle, and the husband had

not so acquiesced as to make it subject to the trusts of the settlement.

Churchill v Shepherd (1863) 33 Beav 107; 55 ER 307

681 Vested interest not in possession — Money — Share of estate — Release set aside by court

By marriage settlement in 1859, which recited that the wife was absolutely entitled, amongst other property, to £10,000, part of her share of the residue of A's estate in the hands of the executors of his will, and secured by a mortgage, and that it had been agreed that the intended husband and wife should enter into covenants for the settlement of the future real and personal estate of the intended wife, this £10,000 was settled, and the husband and wife, in pursuance of the recited agreement, covenanted with the trustee for the settlement of all the estate property and effects, exceeding £300 at one time, which the husband and wife, or either of them in her right, should at any time or times subsequent to the marriage and during the coverture become seised or possessed of or entitled to at law or in equity by any means whatsoever. The day before the settlement the intended wife, then *sui juris*, had, in consideration of the payment of £10,500, executed to the executors of A's will a general release of all her claims as residuary legatee. The release was executed by the intended wife without independent advice, and in ignorance that her share of residue was worth considerably more than £10,500. On 10 February 1885, while the coverture was still subsisting, an order setting aside the release was made by the Court of Appeal: *Held* the covenant to settle after-acquired property did not apply to any existing property to which the wife was entitled at the moment of marriage other than the £10,000; but the setting aside the release of 1859 did not confer any new title, but merely removed a bar to the assertion of a pre-existing title, and accordingly the additional residuary property could not be treated as first acquired when the release was set aside, so as to be bound by the covenant.

Re Garnett, Robinson v Gandy (1886) 33 Ch D 300; 55 LJ Ch 773; 55 LT 562, CA

682 Vested interest not in possession

By a marriage settlement dated 14 April 1937, the wife settled certain securities, her absolute property, and covenanted with the trustees "that there shall be duly vested in the trustees . . . all real and personal property exceeding in value from the same source £200 to which the wife may afterwards during the marriage become entitled in possession or reversion or have any power of beneficial disposition over except by will . . .": *Held* property in which the wife was entitled to a vested interest in reversion at the date of the marriage was not, on its falling into possession during the marriage, caught by the covenant, but property in which, at the date of her marriage, she had an interest in default of appointment, and in which during her marriage she took an interest by virtue of the exercise in her favour of power of appointment, was caught by the covenant.

Re Maltby Marriage Settlement, Aylen v Gaud [1953] 2 All ER 220; 97 Sol Jo 421

ANNOTATION **Consd** Re Peel's Settlmt, Millard v Peel [1964] 3 All ER 567

683 Vested interest not in possession

In her marriage settlement in 1946 a wife covenanted with the trustees that "all real and personal property to which the wife may after the marriage become entitled in possession or reversion shall at the cost of the wife's fund be assured to or otherwise vested in the trustees". At all material times, *viz*, before and after the marriage, the wife was entitled to three interests, *viz* a vested but defeasible interest (the M settlement interests), an interest which was indefeasibly vested (the T settlement interests) and a contingent interest (the T will interest) subject in each case to a life interest of M or T who were the wife's mother and the mother's sister. The question arose whether these three interests were caught by the covenant. In 1951 by family arrangement with the approval of the court the trusts of another settled share were terminated and the funds were split up among beneficiaries, the wife's share being paid to the trustees of the settlement: *Held* (1) the words "may after the marriage become entitled" in the covenant were words of futurity, so that the covenant was not intended to catch any property to which the wife was already entitled at the date of the marriage in possession or any interest which she then had in any property to which she was then entitled in the future; accordingly the covenant did not operate immediately in respect of any of the three interests; (2) on the true construction of the words "may after the marriage become entitled in possession or reversion" the test was the date at which the wife first became entitled to the interest in question, not the date, eg, at which the interest fructified in possession; accordingly neither the M settlement interests nor the T settlement interests were caught by the covenant or would be caught when they fell into possession; (3) if the wife's title to the subject-matter of the T will interest became vested while the covenant was still effective, that interest would be caught by the covenant; the covenant would continue in force while the marriage subsisted, but it was doubtful whether the covenant would be effective thereafter.

Per curiam: what the wife received under the family arrangements of 1951 sanctioned by the court was something new, not the fruition of any right of hers under the relevant trusts, and accordingly what she so received was caught by the covenant.
Re Peel's Settlmt, Millard v Peel [1964] 3 All ER 567; [1964] 1 WLR 1232; 108 Sol Jo 858

684 Interest in default of appointment
Re Maltby Marriage Settlement, Aylen v Gaud no 682 ante

685 Interest as appointee
Re Maltby Marriage Settlement, Aylen v Gaud no 682 ante

Scottish, Irish and Commonwealth Cases

686 Property not mentioned in settlement
Stack v Royse (1861) 12 I Ch R 246; 14 Ir Jur 114; affd (1862) 13 I Ch R 213; 15 Ir Jur 249 (IR)

687 Property not mentioned in settlement — Loan from wife to husband
By an ante-nuptial settlement, the intended husband and wife covenanted with the trustees thereof that all personal estate, save certain excepted particulars, to which the wife or the husband in her right should become entitled during the coverture should be vested in the trustees upon the trusts of the settlement. A sum of money not mentioned in the settlement was handed by the wife to the husband before the marriage took place, and the evidence, in the opinion of the court, established that the transaction was simply a loan: *Held* the sum of money was caught by the settlement and was subject to the trusts thereof.
Hamilton v James (1877) 11 IR Eq 223 (IR)

688 Vested interest not in possession — Money — Share of estate
Re Atkinson's Trusts, Ex p Fitzroy [1895] 1 IR 230 (IR)

689 Vested interest not in possession — Legacies
Macken v Hogan (1862) 14 I Ch 285 (IR)

b Interests in remainder or reversion

i Indefeasible interests

LAW See Halsbury's Laws (4th edn) vol 42 para 650

690 Interest falling into possession during coverture
By a marriage settlement £1,500 and £2,700 stock, of which the lady was possessed, were settled in trust for her separate use for life, remainder in trust for her intended husband for life, and after his death as the wife should appoint by will; and the intended husband covenanted that, if the marriage should take effect, he would, as often as occasion should require, join with his wife in doing all necessary acts for assigning in the trustees all the property to which his wife should become entitled during the coverture upon the trusts declared of the £1,500 and £2,700 stock. At the date of the settlement the wife had an absolute vested interest in £1,935 stock expectant on her father's death, but it was not mentioned in the settlement. During the marriage the husband became bankrupt, and then the wife's father died: *Held* the £1,935 stock did not belong to the husband's assignee as part of his estate, but was bound by his covenant as being property to which the wife would become entitled during the coverture.
Blythe v Granville (1842) 13 Sim 190; 12 LJ Ch 82; 6 Jur 961; 60 ER 74

ANNOTATIONS **Apld** Re London Dock Co, Ex p Blake (1853) 16 Beav 463 **NF** Wilton v Colvin (1856) 3 Drew 617 **Consd** Maclurcan v Lane, Melhuish v Maclurcan (1858) 5 Jur NS 36; Archer v Kelly (1860) 1 Drew&Sm 300 **Apld** Re Hill (1863) 11 WR 930; Re Clinton's Trust, Holloway's Fund, The Same, Weare's Fund (1871) LR 13 Eq 295 **Consd** Re Bland's Settlmt, Bland v Perkin [1905] 1 Ch 4; Re Peel's Settlmt, Millard v Peel [1964] 3 All ER 567

691 Interest falling into possession during coverture — "Descend, come to or vest in" — Proceeds of compulsory purchase
A covenant in a marriage settlement, that in case, at any time "thereafter" during the coverture, any real or personal estate should "descend, come to or vest in" the wife, who was then an infant, it should be settled, held to include the proceeds of real estate taken by a public company, to which the wife at the execution of the settlement, was entitled in remainder.
Re London Dock Co, Ex p Blake (1853) 16 Beav 463; 21 LTOS 16; 51 ER 857

ANNOTATIONS **Consd** Field v Moore (1855) 7 De GM&G 691 **Distd** Wilton v Colvin (1856) 3 Drew 617 **Apld** Spring v Pride (1864) 12 WR 510

692 Interest falling into possession during coverture
A covenant contained in A's marriage settlement, to settle any real or personal estate which, "during A's life may be given or devised, descend or devolve, be bequeathed or come to A or her husband in her right," includes a reversionary interest to which A, at the date of the marriage, was entitled, expectant on her mother's decease.
Spring v Pride (1864) 4 De GJ&Sm 395; 10 LT 473; 10 Jur NS 646; 12 WR 892; 46 ER 971, LJJ

ANNOTATION **Apld** Re Clinton's Trust, Holloway's Fund, The Same, Weare's Fund (1871) LR 13 Eq 295

693 Interest falling into possession during coverture — "Become entitled"
Re Clinton's Trust, Holloway's Fund, The Same, Weare's Fund no 855 post

694 Interest falling into possession during coverture — "Become entitled" — Wife or husband in her right

A widow entitled to a life interest in a fund, and also to a moiety of the capital, subject to her own life interest, married again. By the settlement on the second marriage her life interest was settled, and she and her intended husband covenanted to settle property to which she or he in her right should, during the coverture, become entitled: *Held* the words of futurity were satisfied in respect of the husband's interest, and the moiety of the fund was subject to the covenant.

Re Viant's Settlement Trusts (1874) LR 18 Eq 436; 43 LJ Ch 832; 30 LT 544; 22 WR 686

ANNOTATIONS **NF** Re Jones Settlmt (1876) 2 Ch D 362 **Consd** Re Michell's Trusts (1877) 6 Ch D 618

695 Interest falling into possession during coverture — "Become entitled" — Wife or husband in her right

By marriage settlement executed by husband and wife in 1896, after a recital that provision should be made for the settlement of the future acquired property of the wife, it was agreed that if the wife during the coverture or the husband in her right should become by any means, except purchase for valuable consideration, seised, possessed, or entitled of or to any real or personal property or any estate or interest whatsoever in possession, reversion, remainder, or expectancy, except certain property which did not include the property in question, such property should be assured by the wife and all other necessary parties to the trustees upon trust that they should, but as to reversionary property not until it fell into possession unless it should appear to the trustees that an earlier title would be beneficial, sell and convert the same and should hold the proceeds upon trusts therein declared in favour of the wife and husband and their children. At the date of the marriage the wife was entitled in reversion under her parents' marriage settlement to certain policy moneys and the proceeds of sale of certain furniture, subject to the life interests of her parents therein. By the deaths of her parents during her coverture the wife became entitled in possession to the property to which at the date of her marriage she was so entitled in reversion: *Held* (1) upon the assumption that the property was the property of the wife and therefore capable of being bound by her covenant, that upon the true construction of the settlement, notwithstanding that at the date of her marriage she was entitled to the property in reversion, yet, as she became entitled thereto in possession during the coverture, the property was, within the meaning of the covenant, property to which during the coverture the wife might become entitled in possession, and was therefore caught by the settlement; (2) if the property were not bound by the covenant of the wife, then, as the effect of Married Women's Property Act 1882 (c 75) s 19 is to render Married Women's Property Act 1882 (c 75) s 2 (repealed), as if it were non-existent in the case of a settlement which would have bound the property but for that Act, the property on falling into possession belonged to the husband in right of his wife and he became bound by his covenant to settle the same.

Re Crook's Settlement, Re Glasier's Settlement, Crook v Preston [1923] 2 Ch 339; 92 LJ Ch 495; 129 LT 284

ANNOTATIONS As to (1) **Consd** Re Maltby Marriage Settlement, Aylen v Gaud [1953] 2 All ER 220. Generally **Consd** Re Peel's Settlmt, Millard v Peel [1964] 3 All ER 567

696 Interest falling into possession during coverture — "Become entitled"

By a marriage settlement made since the coming into operation of the Married Women's Property Act 1882 (c 75) it was agreed and declared that all property to which the wife during her then intended coverture should "become entitled" should be vested in the trustees of the settlement upon trust for sale and conversion subject to a proviso forbidding the trustees to sell any property of a reversionary nature during the lives of the husband and wife without their consent: *Held* property to which the wife was entitled in reversion at the date of the marriage would not, in the event of its falling into possession during the coverture, be included in the covenant.

Re Bland's Settlement, Bland v Perkin [1905] 1 Ch 4; 74 LJ Ch 28; 91 LT 681

ANNOTATIONS **Distd** Re Brook, Brook v Hirst (1914) 111 LT 36 **Folld** Re Capel's Trusts, Arbuthnot v Galloway [1914] WN 378 **Consd** Re Cazenove, Perkin v Bland (1919) 122 LT 181; Re Peel's Settlmt, Millard v Peel [1964] 3 All ER 567

697 Interest falling into possession during coverture — "Become entitled" — Entitled in interest or possession

Re Capel's Trusts, Arbuthnot v Galloway [1914] WN 378

698 Interest falling into possession during coverture — "Become entitled"

Re Thompson's Settlement, Allen v Pack (1915) 139 LT Jo 211

699 Interest falling into possession during coverture — "Become entitled" — "Interest in possession"

Re Crook's Settlement, Re Glasier's Settlement, Crook v Preston no 695 ante

700 Interest falling into possession during coverture — "Become possessed of or entitled to"

Where there was a clause of forfeiture of benefits under her father's will if the daughter did not settle after-acquired property which she should "become possessed of or entitled to" of over the value of £1,000, the words "possessed of or entitled to" were held to be not cumulative but alternative and separate meanings must accordingly be found for them and accordingly property of over the value of £1,000 in respect of which the daughter had before her father's death a vested reversionary interest was held to be subject to this clause of forfeiture.

Re Brook, Brook v Hirst (1914) 111 LT 36; 58 Sol Jo 399

701 Interest falling into possession after coverture — Death of husband and wife

By a marriage settlement certain specified property of the wife was settled, with an ultimate limitation, in default of children, to her next of kin, and the husband covenanted to settle any property which his wife, or he in her right, should thereafter, during the coverture, succeed to the possession of, or acquire on like trusts. At the time of the marriage, a sum of money, which was not mentioned in the settlement, stood settled, in trust, for the wife for life, with remainder to her children, with remainder as she should appoint, and in default thereof, "to her executors, administrators and assigns." The husband survived the wife; there were no children, and the wife made no appointment: *Held* after the death of the husband and wife, the next of kin of the wife, and not the representatives of the husband, were entitled to the fund.

Grafftey v Humpage (1838) 1 Beav 46; 8 LJ Ch 98; 48 ER 855; affd (1839) 3 Jur 622

ANNOTATIONS **Distd** Otter v Melvill (1848) 2 De G&Sm 257 **Consd** Re London Dock Co, Ex p Blake (1853) 16 Beav 463; Wilton v Colvin (1856) 3 Drew 617 **Folld** Hughes v Young (1862) 1 New Rep 166; Re Hughes's Trusts (1863) 4 Giff 432 **Distd** Re Wyndham's Trusts (1865) LR 1 Eq 290 **Folld** Rose v Cornish (1867) 16 LT 786 **Consd** Re Clinton's Trust, Holloway's Fund, The Same, Weare's Fund (1871) LR 13 1 Eq 295

702 Interest falling into possession after coverture — Death of husband and wife — "Become entitled"

Re Hughes's Trusts no 879 post

703 Interest falling into possession after coverture — Death of husband and wife — "Become entitled"

Re Clinton's Trust, Holloway's Fund, The Same, Weare's Fund no 855 post

704 Interest falling into possession after coverture — Death of husband and wife — "Become entitled"

By a marriage settlement, dated in 1852, it was agreed and declared by and among the parties thereto, and the husband covenanted with the trustees of the settlement, that all such real and personal estates and effects as the wife should be, at the time of the marriage, or as she, or the husband in her right, should during the coverture become possessed of or entitled to, should, when and so far as the rights, interests; or powers of the husband and wife, or either of them, in or over the same would allow, be conveyed and assigned to the trustees of the settlement upon the trusts therein declared. At the date of the marriage the wife was entitled to a vested reversion in certain personal property. After the death of the husband and wife the reversion fell in: *Held* although the clause as to settling after-acquired property contained no express covenant by the wife to do so, the act contemplated and intended to be done was an act as much to be done by the wife as by the husband, and consequently the reversionary interest was bound by the settlement.

Re D'Estampes, D'Estampes v Hankey (1884) 51 LT 502; 32 WR 978

705 Interest falling into possession after coverture — Death of wife — "Come to or devolve upon"

A marriage settlement contained a covenant to settle any property which should come to or devolve upon the intended wife, or her husband in her right, "at any time or times after the solemnisation of the said intended marriage and during the continuance thereof." At the date of the settlement, the intended wife was entitled to a reversionary interest in personalty, subject to the life interest of her mother. The wife died before the tenant for life, leaving the husband surviving: *Held* the wife's reversionary interest was bound by the covenant.

Rose v Cornish (1867) 16 LT 786

ANNOTATION **NF** Re Clinton's Trusts, Re Holloways' Fund, The Same, Weare's Fund (1871) LR 13 Eq 295

706 Interest falling into possession after coverture — Death of wife

By a marriage settlement the intended husband and wife severally covenanted with the trustees that all the real and personal property, if any, not thereinbefore settled, to which the wife or the husband in her right, "shall at any time or times during the said intended coverture become beneficially entitled in possession or reversion, or in any matter whatever, derivable directly or indirectly from" J, should be settled as therein mentioned. At the date of the settlement and of the marriage the wife was entitled to

a fund bequeathed by J, subject to the life interest of a person who outlived the wife: *Held* the fund was not subject to the covenant.

Re Jones' Will (1876) 2 Ch D 362; 45 LJ Ch 428; 24 WR 697; sub nom *Re Jones' Settlement Trusts* (1876) 35 LT 25

ANNOTATION **Consd** Re Michell's Trust (1877) 6 Ch D 618

707 Interest falling into possession after coverture — Death of wife — Covenant by husband alone

Fisher v Shirley no 770 post

708 Interest falling into possession after coverture — Death of husband

By a marriage settlement, it was expressed to be agreed between the parties thereto, and the husband covenanted, that if any personal property should, during coverture, come to or vest in the wife, or in him in her right, the same should be transferred, by all proper parties, upon the trusts of the settlement. The wife became entitled to a reversionary interest in a chose in action, which did not fall into possession until after the death of the husband: *Held* the wife was bound to settle it.

Butcher v Butcher (1851) 14 Beav 222; 51 ER 272

ANNOTATIONS **Distd** Ramsden v Smith (1854) 2 Drew 298; Young v Smith (1865) LR 1 Eq 180; Dawes v Tredwell (1881) 44 LT 740 **Follld** Re D'Estampes' Settlmt, D'Estampes v Crowe (1884) 53 LJ Ch 1117

709 Interest falling into possession after coverture — Death of husband

Dickinson v Dillwyn no 758 post

710 Interest falling into possession after coverture — Death of husband — Covenant by husband alone

A marriage settlement to which the wife was a party recited that it had been agreed that all moneys should be settled to which she then was or thereafter during the coverture, or to which her husband in her right might become entitled, and that the husband should enter into the covenant to that effect thereinafter contained. The covenant was by the husband that he would settle all such moneys and execute all deeds, etc, for carrying out such settlement: *Held* the wife was not bound by the covenant, and was entitled after her husband's death to receive a fund which, although vested in her at the marriage, had not been reduced into possession during the coverture.

Re Webb's Trusts (1877) 46 LJ Ch 769

711 Interest falling into possession after coverture — "Become seised or possessed of or entitled to"

By a marriage settlement the intended wife and husband severally covenanted with the trustees, that in case the marriage should be solemnised, all the estate, property, and effects, both real and personal, which the husband and wife, or either of them, in right of the wife, "shall at any time or times during the said intended coverture become seised or possessed of, or entitled to," should be settled. At the date of the settlement and of the marriage the wife was entitled to a vested remainder in land, expectant on the death of a tenant for life, who outlived the coverture: *Held* the land was not subject to the trusts of the settlement.

Re Pedder's Settlement Trusts (1870) LR 10 Eq 585; 40 LJ Ch 77

ANNOTATIONS **Apld** Re Clinton's Trust, Holloway's Fund, The Same, Weare's Fund (1871) LR 13 Eq 295 **Distd** Re Viant's Settlmt Trusts (1874) LR 18 Eq 436 **Apld** Re Jones' Will (1876) 2 Ch D 362 **Consd** Re Michell's Trusts (1877) 6 Ch D 618

712 Covenant expressly including wife's existing property

A marriage settlement contained a covenant that if the wife then was, or should at any time during the coverture become, entitled to any real or personal property of the value of £400, for any estate or interest whatsoever, it should be settled upon certain trusts. At the date of the settlement the wife was entitled on the death of her mother, to a share in a sum of stock in her own right, and a further share as one of the next of kin of a deceased brother. The value of the two shares taken together was above £400, but the value of the wife's reversionary interest in them at the date of the settlement was much less than £400. On the death of the mother, the husband and wife presented a petition to have the two shares paid to the husband: *Held* (1) the share in the trust fund was included in the first part of the covenant, as property to which the wife was entitled at the time of her marriage; (2) the covenant referred to the value of the property, not to the value of the wife's reversionary interest in it; (3) in estimating the value of the share, the aggregate value of the two sums must be taken, and not the value of each sum separately. *Quaere*: whether succession duty and costs should be deducted in estimating such value.

Re Mackenzie's Settlement (1867) 2 Ch App 345; 36 LJ Ch 320; 16 LT 138; 15 WR 662, LJJ

ANNOTATIONS As to (1) **Apld** Agar v George (1876) 2 Ch D 706; Cornmell v Keith (1876) 3 Ch D 767. As to (2) **Consd** Agar v George (1876) 2 Ch D 706. Generally **Consd** Re Jackson's Will (1879) 13 Ch D 189

713 Covenant expressly including wife's existing property

Caldwell v Fellowes no 735 post

714 Interest falling into possession during coverture — "Acquired from time to time" — Interests of which settlor then seized in reversion not bound
Ridout v Gwynne (1859) 7 Gr 505 (CAN)

ii Contingent or defeasible interests

LAW See Halsbury's Laws (4th edn) vol 42 para 650

CROSS REFERENCE See POWERS vol 37(2) (reissue) no 828 et seq (divesting of vested estates)

715 Covenant expressly including existing interests — Interest liable to be divested by appointment
A marriage settlement contained a covenant by the husband and wife to settle all property then vested in the wife. At the time of the marriage the wife was entitled in default of appointment to the children, grandchildren or issue of her father's marriage, to the funds settled by her father's marriage settlement. These funds were afterwards appointed to the wife absolutely for her separate use: *Held* they were subject to the above-mentioned covenant.
Re Frowd's Settlement (1864) 4 New Rep 54; 10 LT 367

ANNOTATIONS **Dbtd** De Serre v Clarke (1874) LR 18 Eq 587 Although my own opinion might coincide with that view, I consider that the law is settled the other way (Malins V-C) **Distd** Sweetapple v Horlock (1879) 11 Ch D 745

716 Covenant expressly including existing interests — Interest liable to be divested by appointment
By an ante-nuptial settlement the husband and wife, after settling certain trust funds belonging to the wife, covenanted with the trustees "that if at the time of the solemnisation of the intended marriage the wife shall be, or if at any time thereafter and during the joint lives of the husband and wife, she, or her husband in her right, shall become beneficially entitled to any real or personal property, estate or effects, for any estate or interest whatsoever, then and in every such case the husband and wife and all other necessary parties shall, as soon as circumstances will permit," assure such property and effects to the trustees in trust for sale, and to hold the proceeds upon the trusts thereinbefore declared of the wife's trust funds, "or as near thereto in all respects as the deaths of parties and other circumstances will admit": *Held* a reversionary interest in personalty vested in the wife at the date of the marriage, but liable to be divested by the exercise of a power of appointment, was included in the covenant.
Re Jackson's Will (1879) 13 Ch D 189; 49 LJ Ch 82; 41 LT 494; 28 WR 209

ANNOTATIONS **Distd** Hilbers v Parkinson (1883) 25 Ch D 200 **Apld** Re Ware, Cumberlege v Cumberlege-Ware (1890) 45 Ch D 269; Re Rush, Warre v Rush [1922] 1 Ch 302 (see [1923] 1 Ch 56)

717 Covenant expressly including existing interests — Interest liable to be divested by appointment
Under a marriage settlement real estate stood limited to H, the husband, for life, with remainder to the use of such of the children or issue of the marriage as he should by deed or will appoint; and in default of appointment, to the use of the children of the marriage equally as tenants in common in fee. There was issue of the marriage two children only, a son and a daughter. The daughter married, and by her marriage settlement she and her intended husband covenanted with the trustees for the conveyance and settlement of all property which she then was "seised of, or interested in, or entitled to," upon the trusts therein mentioned, including in effect reversionary interests. The daughter survived her husband, and thereupon H by deed appointed the real estate comprised in the original settlement, subject to his life estate, to his son and daughter equally in fee, the daughter thus taking the same share as she would have taken in default of appointment: *Held* inasmuch as the reversionary moiety appointed to the daughter constituted a new interest acquired by her subsequently to the date of her settlement, such moiety was not bound by the covenant in her marriage settlement.
Sweetapple v Horlock (1879) 11 Ch D 745; 48 LJ Ch 660; 41 LT 272; 27 WR 865

ANNOTATIONS **Expld** Re Jackson's Will (1879) 13 Ch D 189 **Consd** A-G v Selbourne [1902] 1 KB 388; Parr v A-G [1926] AC 239

718 Covenant expressly including existing interests
Dering v Kynaston no 661 ante

719 Covenant expressly including existing interests
By a marriage settlement certain property of the wife was settled upon trust for her for life, with remainder to her children, and in default of children, for her brother absolutely, and the husband and wife jointly and severally covenanted that if the wife "now is or at any time during the coverture she, or her husband in her right, shall become entitled by gift, descent, succession, or otherwise howsoever, to any real or personal estate, property or effects, of the value of £100 or upwards," except property belonging to her for her separate use, "the same shall be forthwith conveyed, assured and paid to the trustees upon the trusts herein declared concerning the

property" settled by the wife, "or such of them as shall be then subsisting and capable of taking effect, or as near thereto as the natures and qualities of the said properties respectively shall admit": *Held* the covenant included certain personal estate which, at the date of the settlement, was under a will vested in the wife in remainder expectant on her death without issue, subject to the life interest of any husband who might survive her; and accordingly, on the death of the husband and wife, and failure of children of the marriage, the property passed under the settlement to the brother absolutely.

I may observe, that as to the words, of the value or to the amount of £100 or upwards, it has been decided that they do not mean the actual value of the thing, if reversionary, but the property as if in possession, *ie*, considering it as if in possession though in fact in reversion (*Hall V-C*).

Cornmell v Keith (1876) 3 Ch D 767; 45 LJ Ch 689; 35 LT 29; 24 WR 633

ANNOTATION **Consd** Re Michell's Trusts (1877) 6 Ch D 618

720 Interest falling into possession during coverture

A marriage settlement, executed in 1819, recited an agreement that one moiety "of all such property and effects as the said AB, the settlor, should or might at any time during the said intended coverture, be or become seised or possessed of, or interested in or entitled unto" should be settled as therein mentioned. The settlement also contained a covenant by the said AB for himself, his heirs, etc, "that in case any lands, tenements, etc, or other real or personal estate, should at any time during the said then intended coverture, accrue unto or vest in him the said AB upon the death, or by the settlement, devise or bequest, gift or disposition of any of the relations of the said AB or of any person or persons whomsoever," he the said AB should and would convey, settle and assign the same. At the date of the settlement, the settlor had a vested remainder in tail in certain lands, expectant on the death of his father, and defeasible under the father's power of appointment.

The father died in 1828, without having exercised the power of appointment; whereupon the estate tail vested in the settlor in possession. A disentailing deed was afterwards executed by the settlor: *Held* upon the true construction of the settlement, taking the covenant with reference to the recital, the estate tail which had become vested in the settlor in possession was an estate which had "accrued" to him on the death of his father; and consequently it was included within the covenant, and was subject to the trusts of the settlement.

McLurcan v Lane, Melhuish v McLurcan (1858) 32 LTOS 172; 5 Jur NS 56; 7 WR 135

ANNOTATION **Consd** Reid v Reid (1886) 31 Ch D 402

721 Interest falling into possession during coverture

Archer v Kelly no 674 ante

722 Interest falling into possession during coverture

Where a covenant to settle after-acquired property was contained in a settlement executed on the marriage of a lady, who at the time was entitled to a contingent interest liable to be divested, but which afterwards fell into possession; and who afterwards became entitled to property to her separate use, as to part of which there was a proviso against alienation: *Held* the property to which the lady was contingently entitled at the time of her marriage came within the terms of the covenant, but the property settled to her separate use, and as to which there was a proviso against alienation, was not included in it.

Brooks v Keith (1861) 1 Drew&Sm 462; 4 LT 541; 7 Jur NS 482; 9 WR 565; 62 ER 455

ANNOTATIONS **NF** Re Jackson's Will (1879) 41 LT 494
Expld Re Allnutt, Pott v Brassey (1882) 22 Ch D 275

723 Interest falling into possession during coverture

An infant *feme sole*, being entitled to property under a will if she attained twenty-one, married, and by the settlement made immediately previously to such marriage the intended husband covenanted with the trustees that all the estate, property, and effects, real and personal, which he and his intended wife, or either in her right, should at any time during the coverture become seised or possessed of or entitled to at law or in equity, of the value of £200 and upwards, under any gift, devise or bequest, or by descent, representation, or any other means whatsoever, should be settled, and that they should do all necessary acts, etc: *Held* the contingent interest, to which the intended wife was entitled was within the covenant.

Re Worsley's Trusts (1867) 16 LT 826

724 Interest falling into possession during coverture

Re Yardley's Settlement, Milward v Yardley (1908) 124 LT Jo 315

725 Interest falling into possession during coverture

Upon attaining the age of twenty-one years in 1907, plaintiff became absolutely entitled in possession to

one-third of her parents' marriage settlement funds and was contingently entitled to a further one-third share in the same funds upon the death of either of her two younger brothers before attaining the age of twenty-one years. In contemplation of her marriage in 1909 plaintiff by deed assigned (*inter alia*) her one-third share of certain mortgaged debts constituting part of her late mother's marriage settlement fund "and all other if any her share and interest in the said mortgaged debts" to trustees upon trust after the marriage to raise thereout, and out of certain stocks, funds, and securities already transferred, the sum of £12,000, and subject thereto to stand possessed of the premises thereby assigned and the said stocks, funds, and securities in trust for plaintiff absolutely. By her marriage settlement of even date the £12,000 was settled upon the usual trusts of a wife's fund, and plaintiff thereby covenanted with the trustees that if she should at any time during the intended coverture "become entitled in any manner and for any estate or interest" to any real or personal estate exceeding in value £500 at one time and from one and the same source, except as therein mentioned, she would convey the same to the trustees upon trust to sell and convert, a reversionary interest not to be sold except for special reason before it fell into possession, and to hold the proceeds upon the trusts of the wife's fund. Her younger brother F died under the age of twenty-one years shortly after plaintiff's marriage: *Held* plaintiff's interest on attaining twenty-one in the shares to which her younger brothers were entitled contingently on their attaining twenty-one in their parents' marriage settlement funds was a contingent and not a vested interest. Plaintiff's share in her parents' marriage settlement funds, other than the mortgage debts, which fell into possession on her brother F's death was caught by the covenant in her settlement.

Re Williams' Settlement, Williams v Williams [1911] 1 Ch 441; 80 LJ Ch 249; 104 LT 310; 55 Sol Jo 236

ANNOTATIONS **Distd** Re Cazenove, Perkin v Bland (1919) 122 LT 181 **Consd** Re Crook's Settlmt, Re Glasier's Settlmt, Crook v Preston [1923] 2 Ch 339 **Apld** Re Maltby Marriage Settlement, Aylen v Gaud [1953] 2 All ER 220 **Follld** Re Peel's Settlmt, Millard v Peel [1964] 3 All ER 567

726 Interest falling into possession during coverture

Re Peel's Settlement, Millard v Peel no 684 ante

727 Interest falling into possession after coverture — Death of husband — "Be or become entitled"

By an ante-nuptial settlement the intended husband and wife covenanted with the trustees that if the intended husband and wife, or either of them in her right, should at any time during the coverture "be or become entitled" to any personal property of the value of £100 or upwards, the same should be settled. At the time of executing the settlement the wife was interested in a legacy, which had been bequeathed in trust for all the daughters of her father living at the time of his death, who should attain twenty-one or marry, in equal shares. The marriage was solemnised, and the wife's father survived her husband: *Held* the interest of the wife in the legacy during the coverture was contingent, and it was not within the covenant in the settlement.

Atcherley v Du Moulin (1855) 2 K&J 186; 69 ER 746

ANNOTATIONS **Distd** Hughes v Young (1862) 1 New Rep 166 **Consd** Hood v Franklin (1873) LR 16 Eq 496 **Distd** Cornmell v Keith (1876) 3 Ch D 767 **NF** Re Jackson's Will (1879) 41 LT 494 **Consd** Re Parsons, Stockley v Parsons (1890) 45 Ch D 51

728 Interest falling into possession after coverture — Death of wife — Share under will payable on death without issue

Gift to daughters for life, with remainder to the child or children of such daughters, as they should appoint; in default of appointment equally, and on the death of such of the said daughters after attaining the age of twenty-one years as should die without issue, her share to be paid to her personal representative. The husband of one of the daughters, after the death of testatrix, by post-nuptial deed covenanted with a trustee that all the real and personal property which might thereafter at any time during the joint lives of himself and his wife devolve on her, should be held and disposed of by her as separate property, notwithstanding coverture: *Held* the before-mentioned property, on the wife's death without children, was not subject to the covenant and did not pass by her will, but went to her husband as general administrator.

Re Wyndham's Trusts (1865) LR 1 Eq 290

729 Interest falling into possession after coverture — Death of wife

By a post-nuptial settlement a husband covenanted to settle any property to which the wife, or he in her right, either then was or at any time during the coverture should become entitled to: *Held* a contingent interest in a fund standing in court to the credit of a cause, which fell into possession after the termination of the coverture was bound by the covenant.

Agar v George (1876) 2 Ch D 706; 34 LT 487; 24 WR 696

ANNOTATION **Consd** Re Michell's Trusts (1877) 6 Ch D 618

730 Interest falling into possession after coverture — Dissolution of marriage

Two daughters of testator, PC, EFC, who became EFP, and EC, who became EH, testator having died in 1880 and divided his converted estate into nine equal parts or shares, were respectively entitled to a one-ninth share under his will. The shares were given upon trust to pay the income unto each of his daughters during their lives, and after their respective decease and the decease of their surviving husbands each daughter's share was to be in trust for the daughter's children at twenty-one or marriage in equal shares, and testator directed that if any of his daughters should die without leaving children her surviving then the share of such daughter should be divisible amongst brothers and sisters then living and the children of such of them as should be dead, such children to take equally their parent's share only. One share of residue was held in trust for EFP the mother of the first and second defendants. The first defendant, a daughter of EFP, was married in 1895. Her father died in 1910, her mother, EFP, in 1914, and her marriage was dissolved in July 1917.

By her marriage settlement, dated 15 June 1895, she covenanted that all property to which she should during her then intended coverture become entitled should be vested in the trustees as soon as circumstances permitted upon trusts as to the income as therein directed.

EH, another of testator's daughters, married, and having survived her husband, died, aged ninety-three, without having had a child. On EH's death one-fifth of her share passed to the first defendant, who had previously mortgaged her reversionary interest in PC's estate to the second defendant: *Held* the first defendant's interest in the one-ninth share being contingent on the death of her mother and of EH without issue, and not having belonged to her absolutely during the coverture, since the court could not take into consideration that EH was from the date of the marriage settlement past the age of child bearing, was not caught by her covenant to settle after-acquired property.

Re Cazenove, Perkin v Bland (1919) 122 LT 181

731 Interest becoming indefeasibly vested during coverture

Dering v Kynaston no 661 ante

732 Interest becoming indefeasibly vested during coverture

A marriage settlement which recited an agreement to settle certain specified property upon the trusts thereinafter declared, and that it had been agreed that the husband should enter into the covenant thereinafter contained for settling upon the same trusts any future property to which the wife might become entitled after the solemnisation of the marriage, contained a covenant by the husband that if at any time during the joint lives of the husband and wife any future portion, or real or personal estate, should "come to or devolve upon" the wife, or upon the husband in her right, and whether in possession, reversion, remainder, contingency, or expectancy, the husband would settle, or concur with the wife in settling, such future portion, real or personal estate upon the trusts declared by the settlement concerning the settled funds. At the time of the marriage the wife was entitled under a will to a contingent reversionary interest in personal estate, which during the coverture, became vested, but did not come into possession until after the coverture had determined by the death of the wife: *Held* it was not within the covenant.

Re Michell's Trusts (1878) 9 Ch D 5; 48 LJ Ch 50; 38 LT 462; 26 WR 762, CA

ANNOTATION **Expld** Lloyd v Prichard [1908] 1 Ch 265

733 Expectancy

By the terms of a marriage settlement the income of the settled fund was directed to be paid to the wife during her life and subject to that trust the fund was to be held in trust for such of her issue as she might by deed or will appoint; in default of any such appointment the fund was to be held in trust for all her children who being sons should attain the age of twenty-one years or being daughters should attain that age or marry in equal shares. In 1929 one of her children, AT, executed a voluntary settlement whereby he assigned to trustees "all the part or share, parts or shares and other interest whether vested or contingent to which the settlor is now or may hereafter become entitled whether in default of appointment, or under any appointment hereafter to be made or on failure of any such appointment of and in the trust property subject to the marriage settlement." By an appointment in pursuance of the power executed in 1939, his mother appointed him a sum of £3,517 and released her life interest: *Held* (1) the terms of the voluntary settlement were on construction wide enough to embrace all the interests which AT might take under the marriage settlement, but (2) inasmuch as his mother had not at the date thereof exercised her power in his favour, he was purporting thereby to assign a mere expectancy of something to which he was not then entitled but to which he might thereafter become entitled, and (3) accordingly he was entitled to require payment of the sum appointed, and could

not be compelled to hand it over to the trustees of the voluntary settlement.

Re Brooks' Settlement Trusts, Lloyds Bank Ltd v Tillard [1939] Ch 993; [1939] 3 All ER 920; 109 LJ Ch 28; 161 LT 158; 55 TLR 914; 83 Sol Jo 545

F Joint tenancies

CROSS REFERENCE See REAL PROPERTY vol 38 (reissue) no 5114 et seq (severance of joint tenancy by covenant)

734 Husband and wife joint tenants

Edye v Addison no 778 post

735 Wife joint tenant with strangers — Interest in remainder

A covenant in a settlement to settle all the property of the wife of which she was possessed at the date thereof: *Held* to include property to which she was entitled jointly with other persons in remainder after an estate in tail, though the covenant was in terms only the covenant of the husband and not of the wife, and though the recitals in the settlement specified certain property to which the wife was then entitled in expectancy but did not mention this particular interest.

Caldwell v Fellowes (1870) LR 9 Eq 410; 39 LJ Ch 618; 22 LT 225; 18 WR 486

ANNOTATIONS **Apld** Cornmell v Keith (1876) 3 Ch D 767 **Folld** Baillie v Treharne (1881) 17 Ch D 388 **Apld** Re Hewett, Hewett v Hallett [1894] 1 Ch 362

G Life interests

736 General rule — Not included

A covenant by a husband to settle all future acquired property on himself, his wife and children, does not include his life interest in property bequeathed to him with a direction to settle it on himself and his family.

White v Briggs (1848) 22 Beav 176n; 52 ER 1075, LC

ANNOTATIONS **Folld** St Aubyn v Humphreys (1856) 22 Beav 175; Re Dowding's Settlmt Trusts, Gregory v Dowding [1904] 1 Ch 441

737 General rule — Not included

Settlement by husband of all his personal estate to which he was then, or might thereafter become, entitled, in trust for himself for life, with remainder absolutely to his wife: *Held* not to comprise his interest in a fund bequeathed to him for life, with remainder to his children.

St Aubyn v Humphreys (1856) 22 Beav 175; 52 ER 1074

ANNOTATION **Consd** Re Dowding's Settlmt Trusts, Gregory v Dowding [1904] 1 Ch 441

738 General rule — Not included

By a marriage settlement it was declared and agreed between the parties, and the husband covenanted with the trustees, that in case the wife, or the husband in her right, should at any time during his life become possessed of, interested in, or entitled to, any personal estate, moneys, effects or other property, in possession, reversion, remainder or expectancy, by gift, bequest, or under Statute of Distributions, the husband and wife would, within six months, transfer assure, assign and make over all such property to the trustees upon the trusts of the settlement. Subsequently to the marriage, the father of the wife, by his will, vested a sum of £5,000 in trustees to hold the same upon such trusts as the wife should be deed or will appoint; and in default of such appointment, to pay the dividends and interest of the said sum of £5,000 to the wife for her separate use, and after her death upon trust for her executors or administrators: *Held* the covenant in the settlement did not affect or control the general power of appointment given to the wife over the £5,000 by her father's will; and it did not affect her life interest to her separate use, but it did affect the reversionary interest so far as her husband, in the event of his surviving his wife, would be entitled to the property in her right, or as her executor or administrator.

Townshend v Harrowby (1858) 27 LJ Ch 553; 31 LTOS 33; 4 Jur NS 353; 6 WR 413

ANNOTATIONS **Distd** Re O'Connell, Mawle v Jagoe [1903] 2 Ch 574 **Folld** Re Dowding's Settlmt Trusts, Gregory v Dowding [1904] 1 Ch 441; Tremayne v Rashleigh [1908] 1 Ch 681 **Consd** Lloyd v Prichard [1908] 1 Ch 265 **Apld** Vetch v Elder [1908] WN 137

739 General rule — Not included

Re Anstis, Chetwynd v Morgan, Morgan v Chetwynd no 969 post

740 General rule — Not included

A covenant in general terms to settle after-acquired property does not include a life interest or an annuity, in the absence of any indication in the settlement of a specific intention to include such interests.

Accordingly, where a marriage settlement contained a covenant that all real and personal property to which the wife should during her coverture become entitled, whether in possession, remainder, or otherwise, should be transferred to the trustees of the settlement upon trust for sale and conversion and to hold the proceeds upon the trusts of the settlement: *Held* an annuity acquired by the wife during her coverture was not caught by the covenant.

Re Dowding's Settlement Trusts, Gregory v Dowding [1904] 1 Ch 441; 73 LJ Ch 194; 90 LT 82; 52 WR 293; 48 Sol Jo 191

741 Life annuity — Where intention to include life interests

Where a covenant has been entered into for settlement of the future property of a married woman, and a gift is afterwards made to her of such a nature as to come within the terms of the covenant, no expression of the intention of the donor that it shall not be settled will exclude it from the operation of the covenant. By an ante-nuptial settlement made in 1870 the intended husband and wife respectively covenanted with the trustees that all the estate, property, and effects, real or personal, of or to which the wife, or the husband in her right, should at any time during the coverture become seised, possessed, or entitled, should be assured and settled, as regarded personal estate, upon trust, as to such part thereof as should not consist of money or authorised investments, or of interests determinable on the death of the wife, upon trust to convert it, and to invest the proceeds, and such part of the estate as should consist of money, upon such investments as therein mentioned, and during the joint lives of husband and wife pay "the interest, dividends, and annual proceeds thereof" to them in equal shares, the share of the wife to be for her separate use without power of anticipation. By a deed of the same date the wife's father covenanted with the trustees to pay to them an annuity of £500 to be applied by them upon trusts corresponding with those of the income of the personal property mentioned in the covenant. In 1874 the wife's father bought up the husband's interest in this annuity, and assigned it to trustees for the wife's separate use with no restraint on anticipation: *Held* the covenant to settle included life annuities given to the wife; the share assigned by the wife's father in the annuity of £500 was bound by the covenant, and during the joint lives of the husband and wife three-fourths of the annuity belonged to the wife for her separate use with a restraint on anticipation, and the remaining fourth to the trustee of the husband, who had become bankrupt, and persons to whom the wife had mortgaged the interest assigned in 1874 took nothing.

Scholfield v Spooner (1884) 26 Ch D 94; 53 LJ Ch 777; 51 LT 138; 32 WR 910, CA

ANNOTATIONS **Distd** Re Dowding's Settlmt Trusts, Gregory v Dowding [1904] 1 Ch 441 **Apld** Re Ellis's Settlmt, Ellis v Ellis [1909] 1 Ch 618

742 Life annuity

Re Dowding's Settlement Trusts, Gregory v Dowding no 740 ante

743 Life interest determinable on alienation

By an agreement in contemplation of marriage the intended husband agreed that he would settle (*inter alia*) the sum of £5,000, and any further moneys and property which he should receive and be entitled to under the will of his mother. Under the trusts of the settlement the intended wife was to have the first life interest in the settled funds. The mother afterwards by her will, in exercise of a power of appointment contained in the will of her father, gave to the husband a life interest subject to forfeiture upon alienation or attempted alienation by him: *Held* the husband was entitled to this life interest under a will of his mother; it was not comprised in the agreement for a settlement and there had been no forfeiture.

Re Crawshay, Walker v Crawshay [1891] 3 Ch 176; 60 LJ Ch 583; 65 LT 72; 39 WR 682

ANNOTATIONS **Apld** Re Smith, Franklin v Smith (1927) 71 Sol Jo 744; Re Smith, Franklin v Smith [1928] Ch 10

744 Bonus paid on sale of life estate — Irish Land Acts — "Interest in real estate"

A was tenant for life of real estate under a deed of settlement of real estate, and also tenant for life under a deed of settlement of personalty containing a covenant to settle after-acquired property, with certain specified exceptions, including (*inter alia*) the real estates settled by the realty settlement, or "A's estate or interest" therein. Part of the real estate was situate in Ireland, and under Irish Land Act 1903 (c 37) (repealed), was purchased by the occupying tenants for a gross sum of £340,380, with the result that A was entitled, as vendor, to a bonus of £40,845 by Irish Land Act 1903 (c 37) s 8 (repealed): *Held* this bonus was not subject to the covenant to settle after-acquired property contained in the personalty settlement, as it was an interest in real estate specifically excepted from the operation of the covenant.

Re Annaly's (Lady) Trusts, Annaly (Lady) v Bourke (1904) 92 LT 13; 53 WR 150; 49 Sol Jo 118

ANNOTATION **Folld** Tremayne v Rashleigh [1908] 1 Ch 681

745 Bonus paid on sale of life estate — Irish Land Acts

Tremayne v Rashleigh no 753 post

746 Life interest subject to restraint on anticipation — Where intention to include life interests

In 1877 a domiciled Scotsman married a domiciled Englishwoman.

By a marriage settlement in Scottish form made between the husband and the wife with her father's consent, funds belonging to the husband were settled for the life-rent use of the wife if she survived him, with remainder to the children of the marriage as therein expressed, the provisions to be in bar of claims to *jus relictoe* and *legitim* out of the husband's movable estate.

By a contemporaneous settlement in English form made between the wife's father, the wife, the husband, and the trustees, funds belonging to the wife were settled in trust for the wife for life for her separate use without power of anticipation with remainder to the husband for life until bankruptcy or alienation, and subject thereto on the usual trusts for the issue of the marriage, with an ultimate trust in default of issue for the wife if she survived the husband, or her statutory next of kin if she predeceased him.

The after-acquired property clause included life interests. The income of these life interests was to be paid to the wife for her separate use without power of anticipation. They were excluded from the trust for conversion and could only be sold with her consent. Under the wills of her mother and brother, who died after the passing of Married Women's Property (Scotland) Act 1881 (c 21), the wife became entitled to life interests in movables for her separate use without power of anticipation.

The wife died on 19 August 1909, domiciled in Scotland. She was possessed of considerable free movable estate, representing savings of income of movable property settled to her separate use. By her will she disposed of this property to the exclusion of her husband and child: *Held* the after-acquired life interests were caught by the English settlement, notwithstanding the restraint on anticipation imposed by the donors.

Re Mackenzie, Mackenzie v Edwards-Moss [1911] 1 Ch 578; 80 LJ Ch 443; 105 LT 154; 27 TLR 337; 55 Sol Jo 406

Scottish, Irish and Commonwealth Cases

747 Life annuity

A marriage settlement contained a covenant by the wife WV, to vest in trustees, to be had on the trusts of the settlement, any real or personal property of the value of £200 and upwards, of which she might during the marriage become seised or possessed, or to have an absolute power of disposing. Testatrix left a moiety of her residuary estate, which moiety exceeded £200 in value, to her trustees in trust to apply it in the purchase of an annuity to WV during her life: *Held* this moiety of the residuary estate was captured by the covenant to settle.

Re Butler, Beatty v Vance [1916] 1 IR 66 (IR)

H Property subject to power of appointment in covenantor

748 General power of appointment — Power exercised in own favour — Appointment of annuity

In a marriage settlement the intended wife assigned all the property to which she then was, or to which she or her intended husband in her right should, during the coverture, become entitled, to trustees, upon the trusts thereby declared, for herself, the husband and the children of the marriage. After the marriage her father died, having by his will given her a general power of appointment over his residuary estate. The wife, during the coverture, in exercise of the power contained in the will, appointed to herself, for her separate use, a gross sum of £1,000, and an annuity of £100 for her life, and amongst her family the residue, upon trusts differing from those of the marriage settlement, reserving a power of revocation: *Held* (1) the terms of the assignment by the wife in the marriage settlement did not amount to a covenant to exercise a general power of appointment in favour of the objects and in conformity with the trusts of such settlement, and property over which the wife afterwards acquired a general power of appointment was not by that circumstance brought within the operation of the settlement; (2) upon the appointment by the wife of the £1,000 for her own absolute use that sum became bound by the trusts of the settlement, and the power of revocation was ineffectual; (3) the interest in the annuity of £100 for her own life for her separate use, which the wife took under her appointment, an interest which was in conformity with that which she should have taken under the trusts of the settlement if the annuity had been otherwise acquired, was not disturbed by the effect of the settlement, inasmuch as it was not the intention of the contract expressed therein that any after-acquired property should be converted, or taken otherwise than in the state in which it should be so acquired.

Ewart v Ewart (1853) 11 Hare 276; 1 Eq Rep 536; 17 Jur 1022; 1 WR 466; 68 ER 1278

749 General power of appointment

Townshend v Harrowby no 738 ante

750 Donee entitled in default — Power exercised in favour of stranger

Steward v Poppleton [1877] WN 29

ANNOTATIONS **Distd** Re Gerard, Oliphant v Gerard (1888) 58 LT 800 **Folld** Re O'Connell, Mawle v Jagoe [1903] 2 Ch 574 **NF** Tremayne v Rashleigh [1908] 1 Ch 681

751 Donee entitled in default — Power exercised in own favour

By a marriage settlement, made in 1878, it was agreed that if M, the intended wife, or her husband in her right, should at one and the same time, and from the same source become entitled to any real or personal property of the value of £500 or upwards, then and in every such case the husband and wife should cause the same to be vested in the trustees of the settlement, to be held by them upon the trusts of the property

assigned by M. By his will, made in 1884, the father of M bequeathed to the trustees of the will a sum of £4,000 upon trust for such persons and purposes as M should appoint in writing, and in default of or subject to any such appointment in trust for her sole and separate use, and testator declared it to be his intention that M might be able, by exercising her power of appointment, to defeat the operation of the covenants contained in her marriage settlement for the settlement of her after-acquired property. Testator died in 1887. M appointed that the sum of £4,000 should be held in trust for her separate use by nine separate appointments, made in separate days, and each under £500 in amount: *Held* the sum of £4,000 had been properly appointed by M, and was payable to her, and was not bound by her covenant to settle after-acquired property.

Re Gerard (Lord), Oliphant v Gerard (1888) 58 LT 800

ANNOTATIONS **Consd** Re O'Connell, Mawle v Jagoe [1903] 2 Ch 574; Tremayne v Rashleigh [1908] 1 Ch 681

752 Donee entitled in default — Power exercised in own favour

A covenant for settlement of after-acquired property extends to property which is limited to such purposes as the covenantor shall appoint, and in default of appointment to him or her absolutely.

A marriage settlement contained a covenant that any property exceeding £200 in value which the wife should become possessed of or entitled to should be brought into settlement. Property, exceeding £200 in value, was subsequently bequeathed in trust for such purposes as she should appoint, and in default of appointment to her absolutely for her separate use. She executed deeds-poll purporting to appoint out of the property several sums of £199 each to herself absolutely: *Held* notwithstanding the general power of appointment, the bequeathed property was bound by the covenant, and the deeds-poll were therefore ineffectual.

Re O'Connell, Mawle v Jagoe [1903] 2 Ch 574; 72 LJ Ch 709; 89 LT 166; 52 WR 102

ANNOTATION **NF** Tremayne v Rashleigh [1908] 1 Ch 681

753 Donee entitled in default — Power exercised in own favour — After termination of coverture

By a voluntary settlement dated 26 March 1902, applicant, a married woman, covenanted to settle all real and personal property to which she was then, or should at any time during her then present coverture become, entitled for any estate or interest whatsoever in possession, reversion, remainder, contingency, or expectancy. There was no child of the marriage, which was dissolved on the wife's petition as from 9 June 1904, and the property of the wife comprised in her marriage settlement was ordered to be conveyed to her as if the husband had died in her lifetime.

In these circumstances questions arose whether the trustees of the voluntary settlement were entitled by virtue of the above-mentioned covenant to the following moneys, namely: (*a*) A sum of £2,800, which became payable on 12 April 1905, representing applicant's fund, settled by her marriage settlement, and at the date thereof neither ascertained nor payable, over which fund, in the event of there being no child of the marriage, applicant had a general power of appointment exercisable by deed while not under coverture, or by will whether covert or sole, and to which fund in default of any such appointment she was absolutely entitled if she survived her husband. On 4 December 1905, applicant had appointed the marriage settlement funds to herself absolutely. (*b*) A sum of £241 4*s* arising upon the sale by applicant as tenant for life, of certain land in Ireland comprised in the voluntary settlement, sold by her, after the dissolution of her marriage, under the provisions of the Irish Land Act 1903 (c 37) (repealed). The sum in question represented the 12 per cent bonus payable to vendors under s 48(1) (repealed) of that Act, and by virtue of the provisions of Irish Land Act 1904 (c 34) (repealed), belonged to applicant, as tenant for life, as her "own proper moneys for" her "own use and benefit": *Held* (1) on (*a*) the determination of the question of title to the sum of £2,800 turned upon the distinction between power and property, and although the exercise of the power after the dissolution of the marriage created property, yet during the coverture all that applicant had was a power of appointment over the fund, and a power not being within the scope of the covenant, the sum of £2,800 belonged to her absolutely; (2) on (*b*) adopting the view taken of the nature of the bonus in *Re Annaly's (Lady) Trusts, Annaly (Lady) v Bourke* (no 744 ante) the bonus was not merely a by-product of applicant's life estate, but was an interest in the settled hereditament accruing to her when the Irish Land Act 1903 (c 37) (repealed), interpreted by Irish Land Act 1904 (c 34) (repealed), came into operation on 1 November 1903, and the bonus was caught by the covenant and must be retained by the trustees of the voluntary settlement.

Tremayne v Rashleigh [1908] 1 Ch 681; 77 LJ Ch 292, 365; 98 LT 615; 24 TLR 298; 52 Sol Jo 263

ANNOTATION As to (1) **Folld** Vetch v Elder [1908] WN 137

754 Donee entitled in default — Power exercised in favour of husband

Vetch v Elder [1908] WN 137

755 Gift over to stranger in default

A marriage settlement contained a covenant that all property afterwards acquired by the wife, of the value of £500 or upwards, should be settled, capital sums to be held on the trusts of the settlement, and any annuity or interest for the life of the wife to be paid to her separate use, without power of anticipation.

The wife's father, reciting that he wished to give her property without the obligation of having it settled, bequeathed a share of his estate, exceeding £5,500 in value to such uses and on such trusts as she might appoint, and in default of appointment, in trust for her for life, for her separate use, with remainders over.

The wife then executed eleven deeds, each appointing to her separate use £499 19*s* 11*d*, four of the deeds being executed on one day, six on another, and one on another: *Held* the wife was entitled to the eleven sums of £499 19*s* 11*d* for her separate use, without any obligation to settle them.

Bower v Smith (1871) LR 11 Eq 279; 40 LJ Ch 194; 24 LT 118; 19 WR 399

ANNOTATIONS **Expld** Steward v Poppleton [1877] WN 29 **Folld** Re Gerard, Oliphant v Gerard (1888) 58 LT 800 **Consd** Re Davies, Harrison v Davies [1897] 2 Ch 204; Re O'Connell, Mawle v Jagoe [1903] 2 Ch 574; Tremayne v Rashleigh [1908] 1 Ch 681

I Property acquired after termination of coverture

a In general

CROSS REFERENCES See no 669 et seq ante (property not vesting in possession during coverture: interests existing at date of covenant), no 786 et seq post (property not vesting in possession during coverture: reversionary interests)

756 General rule — Not included

Clause in a marriage settlement, that the future property of the wife should be limited upon the trusts of the settlement: *Held* to apply to such property only as should accrue to her during the continuance of the coverture.

Howell v Howell, Howell v James (1835) 4 LJ Ch 242

ANNOTATIONS **Apld** Carter v Carter (1869) LR 8 Eq 551; Dickinson v Dillwyn (1869) LR 8 Eq 546

757 General rule — Not included

In a marriage settlement a covenant to settle the wife's after-acquired property will be construed as applying only to property acquired during the coverture, although the words "during the coverture" are not inserted.

A joint and several covenant by an intended husband and wife, that if the wife, her executors or administrators, or the husband, his executors or administrators, in her right, should "at any one time thereafter" become absolutely entitled to any real or personal estate, the husband and wife respectively, or their respective executors or administrators, would bring it into settlement: *Held* not to apply to real and personal estate coming to the wife under the husband's will.

Carter v Carter (1869) LR 8 Eq 551; 39 LJ Ch 268; 21 LT 194

ANNOTATIONS **Folld** Re Edwards (1873) 9 Ch App 97 **Apld** Re Coghlan, Broughton v Broughton [1894] 3 Ch 76 **Consd** Re Ellis's Settlmt, Ellis v Ellis [1909] 1 Ch 618

758 General rule — Not included

A marriage settlement contained a joint covenant by husband and wife to concur and join in conveying to the trustees, upon the trusts of the settlement, all property which the wife, or the husband in her right, might thereafter become entitled to, either under the will or intestacy of, or by gifts from the wife's father; or under the will or intestacy of, or by gift from any other reason or persons whomsoever. The husband died and left all his property to his wife absolutely. The wife's father died before the husband; and by events which happened after the husband's death, a sum of £100, previously reversionary, devolved on the widow in possession under her father's will: *Held* the property left by the husband was not subject to the covenant but the £100 was.

According to the literal meaning of the expression, "all the property which A [the wife], or G [the husband] in her right, may thereafter become entitled to or interested in, by, through, or under the will, or intestacy of, or by gift from J [the father]; or under the will, or intestacy, of, or by gift from any other person or persons whomsoever," it means what may be acquired at any time during the life of A; but in the absence of authority I should have said it was intended to apply only to property acquired during coverture (*Malins V-C*).

Dickinson v Dillwyn (1869) LR 8 Eq 546; 39 LJ Ch 266; 22 LT 647; 17 WR 1122

ANNOTATIONS **Folld** Carter v Carter (1869) LR 8 Eq 551; Re Edwards (1873) 9 Ch App 97 **Apld** Re Coghlan, Broughton v Broughton [1894] 3 Ch 76; Coles v Coles [1901] 1 Ch 711 **Consd** Re Ellis's Settlmt, Ellis v Ellis [1909] 1 Ch 618

759 General rule — Not included

In a marriage settlement a covenant to settle the wife's after-acquired property will, in the absence of expressions showing a contrary intention, be construed as applying only to property acquired during

the coverture, although the words "during the intended coverture" are omitted.

Re Edwards (1873) 9 Ch App 97; 43 LJ Ch 265; 29 LT 712; 22 WR 144, LJJ

ANNOTATIONS **Folld** Alleyne v Hussey (1873) 22 WR 203 **Apld** Holloway v Holloway (1877) 25 WR 575 **Consd** Fisher v Shirley (1889) 43 Ch D 290 **Folld** Re Coghlan, Broughton v Broughton [1894] 3 Ch 76 **Apld** Davenport v Marshall [1902] 1 Ch 82 **Consd** Re Simpson, Simpson v Simpson [1904] 1 Ch 1; Re Ellis's Settlmt, Ellis v Ellis [1909] 1 Ch 618

760 General rule — Not included

A covenant in a settlement to settle the wife's after-acquired property does not apply to property acquired by her after the death of the husband, although such property may have been specifically referred to in the settlement.

Re Campbell's Policies (1877) 6 Ch D 686; 46 LJ Ch 142; 25 WR 268

761 General rule — Not included — Though settlement contains assignment of after-acquired property

The rule laid down in *Re Edwards* (no 759 ante), that in a marriage settlement a covenant to settle after-acquired property applies only to property acquired during the coverture, governs those cases in which the settlement contains an assignment of after-acquired property.

Holloway v Holloway (1877) 25 WR 575

762 General rule — Not included

A marriage settlement contained a covenant to settle all property to which the wife or her husband in her right should, during the intended marriage become beneficially entitled in possession or reversion. A judicial separation was subsequently decreed between the husband and wife. At the date of the settlement the wife was entitled to a reversionary interest, which fell into possession during the separation; and she became entitled during the separation to some personal property under the will of her mother: *Held* the reversionary interest was bound by the covenant; but the property acquired during the separation was not bound, because the object of the covenant was to exclude the husband, and inasmuch as he was excluded by Matrimonial Causes Act 1857 (c 85) s 25 (repealed), the covenant was inoperative during the separation.

Davenport v Marshall [1902] 1 Ch 82; 71 LJ Ch 29; 85 LT 340; 50 WR 39; 46 Sol Jo 30

ANNOTATION **Distd** Re Bankes, Reynolds v Ellis [1902] 2 Ch 333

763 Property acquired by wife after death of husband

Covenant to settle after-acquired property of the wife: *Held* to extend to property acquired after the death of the husband.

Stevens v Van Voorst (1853) 17 Beav 305; 51 ER 1051

ANNOTATIONS **Distd** Dickinson v Dillwyn (1869) LR 8 Eq 546 **Overd** Re Edwards, Re London, Brighton & South Coast Railways Act (1873) 9 Ch App 97

764 Property acquired by wife after death of husband

Reid v Kenrick no 897 post

765 Property acquired by wife after death of husband — Under husband's will

Carter v Carter no 757 ante

766 Property acquired by wife after death of husband — Under husband's will

Dickinson v Dillwyn no 758 ante

767 Property acquired by wife after death of husband — Specifically referred to in settlement

Dickinson v Dillwyn no 758 ante

768 Property acquired by wife after death of husband — Specifically referred to in settlement

Re Campbell's Policies no 760 ante

769 Property acquired by wife after death of husband

By a covenant in a marriage settlement it was provided that in case the wife, or the husband in her right, "should at any time thereafter, by descent, devise, bequest, or under Statute of Distributions, acquire, succeed to, or become possessed of or entitled to any property, real or personal, which should at any time be of the value of £100," same should be conveyed or assigned to the trustees of the settlement. The wife survived her husband: *Held* this covenant only applied to such property of the wife as she became entitled to during the coverture, and she had a right to have paid over to her a sum of money in court exceeding £100, to which she became entitled after the death of her husband.

Alleyne v Hussey (1873) 22 WR 203

770 Property acquired by wife after death of husband

A general covenant to settle a wife's future property will not be restricted to property falling in during the coverture if the husband survives, though it will be so restricted when the wife survives.

By a marriage settlement made in 1841 certain property belonging to the wife, who was a minor, was settled, and it was agreed and declared and the

husband covenanted with the trustees that if the wife, or he in her right, should become entitled to any other property whatsoever the same should be settled on the trusts of the settlement. At the date of the marriage the wife was, under a settlement made in 1833, entitled to a vested interest in an unascertained share of a settled fund in reversion expectant upon the death of the survivor of certain persons. The wife died in 1852, leaving the husband her surviving, and the reversionary fund did not become divisible until 1888, when the husband was still living: *Held* the wife's share in the fund was bound by the husband's covenant and must be paid to the trustees of the marriage settlement.

Fisher v Shirley (1889) 43 Ch D 290; 59 LJ Ch 29; 61 LT 668; 38 WR 70

ANNOTATION **Consd** Re Coghlan, Broughton v Broughton [1894] 3 Ch 76

771 Property acquired by wife after death of husband

By a marriage settlement, after reciting an agreement that the husband and wife should covenant in manner thereinafter mentioned as to any personal property which "during their joint lives" should be given or bequeathed to the wife or the husband in her right, the husband and wife jointly and severally covenanted with the trustees that, "if at any time after the marriage and during the life" of the wife any personal estate should be given or bequeathed or come to her or the husband in her right, the husband and wife would settle same. The husband also covenanted for the settlement of any personal estate that should "at any time thereafter" come to him. The wife survived the husband, and after his death became entitled to a fund in court as next of kin of an intestate: *Held* the wife's covenant was to be read as operative during coverture only, and this construction was assisted by the recital, which might be referred to in order to explain the ambiguity in the covenant.

Re Coghlan, Broughton v Broughton [1894] 3 Ch 76; 63 LJ Ch 671; 71 LT 186; 42 WR 634; 8 R 384

772 Spes successionis — Whether "estate or interest in personal property"

A wife's mere *spes successionis*, such as her hope of succession to a share of her husband's personal property upon his death, under the Scottish law of the *jus relictoe*, which *jus* vests in the wife only upon the death of the husband, even though coupled with an indemnity by the husband in damages if the *spes* should be disappointed, is not an "estate or interest in personal property" coming to her "during the coverture," within the meaning of the usual covenant in a marriage settlement for the settlement of the wife's after-acquired property.

An ante-nuptial settlement, made in 1873, contained a covenant by the husband and wife that if during the coverture the wife or husband in her right should become entitled to any personal property which should amount to £200, for any estate or interest whatsoever, they would respectively assure same to the trustees upon the trusts of the settlement. The husband and wife separated, and by a separation deed made in 1894 the husband, who was a domiciled Scotsman, agreed that in the event of his death in the lifetime of the wife her rights in his means and estate should not be less than she would have been entitled to by the law of Scotland if he had been a domiciled Scotsman at the date of his death. The husband died, leaving net personal estate of £16,000, to one-third of which the wife would by the law of Scotland have been entitled under her *jus relictoe*: *Held* the equivalent share to which the wife was entitled under the separation deed was not bound by her covenant to settle her after-acquired property.

Re Simpson, Simpson v Simpson [1904] 1 Ch 1; 73 LJ Ch 53; 89 LT 542; 52 WR 310; 48 Sol Jo 83, CA

ANNOTATION **Distd** Re Mudge [1913] 2 Ch 92

773 Spes successionis

By a marriage settlement of 1898 a sum of £10,000, which included a sum of £5,539 secured to the trustees by the covenant of the wife's father, was settled on certain trusts for the wife, husband and children, the wife taking the first life interest, and covenanting to settle after-acquired property, to which she became entitled during the coverture, on substantially the same trusts. By his will of 1905 the father gave one-third of his residuary real and personal estate to the wife for her separate use absolutely. The father died during the coverture. His clear residuary estate, subject only to the covenant, was £80,000, all personalty: *Held* the bequest was a satisfaction as to the wife's life interest in the £5,539 secured by the covenant, but not as to the interest of other *cestuis que trust* not mentioned in the will, taking no direct interest in the bequest, and only in fact taking derivatively under the after-acquired property clause, because the bequest happened to take effect during the coverture. The wife was therefore the only person put to election.

The covenant only extends to property to which the wife becomes entitled "during the said intended coverture." If her husband had died during testator's lifetime the wife would have taken her share absolutely, free from the covenant. So if she had died in testator's lifetime leaving issue who survived testator, her share would have formed part of her estate, under Wills Act 1837

(c 26) s 33, but would not have been bound by the covenant (*Swinfen Eady J*).
Re Blundell, Blundell v Blundell [1906] 2 Ch 222; 75 LJ Ch 561; 94 LT 818; 22 TLR 570

774 Property acquired after death of wife — Covenant by husband alone — As to property acquired during his life
Prebble v Boghurst no 669 ante

775 Property acquired after death of wife — Bequest to wife
Property bequeathed by testator to his daughter, who died in his lifetime, but whose child and husband survived him: *Held* not to be within a covenant to settle property coming to the daughter "during coverture".
Pearce v Graham (1863) 1 New Rep 507; 32 LJ Ch 359; 8 LT 378; 9 Jur NS 568; 11 WR 415

ANNOTATION **Expld** Re Hone's Trusts (1883) 22 Ch D 663

776 Property acquired after death of wife — Bequest to wife
Re Blundell, Blundell v Blundell no 773 ante

777 Property acquired after death of wife — Share of reversionary fund
Fisher v Shirley no 770 ante

778 Property not vesting in possession during coverture
Covenant in marriage settlement by husband and wife to settle all property of the value of £200 which the husband and wife, or either of them in her right, should during the coverture become entitled to other than separate property or life interests of the wife: *Held* property devised and bequeathed to the husband and wife as joint tenants was not within the covenant; *semble* property which does not vest in possession during the coverture is not within a covenant so framed.
Edye v Addison (1863) 1 Hem&M 781; 3 New Rep 66; 33 LJ Ch 132; 9 LT 373; 12 WR 97; 71 ER 342; sub nom
Edge v Addison (1863) 9 Jur NS 1320

ANNOTATIONS **Consd** Burn-Murdoch v Charlesworth (1875) 23 WR 743; Ward v Ward (1880) 14 Ch D 506

Scottish, Irish and Commonwealth Cases

779 Property not vesting in possession during coverture
Held a conveyance by a wife in her marriage contract to the marriage contract trustees, of the whole estate "now belonging to her or to which she may acquire right during the subsistence of the marriage," did not include a *spes successionis* to estate which did not vest in her during the subsistence of the marriage, there being nothing in the other parts of the deed to indicate that she intended to convey it.
M'Ewan's Trustees v Macdonald [1909] SC 57; 46 Sc LR 31; 16 SLT 432 (SCOT)

780 Contingent title acquired during coverture — Property vesting after termination of coverture
A marriage settlement contained a covenant by the wife to bring into the settlement property acquired by will or gift from her father during coverture "whether in possession, reversion or otherwise": *Held* these words included property to which the wife became contingently entitled under her father's will but which did not vest until after coverture was determined.
Re Corry's Will Trusts, Corry v Corry [1950] NI 159 (IR)

b Termination by divorce or separation

CROSS REFERENCE See HUSBAND & WIFE vol 27(1) (2nd reissue) no 1571 et seq (generally)

781 Effect of decree nisi
A husband and wife, by their marriage settlement, covenanted to assign to the trustees of the settlement upon the trusts thereof, any property which the wife or the husband in her right should at any time become possessed of or entitled to during the coverture. A decree *nisi* for the dissolution of the marriage was pronounced; but pending the decree being made absolute, the husband and wife appointed a new trustee of the settlement and property fell into possession of the wife. Subsequently the wife married again: *Held* the property was not bound by the covenant in the settlement.
Re Pearson's Trusts (1872) 26 LT 393; 20 WR 522

ANNOTATION **NF** Sinclair v Fell [1913] 1 Ch 155

782 Effect of decree nisi
By a marriage settlement dated in 1879, it was expressly agreed that if the wife during the then intended coverture, or her husband in her right, should at one and the same time and from the same source become entitled to any real or personal property of the value of £200 or upwards, the property should be settled. On 12 January 1911, a decree *nisi* for the dissolution of the marriage was pronounced. On 22 January 1911, the wife became entitled under her mother's will to certain funds which exceeded in value the amount mentioned in the settlement. On 24 July 1911, the decree *nisi* was made absolute: *Held* the funds fell into possession during the coverture contemplated by the settlement and were therefore bound by the covenant to settle after-acquired property.
Sinclair v Fell [1913] 1 Ch 155; 82 LJ Ch 105; 108 LT 152; 29 TLR 103; 57 Sol Jo 145

783 Effect of judicial separation

A married woman subsequently to obtaining a decree of judicial separation from her husband, became absolutely entitled to certain sums of stock: *Held* under Matrimonial Causes Act 1857 (c 85) s 25 (repealed), the stock belonged to her as if she were a *feme sole*, and was not included in a covenant in her marriage settlement to settle all property which she or her husband in her right might acquire "during the coverture."

Dawes v Creyke (1885) 30 Ch D 500; 54 LJ Ch 1096; 53 LT 292; 33 WR 869

ANNOTATION **Consd** Davenport v Marshall [1902] 1 Ch 82

784 Effect of judicial separation

Davenport v Marshall no 762 ante

785 Effect of judicial separation — Under decree of foreign court

By a settlement in English form executed in 1878 in contemplation of a marriage between a domiciled Italian and an Englishwoman, it was agreed that the trustee should hold a sum of money secured upon an English mortgage upon trust to invest in English securities and to hold the same upon trusts for the benefit of the wife and husband and their issue. The settlement contained a covenant to settle after-acquired property of the wife. The marriage took place in Italy, where the husband and wife continued to reside. In 1898 a decree for the voluntary separation of the husband and wife was made by the Italian court, and they had since lived apart from each other. In 1881 the wife's father died, having by his will bequeathed to the wife certain legacies subject to his widow's life interest therein. The will contained a declaration that all money payable to any female should during coverture be paid to her for her separate use without power of anticipation. The widow died in 1899: *Held* (1) assuming English law to be applicable, the restraint on anticipation lasted until the date of payment, namely, the death of the widow, and the legacies were therefore bound by the covenant; (2) inasmuch as the decree of the Italian court for separation did not, like an English decree for judicial separation, affect the rights of property of the parties, *Davenport v Marshall* (no 762 ante) did not apply, and the covenant to settle after-acquired property was still binding.

Re Bankes, Reynolds v Ellis [1902] 2 Ch 333; 71 LJ Ch 708; 87 LT 432; 50 WR 663; 46 Sol Jo 601

J Reversionary interests

a In general

LAW See Halsbury's Laws (4th edn) vol 42 para 650

CROSS REFERENCE See no 669 et seq ante (interests existing at date of covenant)

786 Covenant to settle any share or interest

A reversion of a moiety of a farm was settled on a marriage, and the trustees were empowered to sell it when in possession; and the intended husband and wife covenanted that if they should thereafter acquire any other share or interest in the farm, they would, immediately thereupon, convey the same so that it might become vested in the trustees upon the trusts and subject to the powers declared of the settled moiety. After that moiety had fallen into possession, a moiety of the other moiety descended to the wife, not in possession but subject to a life interest: *Held* nevertheless, it, as well as the settled moiety, were saleable under the power.

As soon as Mrs J became entitled to the interest in reversion or remainder expectant on her sister's death in a moiety of a moiety of the farm, she and her husband were bound to convey it, so that it might become subject immediately, and not when it should become an interest in possession, to the trusts and powers of the settlement (*Shadwell V-C*).

Giles v Homes (1846) 15 Sim 359; 60 ER 657

787 Interest omitted from settlement by mistake

Upon the marriage of a ward, the intended husband proposed to settle the whole of her fortune. The master, in ascertaining her fortune, omitted to state a reversionary interest. Her property was settled, omitting the reversionary interest, and the husband covenanted to settle any property to which the wife or he, in her right, "should at any time during the marriage" become entitled: *Held* the reversionary interest ought to be settled.

Bute (Marquis) v Harman (1846) 9 Beav 320; 50 ER 367

788 Interest falling into possession after coverture — Covenant to carry property coming to or vesting in wife — Reversionary interest in chose in action

Butcher v Butcher no 708 ante

789 Interest falling into possession after coverture

Reid v Kenrick no 876 post

790 Interest falling into possession after coverture

A reversionary interest bequeathed to a married woman, which did not fall into possession until after the termination of the coverture: *Held* bound by a covenant in her marriage settlement to settle any

property to which she or her husband in her right might become entitled during the coverture.
Hughes v Young (1862) 1 New Rep 166; 32 LJ Ch 137; 9 Jur NS 376

791 Interest falling into possession after coverture
Cowper-Smith v Anstey [1877] WN 28

792 Interest falling into possession after coverture — Covenant to convey property in any manner accruing
Re Roy's Settlement, Jebb v Roy (1906) 50 Sol Jo 256

b Contingent or defeasible interests

CROSS REFERENCE See no 669 et seq ante (interests existing at date of covenant)

793 Interest subject to divestment by appointment — Falling into possession during coverture
McLurcan v Lane, Melhuish v McLurcan no 720 ante

794 Interest subject to divestment by appointment — "Come to or vest in"
A marriage settlement contained a covenant by the husband for the settlement of all personal estate which at any time during the coverture should come to or "vest" in him in right of his intended wife, or in her by bequest, gift or otherwise: *Held* a reversionary interest in a legacy in default of appointment, which vested in the wife during the coverture, though liable to be divested by the exercise of the power of appointment was included in this covenant.
Re Ware, Cumberlege v Cumberlege-Ware (1890) 45 Ch D 269; 59 LJ Ch 717; 63 LT 52; 38 WR 767; 6 TLR 388

795 Contingent interest under voluntary settlement — Becoming vested during coverture
A covenant by an intended husband and wife to settle the wife's after-acquired property: *Held* to sever the wife's joint interest in personal estate created by a subsequent instrument.

Three years after that marriage settlement a voluntary settlement is made by P, in which there is an ultimate trust, if certain prior trusts fail, for his next of kin. That, as soon as the settlement was executed, did give a contingent interest to any person who might prove to be entitled under those words. Of course, it could not then be ascertained that these parties could take anything under it, because the next of kin of P were the persons contingently entitled, and they could only be ascertained at the time at which he died. I do not, therefore, agree with the view that the settlement did affect this particular property at the time at which the voluntary settlement was made in 1883; though, no doubt, a possibility of succeeding to that property as one of the next of kin might thenceforward have been in the contemplation of the parties. But when P died it was known who his three next of kin were, and those persons at once had an immediate interest. I do not say an interest in possession, but they had a clear interest in the property, although, no doubt, it might be a very remote interest, and possibly might fail; but there was an interest which vested in the next of kin at that time, and Mrs H's [the wife's] share in which, according to my view of the covenant, the parties had bound themselves to convey and assure when circumstances should permit (*North J*).
Re Hewett, Hewett v Hallett [1894] 1 Ch 362; 63 LJ Ch 182; 70 LT 393; 42 WR 233; 38 Sol Jo 113; 8 R 70

796 Contingent reversionary interest under will
A settlement made in 1870, on the marriage of L, the husband and D, the wife, contained a covenant by both of them with the trustees of the settlement that all other, if any, the present and future real and personal estate and effects whatsoever, whether in possession or expectancy, of or to which L and D, or either of them in her right, or by marital right, should at any time or times during the coverture become seised, possessed, or entitled, or of or to which L, or any person claiming through or under him, should by any means whatsoever become, in her right or by marital right, at any time or times after solemnisation of the marriage, seised, possessed, or entitled, except only such estate and effects as should be settled on her for her separate use, should from time to time, as soon as might be thereafter, or after they or he should become possessed of or entitled to the same, be conveyed, assigned, transferred, or paid unto the trustees, and be settled and assured upon the trusts of the settlement, or such of them as should be subsisting and capable of taking effect.

D in 1871, during the coverture, became entitled under her mother's will to a contingent reversionary interest in part of the proceeds of sale of realty and personalty which was given for separate use, and under a codicil to the same will to a contingent reversionary interest in another part of the proceeds, which was not given for her separate use. After L's death the interest under the will fell into possession; the interest under the codicil was still reversionary: *Held* (1) the interest under the will was not within the operation of the covenant; (2) the interest under the codicil was within the covenant.

Semble: it always has been possible, whether before or after Malins' Act [Married Women's Reversionary Interests Act 1857 (c 57)], by a properly

framed covenant as to after-acquired property in a marriage settlement, to bind a married woman's reversionary interests, whether contingent or otherwise, acquired during coverture, but not falling into possession until afterwards; and the court can and always could, notwithstanding technical difficulties as to getting an actual conveyance, bind the property in the hands of every one, including the heir or legal personal representative of the husband or wife, as the case may be.
Lloyd v Prichard [1908] 1 Ch 265; 77 LJ Ch 183; 97 LT 904; 52 Sol Jo 58

797 Contingent reversionary interest under will — Given for separate use of wife — Falling into possession after coverture
Lloyd v Prichard no 796 ante

Scottish, Irish and Commonwealth Cases

798 Contingent reversionary interest under will
Dowling v Dowling [1917] VLR 208 (AUS)

K Property subject to restraint on anticipation

CROSS REFERENCE See HUSBAND & WIFE vol 27(1) (2nd reissue) no 3205 et seq (restraint on anticipation generally)

799 Whether included
By a Scotch marriage settlement all the property which the wife might acquire during the coverture was settled upon the husband for life, with remainder to the wife absolutely. A legacy of £2,000 was afterwards bequeathed upon trust for the wife for her separate use for life, without power of anticipation, with trusts over in favour of the husband and the children of the marriage. The husband having become bankrupt: *Held* his assignees had no interest in the dividends on the £2,000, which were ordered to be paid to the wife during her life.
Duncan v Cannan (No 2) (1855) 21 Beav 307; 4 WR 2; 52 ER 877

800 Whether included
A married woman became entitled to a fund in court, under a will, whereby the property was directed to be paid into her hands, or to such person as she should appoint, so as that the same should not be subject to the control of her husband, nor be alienable by herself or him. Their marriage settlement contained a covenant by the husband to settle her after-acquired property. Upon a petition by the wife for payment of the fund to her: *Held* the intention in the will was to restrain alienation during coverture, and the fund ought to be retained, and the dividends only paid to the wife.
Re Sarel (1864) 4 New Rep 321; 10 LT 691; 10 Jur NS 876

801 Whether included
A restraint on anticipation was equivalent to a restraint on alienation, and accordingly the shares of married women in residuary real and personal estate given to them by will for their separate use without power of anticipation, were not bound by covenants for settlement of after-acquired property contained in their respective marriage settlements; and the capital of the personal estate was not payable to them on their separate receipt.
Re Currey, Gibson v Way (1886) 32 Ch D 361; 55 LJ Ch 906; 54 LT 665; 34 WR 541

ANNOTATION **Distd** Re Bankes, Reynolds v Ellis [1902] 2 Ch 333

802 Whether included — Restraint attaching to income only
On 5 June 1860, A and B in exercise of the power of appointment in favour of children contained in their marriage settlement, dated in 1830, appointed £3,500 to their daughter M, afterwards MS.

By the marriage settlement of NS and MS dated 6 June 1860, MS assigned the £3,500 to the trustees, upon trusts under which NS had the first life interest, and, in default of children, MS had a general testamentary power of appointment. There was also a covenant by NS and MS that if they, or either of them, should during the coverture become entitled to any real or personal property, except certain specified interests, the same should be forthwith assured to the trustees.

On 20 June 1860, A and B appointed that a moiety of the residue unappointed of the trust funds under the settlement of 1830 should, after the decease of the survivor of them go to MS, during her coverture, for her sole and separate use, without power of anticipation, her receipt to be a sufficient discharge for the payment thereof. There was a proviso that if MS should die in the lifetime of NS, leaving no children, the same moiety should go to the brother of MS absolutely, and that if MS should survive her husband, the same moiety should go to MS absolutely.

MS died in 1887 leaving children, and having by her will appointed and bequeathed all her property to NS and appointed him sole executor. A and B had both pre-deceased MS: *Held* the appointment by A and B, of 20 June 1860, showed an intention to exclude NS and any interest which he would take if the fund was caught by his marriage settlement; though the restraint on anticipation must be rejected, yet taken together with the gift over in default of children and the receipt clause, it showed an intention that the separate use should apply only to the income accruing during the particular coverture, and

that MS should have no power of disposition over the corpus, such a limitation was clearly good and therefore, the fund having accrued during the coverture, the corpus was caught by the after-acquired property clause.
Shute v Hogge (1888) 58 LT 546

803 Whether included — Restraint attaching only while interest reversionary
Re Bankes, Reynolds v Ellis no 785 ante

804 Whether included — Property given to wife with gift over on alienation
Brooks v Keith no 722 ante

805 Whether included — Property given to wife with gift over on alienation
Re Crawshay, Walker v Crawshay no 743 ante

806 Whether included — Property given to wife with gift over on alienation
Re Smith, Franklin v Smith no 649 ante

Scottish, Irish and Commonwealth Cases

807 Whether included
The covenant in question herein in a marriage settlement whereby the wife covenanted for settlement of after-acquired property: *Held* not to catch the income received by her under the will of her father without power of anticipation.
National Trust Co Ltd v Ashton [1936] 2 WWR 457 (CAN)

808 Whether included
Russell v Lawder [1904] 1 IR 328 (IR)

L Other cases

CROSS REFERENCE See no 840 et seq post (trinkets expressly excepted in covenant)

809 Freehold leases for lives — Whether chattels "real"
A on his marriage, covenanted that if his wife should die before him, leaving issue of their bodies, he would pay, grant, secure, or sufficiently settle to and for such issue, one-third part of all his chattels, real and personal, which at the death of the wife he should be possessed of, to be divided between them, if more than one, as he should direct. The wife died, leaving two daughters, and the husband, during the coverture, acquired some freehold leases for lives: *Held* these leases were included in the covenant, but the daughters were not entitled to a division until after the father's death; which he was decreed to give security to make.
Hankes v Jones (1756) 5 Bro Parl Cas 136; 2 ER 583, HL

810 Personal estate and effects
Lewis v Madocks no 650 ante

811 Personal estate and effects — Leasehold interest
By marriage articles made in 1886 between WYB, LKB, his intended wife, and plaintiff and three other trustees, it was agreed that so soon as might be after the marriage a settlement should be made of the property therein mentioned and WYB agreed to settle any property which he might acquire during the intended coverture. The marriage took place, and a settlement was executed accordingly. Subsequently plaintiff demised certain property to WYB for twenty-one years, WYB covenanting to keep the property in repair, and not to assign or underlet without leave of the lessor. WYB thereafter became bankrupt, and the premises were surrendered to plaintiff by the trustees in bankruptcy. In an action by plaintiff against LKB claiming possession of the premises: *Held* the covenant in the settlement *primâ facie* included the premises, that, as the difficulty as to underletting could be got over in the manner pointed out in *Re Turcan* (no 823 post) the trustees would be able to apply the income arising therefrom for the benefit of the *cestuis que trust*, and consequently the premises must be held bound by the trusts of the settlement.
Churston (Lord) v Buller (1897) 77 LT 45

812 Household goods, etc
Anon [1875] WN 203; Bitt Prac Cas 19; 1 Char Cham Cas 31

813 Capital not income
Lewis v Madocks no 650 ante

814 Property given for separate use of wife
Brooks v Keith no 722 ante

815 Property given for separate use of wife
A marriage settlement recited that it had been agreed that the intended husband and wife should covenant for the settlement of such property as should devolve upon the wife or the husband in her right through M; and the husband and wife thereby severally covenanted that if the husband and wife or the husband in right of the wife should become possessed of or entitled to any such property, except interests given to the wife for her life, and which, as was thereby stated, should, unless settled to her separate use, be so settled, then such property should be settled upon the trusts of the settlement: *Held* the terms of the covenant did not include property bequeathed by M to the wife absolutely for her separate use, and the construction was not altered by the recital or the words of exception.
Burn-Murdoch v Charlesworth (1875) 23 WR 743

816 Property given for separate use of wife
By a marriage settlement, after a recital that on the treaty for the marriage it was agreed that all real and

personal property which during the coverture should devolve upon or vest in the wife or the husband in her right to the value of £200 at any one time should be settled upon the trusts thereinafter declared, it was witnessed that it was thereby agreed and declared between and by the parties thereto, and the husband thereby covenanted with the trustees that if at any time during the coverture any real or personal estate should devolve on or vest in the wife or the husband in her right to the amount in value of £200 at any one time, the husband would make, do, and execute, or cause and procure to be made, done, and executed, and join and concur in making, doing, and executing all such conveyances, etc, as would effectually vest such real and personal estate in the trustees upon the trusts therein declared. After the marriage a deed was executed by the wife's mother, under which, during the coverture, a sum exceeding £200 became payable to the wife for her separate use: *Held* as the operative part of the deed was clear, the recital could not control it; as the operative part of the deed only related to acts to be done by the husband, the agreement and declaration between and by the parties that those acts should be done did not import a covenant by any other party that they should be done, and there was, therefore, no covenant by any one but the husband; the covenant by him could not be held to relate to property over which he had no power and in which he had no interest and the wife therefore was not bound to bring into settlement property given to her separate use.

Dawes v Tredwell (1881) 18 Ch D 354; 45 LT 118; 29 WR 793, CA

ANNOTATIONS **Consd** Re D'Estampes Settlmt, D Estampes v Crowe (1884) 53 LJ Ch 1117 **Distd** Re De Ros' Trust Hardwicke v Wilmot (1885) 31 Ch D 81 **Consd** Hancock v Hancock (1888) 38 Ch D 78 **Apld** Re Rickman, Stokes v Rickman (1899) 80 LT 518; Re Smith, Robson v Tidy [1900] WN 75

817 Property given for separate use of wife

Lloyd v Prichard no 796 ante

818 Property given for separate use of wife

By her marriage settlement a lady covenanted to bring under the trusts of the settlement any property exceeding in value £200. A legacy was subsequently left to her absolutely and for her separate use and with the condition "so as to be free from any covenant contained in her marriage settlement to settle after acquired property": *Held* the condition was void and the legacy must be bound by the covenant.

Re Wharton, Wharton v Barmby (1910) 102 LT 531

819 Trinkets — Whether "real or personal estate or effects"

Willoughby v Middleton no 901 post

820 Property acquired through medium of settlement — Covenant in separation deed

By a marriage settlement certain personal property was settled upon the usual trusts, as to the wife's property, in trust to her for life to her separate use, with remainder to the children of the marriage. By a subsequent deed of separation the husband covenanted that all such estates, real and personal, which might at the date of the marriage settlement, or which during the joint lives of husband and wife, should descend or come to, or devolve upon or be given or devised or bequeathed, or conveyed to or in trust for him, should be holden, enjoyed, sold, given away, devised, bequeathed and disposed of by the wife, her heirs, executors, administrators and assigns respectively. Two children of the marriage attained their ages of twenty-one, and died intestate, leaving the husband their sole next of kin: *Held* (1) the beneficial interests which the children had acquired under the settlement, and which devolved upon the husband as next of kin, were not bound or affected by the husband's covenant in the separation deed; (2) such beneficial interests formed part of the husband's personal estate.

Hudson v King (1862) 6 LT 856

821 Property acquired through medium of settlement

Mackenzie v Allardes no 657 ante

822 Commutation money — Naval officer's half pay

D, by his marriage settlement, agreed that if he then was, or should during the intended coverture, at one time and from one source, become entitled to any real or personal property of the value of £100 or upwards for any estate or interest whatsoever, he and all necessary parties should execute and do such assurances and things as should be necessary for vesting the same in the trustees of the settlement. D was at the time of his marriage in receipt of half pay, as lieutenant in the navy, which he subsequently commuted, under Pensions Commutation Act 1871 (c 36), for £2,175: *Held* the commutation money was not bound by the agreement in the settlement.

Churchill v Denny (1875) LR 20 Eq 534; 44 LJ Ch 578; 23 WR 825

ANNOTATIONS **Apld** Re Clutterbuck's Settlmt, Bloxam v Clutterbuck [1905] 1 Ch 200; Re Biscoe, Biscoe v Biscoe (1914) 111 LT 902

823 Insurance policies — Whether property to which covenantor entitled by purchase

A trader by his marriage settlement covenanted that if at any time during the marriage he should become possessed or entitled by devise, bequest, purchase, or otherwise, of or to any property, real or personal, he would assign it to the trustees of the settlement.

Afterwards he effected certain life and accident policies, one of which contained a clause against assignment: *Held* the covenant was severable; the policies fell within the class defined by the covenant as property to which he became entitled by purchase, and therefore were bound by the covenant, notwithstanding the clause against assignment, the object of which was treated as being merely the protection of the company.

Re Turcan (1888) 40 Ch D 5; 58 LJ Ch 101; 59 LT 712; 37 WR 70, CA

ANNOTATION **Consd** Helstan Securities Ltd v Hertfordshire CC [1978] 3 All ER 262

824 Interests expressly included in settlement deed — Left to revert to settlor

By a marriage settlement, dated in 1875, personal property of the wife was settled upon trust for the wife for life, P after her death upon trust to pay the income to the husband "so long as he shall remain unmarried, and from and after the death of the survivor," to hold the capital in trust for the children of the marriage, as the husband and wife or the survivor should appoint, and in default for sons at twenty-one and daughters at that age or marriage. There was a power of advancement exercisable with the consent of the husband and wife or the survivor during their lives. The ultimate trust in default of issue was for the wife if she survived, and if the husband survived for the appointee of the wife by will, and in default for her next of kin, as if she had died without having been married. The settlement also comprised a policy on the life of the husband which was settled upon like trusts, except that if the wife survived and married again the policy moneys were to be held upon the same trusts as if she were then dead. Then there was a covenant in the common form for the settlement of other and after-acquired property of the wife. There were six children of the marriage. The wife died in 1886, and the husband took out administration to her estate. In January 1889 he married again. The question was, who since the husband's second marriage was entitled to the income of the property of the wife which was included in the settlement: *Held* upon the marriage again of the surviving husband, there was a resulting trust of the income during the rest of his life, to the legal personal representative of the wife; and the husband as administrator of his wife was entitled to the undisposed-of income.

Such a command is not intended to settle such part of the property expressly included in the deed as is left to revert to the settlor, but to settle property which otherwise the deed would not affect at all (*Kay J*).

Re Wyatt, Gowan v Wyatt (1889) 60 LT 920

825 Arrears of annuity — Paid after death of husband and wife

Tweedale v Tweedale (1894) 39 Sol Jo 134

826 Arrears of annuity — Under terms of separation deed

Re Simpson, Simpson v Simpson no 772 ante

827 Arrears of annuity — Whether interest "in expectancy"

Testatrix by her will dated 1862, gave a fifth share of her residuary estate to her daughter W for life, with remainder to her children, but if she should die without issue, which event happened, "her share to go to her next of kin as if she had not been married." In 1866 J, another daughter of testatrix, married, and by her marriage settlement covenanted that any real or personal property to which she then was entitled for any estate or interest whatsoever in reversion, remainder, or expectancy should be settled upon the trusts of the settlement. W died in 1912 without issue, and leaving J her sole next of kin: *Held* inasmuch as the covenant did not relate to any defined *spes successionis* it was too vague to be enforceable in equity; and consequently the property to which J became entitled as next of kin of her sister was not comprised in the settlement.

Re Mudge [1914] 1 Ch 115; 83 LJ Ch 243; 109 LT 781; 58 Sol Jo 117, CA

828 Property at absolute disposal of one party

Mackenzie v Allardes no 657 ante

829 Property altered in outward form — By change of investments

Mackenzie v Allardes no 657 ante

830 Property not capable of being transferred by lex loci — Land in Jersey

A marriage settlement, executed in 1897, contained a covenant whereby it was agreed that all real and personal property to which AMH, the intended wife, then was or at any time during her coverture should be or become entitled, "except her freehold and leasehold property in Jersey, and any cash, stocks, funds, or other securities, now in the actual possession, or standing in the name of AMH" should be assured and transferred by AMH, and all other necessary parties, if any, to the trustees of the settlement upon trust to sell and hold the proceeds upon the trusts relating to the wife's trust fund. At the date of the settlement AMH was absolutely entitled to certain real estate in Jersey. In 1901 she became absolutely entitled to a share in certain other freehold property in Jersey. By the law of that country trusts of this character were not recognised, and all transfers of property were required to be made for adequate pecuniary consideration: *Held* although the words of the exception in the covenant did not exclude the

subsequently acquired property of the wife in Jersey, yet, having regard to the law of Jersey which rendered the transfer of such property to the trustees inoperative, it was not caught by the covenant to settle.

Re Pearse's Settlement, Pearse v Pearse [1909] 1 Ch 304; 78 LJ Ch 73; 100 LT 48; 53 Sol Jo 82

831 Sum raised by appointment under power in will

By a settlement, made on the marriage of B, she was empowered to appoint that the trustees of the settlement should raise out of the settled fund any sums not exceeding in the whole £2,000, and pay the same to B for her separate use. The settlement contained a covenant by B to settle any after-acquired property of the value of £200 or upwards.

The father of B, who died in her lifetime, gave a fourth of his residuary estate in trust for each of his two daughters, and directed his trustees to hold the shares "upon the same trusts and with and subject to the same powers, including the powers of investment, as are in their respective marriage settlements contained with respect to the funds thereby settled." There were separate settlors, separate funds, and separate sets of trustees: *Held* B was entitled to raise by appointment, out of her share of residue, the sum of £2,000 and the £2,000 was subject to the covenant as to after-acquired property.

Re Beaumont, Bradshaw v Packer [1913] 1 Ch 325; 82 LJ Ch 183; sub nom

Re Beaumont, Beaumont-Nesbitt v Packer (1913) 108 LT 181; 57 Sol Jo 283

ANNOTATION **Consd** Re Campbell's Trusts, Public Trustee v Campbell [1922] 1 Ch 551

832 Mortgage granted by husband — In consideration of release of rentcharge

A marriage settlement dated in 1884 contained a covenant for the settlement of the after-acquired property of the wife. The husband covenanted to secure to her a yearly rentcharge of £500, which he charged upon certain property. He subsequently executed a deed for that purpose. Some years later the wife released to her husband the rentcharge, and the husband mortgaged the property to the wife to secure the payment to her of £10,000. This mortgage was subject to a first mortgage of even date. By his will the husband devised the property upon trust for his wife for life, with remainder to such son of his as should first attain twenty-one. After the death of the husband the widow, in exercise of her power as tenant for life, sold the property. The first mortgage was then paid off: *Held* the widow was entitled to the £10,000 with interest and the £10,000 was not subject to the covenant to settle after-acquired property.

Re Biscoe, Biscoe v Biscoe (1914) 111 LT 902

833 Property acquired under will of child — Child having vested interest

By a marriage settlement made in 1893, property was to be held on trust, subject to the interests therein of the husband and wife, for the children of the marriage as the husband and wife should appoint, and, in default of appointment, for all the children of the marriage who should attain twenty-one or, being daughters, marry under that age, and, if there should be no child who should attain a vested interest, there was an ultimate trust, in default of appointment by the wife, for the wife absolutely if she should survive the husband, or, should she die in the husband's lifetime, for the persons who would be entitled on her intestacy if she had died unmarried. The settlement contained a covenant by the wife to settle after-acquired property on the original trusts of the settlement "or as near thereto as circumstances will permit." The only child who attained a vested interest died a bachelor in 1922, having by his will left everything that he possessed to his mother (the wife). At his death, he was entitled, under another settlement, to an absolute interest in remainder in certain property and, this interest was caught by the after-acquired property clause in the marriage settlement. The question was whether, under the provisions of that clause, this interest should be held on trust, subject to the life interests of the husband and wife, for the son, who had attained a vested interest under the original trusts of the marriage settlement, or whether, since it did not become subject to the after-acquired property clause until after the son's death, it should be held on the ultimate trusts of the settlement: *Held* on the true construction of the after-acquired property clause, since the son had already attained a vested interest under the original trusts, the fact that he had died before the property in question was caught by that clause did not prevent its being settled on the original trusts, and, therefore, in the events which had happened, it was to be held, subject to the life interests of the husband and wife therein and in the event of there being no further issue of the marriage, on trust for the wife absolutely.

Re Benett-Stanford Settlement Trust, Atwood v Benett-Stanford [1947] 1 All ER 888; [1947] LJR 1973; 177 LT 301

ANNOTATION **Distd** Re Rogers Settlement, Arnott v Rogers [1951] Ch 450

Scottish, Irish and Commonwealth Cases

834 Insurance policies

Re Fawns (1905) 2 Tas LR 19 (AUS)

835 Insurance policies
Drysdale v Drysdale [1906] VLR 87 (AUS)

836 Separate personal property of wife — Not included in settlement

It is evident from the scope of CSUC Clause 73, that notwithstanding a marriage settlement any separate personal property of a married woman acquired after marriage and not coming under or being affected by such settlement, shall be subject to the provisions of the Act in the same manner as if no such settlement had been made, and as to such property the married woman shall be considered as having married without settlement.

Dawson v Moffatt (1886) 13 OR 170 (CAN)

837 Property of bankrupt

Lyster v Burroughs (1837) 1 Dr&Wal 149 (IR)

838 Exception of property intended by donor to be excepted

Purcell v Sheehy (1885) 16 LR Ir 439 (IR)

839 What property affected — Covenant to take title to lands to be purchased to wife and self in joint fee and life rent to secure annuity — Title taken to self and heirs alone

Ogilvie v Dundas (1826) 2 Wils&S 214 (SCOT)

iv EXPRESS EXCEPTIONS FROM THE COVENANT

1 Limitations as to amount, time and source

A In general

LAW See Halsbury's Laws (4th edn) vol 42 para 653 et seq

840 What property within exception — Property not given so as to be capable of settlement — Residuary bequest to trustees to settle upon trusts of settlement

By a marriage settlement, the intended husband and wife covenanted that if the wife should become thereafter entitled to property exceeding in value £500, it should be settled upon the trusts of the settlement under which the wife and husband took life interests, with limitations over: *Held* in computing this value, a residuary bequest to the trustees of the settlement upon the trusts of it ought not to be reckoned, but that the value was to be that of the future property, which could be settled.

Forster v Davies (1861) 4 De GF&J 133; 31 LJ Ch 276; 5 LT 532; 8 Jur NS 65; 10 WR 180; 45 ER 1134, LJJ

841 What property within exception — Only property of prescribed value — Arising at any one time and from any one source

A marriage settlement contained a covenant that property to which the wife then was, or she or the husband in her right should, at any time during the coverture, become entitled, to the value of £500, should be settled: *Held* the covenant must be construed to affect only property of the prescribed value arising "at any one time, and from any one source."

Re Hooper's Trusts (1865) 5 New Rep 463; 12 LT 137; 11 Jur NS 479; 13 WR 710

ANNOTATIONS **Apld** Hood v Franklin (1873) LR 16 Eq 496; Re Hughes' Settlmt, Hughes v Schooling, Re Smith, Hughes v Schooling [1924] 2 Ch 356

842 What property within exception — Legacy and share in residue under same will

By a marriage settlement it was agreed that all property which, during the joint lives of the husband and wife, should devolve upon the wife or the husband in her right, and which should at the time when the same should respectively so devolve, exceed the value of £500, should be settled upon the trusts of the settlement. By a subsequently executed will a legacy of £200 was left to the wife, and a share of the residuary estate of testator was also given to her for her separate use, such share being declared to be in addition to the legacy of £200. The share of the residue exceeded £500 and was paid to the trustees of the settlement: *Held* the legacy of £200 need not be settled.

Re Middleton's Will (1868) 16 WR 1107

ANNOTATION **Folld** Re Davies, Harrison v Davis [1897] 2 Ch 204

843 What property within exception — Legacy and share in residue under same will

A wife married in 1877 became, under the will of testator who died in 1880, entitled to a sum of £180, and also to an unascertained share of residue assumed to exceed somewhat the sum of £20: *Held* as between the husband and wife, although the wife took the £180 and share of residue under the same instrument, she did so under different titles, and therefore Married Women's Property Act 1870 (c 93) s 7 (repealed), had to be applied to each sum separately and not to both in the aggregate, so that the £180, having been by itself "a sum of money not exceeding £200," belonged to the wife "for her separate use."

Re Davies, Harrison v Davis [1897] 2 Ch 204; 66 LJ Ch 512

844 What property within exception — Legacy and share in legacy as next of kin to legatee

By a marriage settlement it was provided that all such further or other portion or personal estate, if any, as should during the life of the intended wife become vested in or accrue to her or as should or might be assignable in law or equity either for a vested or contingent interest should be assigned to the trustees of the settlement, and it was also provided that this proviso should not extend to any chattel or interest which the intended wife might from time to time become entitled to either in possession or reversion unless every such legacy or interest should at each time amount to £500. The wife became entitled under the will of her mother to a sum of £1,000 and also to a sum of £350 on the death of one of her sisters as one of her next of kin. The property of which the £350 was a part was also derived from the will of the mother by which it was bequeathed to the sister for life with remainder to her, the sister's, next of kin: *Held* the £350 was not subject to the covenant.

Buller v Hornby (1871) 25 LT 901; 20 WR 198

845 What property within exception — Sums below amount acquired under several appointments — Executed in immediate succession to one another

Bower v Smith no 755 ante

846 What property within exception — Sums below amount acquired under several appointments

Re Gerard (Lord), Oliphant v Gerard no 751 ante

847 What property within exception — Sums below amount acquired under several appointments

Re O'Connell, Mawle v Jagoe no 752 ante

848 What property within exception — Omission of proviso as to source — Whether implied

(1) Where a covenant to settle after-acquired property is limited to funds of a specified amount which shall at any time be acquired, a condition is implied that the amount shall be made up of funds derived from the same source.

(2) Where a party having entered into such a covenant, becomes entitled in possession to property which would be subject to the settlement if sufficient in amount, and which has been reduced below the specified amount by the exercise of powers of advancement, the amount received by anticipation must be included for the purpose of determining whether the fund is large enough to be brought into settlement.

Hood v Franklin (1873) LR 16 Eq 496; 21 WR 724

ANNOTATION As to (1) **Apld** Re Hughes' Settlmt, Hughes v Schooling, Re Smith, Hughes v Schooling (1924) 94 LJ Ch 57

849 What property within exception — Covenant to settle property arising at one time — Sums from different sources falling in at same time

St Leger v Magniac [1880] WN 183

850 What property within exception — Reversionary interest falling in after termination of coverture — Below amount at date of settlement — Amount reached after coverture

By a marriage settlement it was agreed that if the wife, at the date of the settlement, or if during the coverture she or her husband in her right, should become seised, possessed of or entitled to any real or personal property of the value of £500, or upwards, the same should as soon as circumstances would admit, be conveyed to the trustees of the settlement.

Under a will which came into operation prior to the date of the settlement, an annuity was given to trustees to be applied wholly or in part for the benefit of a widow, as the trustees should in their discretion think fit, the unapplied balance to be accumulated, and the accumulations, remaining at the death of the widow to be divided among a class of persons, of whom the wife, party to the marriage settlement, was one.

The period for division happened after the determination of the coverture, and the share of each person participating then amounting to over £500, but neither at the date of the settlement nor at any time during the coverture, did such share amount to £500: *Held* the share was not subject to the covenant contained in the settlement.

Re Welstead, Welstead v Leeds (1882) 47 LT 331

851 What property within exception — Legacy out of general estate and another out of real estate — Given by separate codicils of same will

Re Pares, Re Scott Chad, Scott Chad v Pares no 853 post

852 What property within exception — Reversionary interest belonging to wife at time of settlement

An ante-nuptial settlement contained a clause providing that "All real and personal property, if any, not hereinbefore settled to which the intended wife at the time of the intended marriage or at any time during her now intended coverture shall be or

become entitled whether in possession, reversion or otherwise, except moneys, chattels and effects . . . and except also any legacy or other property acquired at one and the same time not exceeding in amount or value the sum of £200 . . . shall as soon as circumstances admit" be brought into settlement: *Held* (1) the exception of "any legacy or other property acquired at one and the same time not exceeding in amount or value the sum of £200" applied to a reversionary interest belonging to the wife at the date of the settlement; (2) in ascertaining for the purpose of the exception the value of reversionary interests acquired at one and the same time from different sources (*a*) the value of these interests ought not to be aggregated, and (*b*) the value of each interest must be ascertained as at the date when it vested in possession.

Re Hughes' Settlement, Hughes v Schooling, Re Smith, Hughes v Schooling [1924] 2 Ch 356; 94 LJ Ch 57; 133 LT 470; 68 Sol Jo 791

ANNOTATION As to (1) **Apld** Cannon v Hartley [1949] 1 All ER 50

B Ascertainment of value

LAW See Halsbury's Laws (4th edn) vol 42 para 653 et seq

853 What must be regarded — Beneficial receipt of covenantor — Not amount of gift

(1) A legacy of £500, which by payment of duty at 10 per cent has been reduced to £450, is not within a covenant to settle any after-acquired property of the value of £500 or upwards.

The legatee in each case has to suffer a deduction of duty at the rate of 10 per cent, so that each of these sums becomes, as far as her beneficial receipt of it is concerned, £450 only, and is therefore not caught by the covenant (*Buckley J*).

(2) A legacy out of general estate given by a codicil to a will, and a legacy given by another codicil to the same will out of the proceeds of sale of real estate which has not yet been sold, are acquired at one and the same time, namely, the death of testatrix, and from one and the same source, namely, testatrix. They must therefore be added together and treated as one sum for the purpose of a covenant to settle any property to which a married woman should become entitled "at one and the same time and from one and the same source."

Re Pares, Re Scott Chad, Scott Chad v Pares [1901] 1 Ch 708; 70 LJ Ch 426; 81 LT 385

854 What must be regarded — Reversionary interest — Value of interest if in possession — Not actual value as reversion

Re Mackenzie's Settlement no 712 ante

855 What must be regarded — Reversionary interest — Value of interest if in possession

(1) A covenant, by husband and wife, to settle property to which the wife or the husband in her right "shall become entitled" during the coverture, held to include property vested in reversion before the coverture, and falling into possession during the coverture, but not to include property to which they are entitled only in reversion during the coverture, and which falls into possession after the coverture.

By the marriage settlements of H and W, two ladies who were each absolutely entitled to a share of the proceeds of the sale of certain real property subject to a life estate, each of the husbands and wives covenanted jointly and separately that if at any time during the coverture they or either of them should become entitled to any property, it should be conveyed to the trustees of the settlement upon the trusts thereof. H and her husband survived, and W and her husband predeceased the tenant for life: *Held* the share of H was bound, and the share of W was not bound, by the covenant.

(2) "The property to be acquired is to be" of the value of £100 or upwards. That seems to me to mean the actual value, and not the estimated value of a remainder acquired during coverture, and not falling into possession till many years afterwards (*Wickens V-C*).

Re Clinton's Trust, Holloway's Fund, The Same, Weare's Fund (1871) LR 13 Eq 295; 41 LJ Ch 191; 26 LT 159; 20 WR 326

ANNOTATIONS As to (1) **Consd** Reid v Reid (1886) 31 Ch D 402; Re Bland's Settlmt, Bland v Perkin [1905] 1 Ch 4. As to (2) **Distd** Re Hughes' Settlmt, Hughes v Schooling, Re Smith, Hughes v Schooling (1924) 94 LJ Ch 57 **Consd** Re Maltby Marriage Settlement, Aylen v Gaud [1953] 2 All ER 220; (generally) Re Peel's Settlmt, Millard v Peel [1964] 3 All ER 567

856 What must be regarded — Reversionary interest — Value of interest if in possession

Cornmell v Keith no 719 ante

857 What must be regarded — Reversionary interest — Value of interest if in possession

Re Hughes' Settlement, Hughes v Schooling, Re Smith, Hughes v Schooling no 852 ante

858 What must be regarded — Endowment policy — Value of policy at time when effected

A marriage settlement contained a covenant to settle all real and personal property, if any, not thereinbefore settled to which the wife after the intended marriage or at any time during her then intended coverture should be or become entitled, either in possession, reversion, remainder, or otherwise, except jewels, etc, and except also any legacy or other

property acquired at one and the same time not exceeding in amount or value the sum of £200. The husband three years after the marriage effected an endowment policy for £500 on his own life. He paid the premiums and died in 1909, and his wife received the money. There was one son surviving: *Held* the value of the policy must be ascertained at the time it was effected, when it was not worth £200, and the policy moneys were not caught by the covenant.
Re Harcourt, White v Harcourt (1911) 105 LT 747; 56 Sol Jo 72

859 What must be deducted — Death duties
Re Mackenzie's Settlement no 712 ante

860 What must be deducted — Death duties
Re Pares, Re Scott Chad, Scott Chad v Pares no 853 ante

861 What must be deducted — Costs
Re Mackenzie's Settlement no 712 ante

2 Excepted property

A Personal chattels

LAW See Halsbury's Laws (4th edn) vol 42 para 653

862 Necessity for express words — Exception of jewellery
Willoughby v Middleton no 901 post

863 Necessity for express words — Exception of consumable goods
Willoughby v Middleton no 901 post

864 Share of personal estate including chattels — Chattels included in aggregate
In a post-nuptial settlement A covenanted to bring into settlement any property coming to him under an intestacy, except chattels of the kinds mentioned. A subsequently became entitled as one of the next of kin of an intestate to a share in the intestate's personal estate, which included chattels of the kinds excepted from the covenant. In the course of administration of the estate these chattels were sold: *Held* the interest of A in the intestate's estate, so far as the estate consisted of such chattels, was not an interest in each of the chattels specifically, and therefore the interest of A in such chattels, or in the proceeds of sale thereof, did not fall within the exception of the covenant, but, together with A's interest in the rest of the estate, was subject to the covenant.
Vanneck v Benham [1917] 1 Ch 60; 86 LJ Ch 7; 115 LT 588

B Property otherwise settled

LAW See Halsbury's Laws (4th edn) vol 42 para 653 et seq

865 On what property binding — Property subsequently bequeathed to wife for her separate use
(1) A covenant by the husband alone to settle the after-acquired property of the wife does not bind her separate property, but such a covenant of the husband and wife does. Such a covenant to settle does not bind property over which a wife is deprived of the power of disposition.
(2) Covenant by husband and wife to settle all after-acquired property, "not being already settled for her separate use": *Held* not to bind property subsequently bequeathed to the wife for her separate use.
Coventry v Coventry (1863) 32 Beav 612; 2 New Rep 349; 8 LT 819; 9 Jur NS 613; 11 WR 868; 55 ER 240

866 On what property binding — Property subsequently bequeathed to wife for her separate use
Covenant in a marriage settlement to settle the wife's after-acquired property, save and except "any estate or effects already settled to her separate use": *Held* a legacy afterwards bequeathed to her for her separate use was not included in the covenant.
Whitgreave v Whitgreave (1864) 33 Beav 532; 55 ER 475

867 On what property binding — Property subsequently bequeathed to wife for her separate use
A marriage settlement, in which the wife's property was vested in trustees for her separate use, without power of anticipation, contained a covenant by the husband and wife that if at any time during the joint lives of them any further portion, fortune, or estate should come to or devolve upon either of them by or under any will, or otherwise, they would effectually settle the same, except such future portion, fortune, or estate as should be otherwise settled previously to the same devolving as aforesaid, upon the trusts of the settlement: *Held* a gift of a legacy to the wife for her own sole and separate use, free from the debts, control, and engagements of her husband, was excluded from the operation of the covenant.
Kane v Kane (1880) 16 Ch D 207; 50 LJ Ch 72; 43 LT 667; 29 WR 212

ANNOTATIONS **Folld** Re Berens' Settlmt Trusts, Berens v Benyon (1888) 59 LT 626; Lloyd v Prichard [1908] 1 Ch 265

868 On what property binding — Property subsequently bequeathed to wife for her separate use
A marriage settlement made in January 1877, contained a covenant by the husband and wife that all

property not thereinbefore settled to which the wife or the husband in her right then was, or should during the intended coverture become, beneficially entitled, except jewels, trinkets, etc, and except also any property which might be settled by the instrument under which it was derived, should be assured and transferred to or otherwise vested in the trustees upon certain trusts. Under an appointment made by an indenture, dated 30 July 1883, the wife had become entitled to a sum of £10,000 which by such indenture, was declared should be for her sole and separate use, and should not be subject to any trust or agreement for settlement contained in any settlement executed upon or in contemplation of her marriage: *Held* the £10,000 was settled by the instrument under which it was derived, and was not within the covenant.

Re Berens' Settlement Trusts, Berens v Benyon (1888) 59 LT 626

869 On what property binding — Property subsequently bequeathed to wife for her separate use — Contingent reversionary interests not falling into possession during coverture

Lloyd v Prichard no 796 ante

C Other cases

LAW See Halsbury's Laws (4th edn) vol 42 para 653 et seq

870 Exception of particular freehold and leasehold property — Covenant to settle present and future property — Exception confined to present interests

At the date of her marriage in 1897 A was seised of freehold property in Jersey, and she afterwards became entitled to other freehold property in the island. The settlement contained the usual trusts for the wife, husband, and children, and a covenant by A alone to assure and transfer to the trustees, with certain exceptions her then and after-acquired property, "except her freehold and leasehold property in Jersey" and any cash, etc, "now in the actual possession or standing in" her name. A and her husband mortgaged her interests in the properties: *Held* having regard to the contest, the exception did not exclude from the operation of the covenant the property of which A was not possessed at the time of the marriage.

Re Pearse's Settlement, Pearse v Pearse [1909] 1 Ch 304; 78 LJ Ch 73; 100 LT 48; 53 Sol Jo 82

871 Exception of property intended by donor to be excepted

Thornton v Bright no 882 post

872 Exception of property intended by donor to be excepted — Gift for purpose inconsistent with covenant — Donor ignorant of covenant

Where a covenant to settle after-acquired property contains an exception of "any property as to which in the instrument under which it is acquired . . . an intention is expressed that it shall be exempt from this present covenant or from any provision of a like nature" a gift for a declared purpose wholly inconsistent with its application under the covenant is within the exception, whether the donor is aware of the covenant or not.

Re Thorne, Thorne v Campbell-Preston [1917] 1 Ch 360; 86 LJ Ch 261; 116 LT 540; 61 Sol Jo 268

873 Exclusion of property where intention expressed — Intention expressed in subsequent deed of appointment

Where an instrument creates a power of appointment and a later instrument exercises that power, the interest created by the exercise of the power arises under the later instrument, for no such interest existed until the power was exercised so as to create it.

A marriage settlement, executed in 1919, on the marriage of RB and MH, contained a covenant by the wife, MH, to settle any after-acquired property, excepting (*inter alia*) any property regarding which an intention was expressed in the instrument under which the property was acquired that it should be exempt from the covenant. In 1938 a settlor made a settlement of property by which, after declaring certain trusts in favour of the wife, MB, and her two sisters for a term of years, the trustees were empowered to appoint the funds to or for the benefit of MB and her issue and other beneficiaries in such shares and to such beneficiaries as they should in their absolute discretion determine. In 1941 the trustees of this settlement by deed poll appointed that on the expiry of the trusts declared by the settlement of 1938 the funds should go to MB and her sisters in equal shares, and declared their intention that each share should be exempt from the covenant to settle after-acquired property contained in the marriage settlements of each of them: *Held* the "instrument under which the property was acquired" was the appointment by deed poll of 1941, the direction to exempt the property was within the powers given to the trustees, and, therefore, the fund appointed was the absolute property of MB and her two sisters.

Re De la Bere's Marriage Settlement Trusts, De la Bere v Public Trustees [1941] Ch 443; [1941] 2 All ER 533; 110 LJ Ch 194; 57 TLR 570; 85 Sol Jo 298; sub nom *Re De la Bere's Marriage Settlement Trusts, Public Trustee v De la Bere* (1941) 165 LT 393

ANNOTATIONS **Consd** Re Batty, Public Trustee v Bell [1952] 1 All ER 425; Begg-MacBrearty (Inspector of Taxes) v Stilwell (trustee of the G E Coke Settlement) [1996] 4 All ER 205

v EXPRESS COVENANTS BY HUSBAND AND WIFE

1 Several and joint covenants by husband and wife

A In general

LAW See Halsbury's Laws (4th edn) vol 42 para 658

CROSS REFERENCES See nos 702, 704 et seq, 708, 709, 711, 715 ante (what property affected in case of reversionary interest in personalty), nos 727, 791, 796 ante, 895 et seq post (effect of general words of agreement)

874 What property affected — Separate property of wife

A *feme* being entitled to a reversionary interest in property for her separate use, both she and her intended husband separately covenanted to settle any property which she, or her husband in her right, was or might become entitled to, upon certain trusts; the above interest having fallen into possession: *Held* it was subject to the trusts of the settlement.

Tawney v Ward (1839) 1 Beav 563; 8 LJ Ch 319; 48 ER 1059

875 What property affected — Separate property of wife

Husband and wife covenanted to vest in the trustees of their settlement, upon the trusts thereof, "all property which should come to her absolutely, and not bound by any trust or provision, otherwise than for her absolute use": *Held* property bequeathed to her "for her separate use absolutely" was bound by the covenant.

Milford v Peile (1854) 17 Beav 602; 2 WR 181; 51 ER 1169

876 What property affected — Separate property of wife

Coventry v Coventry no 865 ante

877 What property affected — Separate property of wife

By an ante-nuptial settlement the husband and wife covenanted with the trustees to settle all property to which the wife then was or during the coverture she or her husband in her right should become entitled by devise, bequest or otherwise "for any estate or interest whatsoever." During the coverture the wife's father died, having by his will devised and bequeathed a moiety of his residuary real and personal estate to her "for her separate use, independently of any husband": *Held* the moiety was bound by the covenant.

Re Allnutt, Pott v Brassey (1882) 22 Ch D 275; 48 LT 155; 31 WR 469; sub nom

Re Alnutt, Pott v Brassey (1882) 52 LJ Ch 299

ANNOTATION **Consd** Scholfield v Spooner (1884) 6 Ch D 94

878 What property affected — Property accruing to husband after bankruptcy

Articles were executed previous to a marriage, by which the husband and wife agreed, that all property, estate and effects to which the husband or wife might thereafter become entitled, should be settled to such uses as the wife should appoint; and in default, on trusts for the husband, wife and children. At the time, neither husband nor wife had any property, the husband was insolvent, and soon after the marriage took the benefit of Insolvent Act. Property subsequently descended on him: *Held* as against his assignee, it was bound by the articles.

Hardey v Green (1849) 12 Beav 182; 18 LJ Ch 480; 14 LTOS 366; 13 Jur 777; 50 ER 1029

879 What property affected — Reversionary interest in personalty — Falling into possession after death of husband

Previous to her marriage A was entitled to a reversionary interest in personal property. By settlement before marriage, after a recital that it had been agreed that any property to which the husband and A, or either of them in her right, "should by any means become absolutely entitled to," should be settled, the husband and A jointly and severally covenanted with the trustees, that if at any time "during the marriage" the husband and A or either of them in her right, should by gift, etc, "or otherwise howsoever, become entitled to any real or personal property" to the amount of £100 and upwards, the same should be assigned to the trustees, "so far as the estates or interests in such future property would extend." After the death of A and her husband the property fell into possession: *Held* it was included within the terms of the above covenant.

Re Hughes's Trusts (1863) 4 Giff 432; 66 ER 776; sub nom

Re Hill's Trusts (1863) 8 LT 825; 9 Jur NS 942; 11 WR 930

ANNOTATION **NF** Re Clinton's Trusts, Holloway's Fund, The Same, Weare's Fund (1971) LR 13 Eq 295

B Covenant by husband alone

LAW See Halsbury's Laws (4th edn) vol 42 para 658

CROSS REFERENCES See nos 697, 707, 710, 713, 729, 732 ante (covenant by husband for "all other necessary parties" where reversionary interests not falling into possession during coverture)

880 What property affected — Property not reduced into possession during coverture

Bash v Dalway no 133 ante

881 What property affected — Property not reduced into possession during coverture

By a marriage settlement in 1859 real estate was settled for the benefit of S and her husband W for their lives and then for the children of S as she should by deed or will appoint, and, in default, to them in equal shares, and if no such child then for such persons as S should by deed or will appoint, and in default for S, her heirs and assigns and in the settlement was a covenant by W that after-acquired property of S should be conveyed to the trustees to be held by them upon the trusts of the settlement. W and S married and had four children, one only of whom was now living. W died in 1891. By her will made in that year S "in pursuance of all powers and authorities in anywise enabling me thereto" directed, limited, and appointed her residuary estate as to a moiety for her son M and his wife and children, and as to the other moiety to persons not objects of the special power. She died in 1898. During her coverture she had become entitled to certain real and personal estate which was never conveyed to the trustees of the settlement: *Held* (1) the after-acquired property was not bound by the covenant in the settlement; (2) there was not sufficient evidence to show an intention on the part of testatrix to exercise her special power of appointment in favour of her son M.

Re Rickman, Stokes v Rickman (1899) 80 LT 518

882 What property affected — Property subject to directions inconsistent with settlement

A by his marriage settlement, covenanted, that if his intended wife, or he in her right, should, during coverture, become entitled to any property, he would, unless otherwise expressly directed by the deed or will under which she should become entitled, convey the same on the trusts of the settlement: *Held* the covenant did not extend to property left to the wife's separate use.

Thornton v Bright (1836) 2 My&Cr 230; 6 LJ Ch 121; 40 ER 628, LC

ANNOTATIONS **Distd** Butcher v Butcher (1851) 14 Beav 222 **Apld** Ewart v Ewart (1853) 11 Hare 276 **Consd** Ramsden v Smith (1854) 2 Drew 298 **Apld** Re Mainwaring's Settlmt (1866) LR 2 Eq 487

883 What property affected — Property for wife's separate use without power of anticipation

A marriage settlement recited an agreement that the future property of the wife should be settled, but the covenant to settle was on the part of the husband alone, to execute all necessary deeds, as that such property should, so far as he was concerned, be vested in the trustees on the trusts of the settlement: *Held* property afterwards given to the separate use of the wife was not liable to be settled.

Hammond v Hammond (1854) 19 Beav 29; 3 Eq Rep 119; 3 WR 36; 52 ER 259

884 What property affected — Property for wife's separate use without power of anticipation

Coventry v Coventry no 865 ante

885 What property affected — Property for wife's separate use without power of anticipation

Husband covenanted with his wife and the trustees of his marriage settlement that he would at the request of the trustees join with the wife in or otherwise do all such acts as might be required on his part in settling the after-acquired property of the wife; and it was thereby agreed and declared that in the meantime until such settlement should be made the property should be held upon the trusts upon which the same was thereby covenanted to be settled: *Held* after-acquired separate property of the wife was not bound by the covenant.

Re Macpherson, Macpherson v Macpherson (1886) 55 LJ Ch 922

886 What property affected — Reversionary property of wife — Covenant merely executory

By marriage articles the intended husband agreed to settle, when required, one moiety of the wife's reversionary interests, and after the death of the tenant for life reduced one moiety into possession and gave a release for the same, but he never executed a settlement or assignment of the other, and died in the lifetime of the wife: *Held* as the covenant was the only covenant of the husband and not of the wife, and merely executory, he never having executed any assignment, the wife was not bound.

Cramer v Moore (1855) 3 Sm&G 141; 25 LTOS 31; 1 Jur NS 915; 3 WR 347; 65 ER 598

887 Husband's covenant contained in operative part — Whether controlled by agreement in recitals

A marriage settlement contained a recital of an agreement that after-acquired property of the wife should be settled. The corresponding operative part was a

covenant by the husband alone, without the usual words, "It is hereby agreed": *Held* the covenant was not controlled by the recital, and was not binding on the wife.

Young v Smith (1865) LR 1 Eq 180; 35 Beav 87; 11 Jur NS 963; 55 ER 827

ANNOTATIONS **Distd** Lee v Lee (1876) 4 Ch D 175 **Consd** Re De Ros' Trust, Hardwicke v Wilmot (1885) 31 Ch D 81 **Apld** Re Macpherson, Macpherson v Macpherson (1886) 55 LJ Ch 922

888 Husband's covenant contained in operative part — Whether controlled by agreement in recitals

A marriage settlement contained a recital of an agreement that all such personal estate above a certain value as should during the coverture be given or bequeathed to or otherwise vest in the wife should be settled, and that the husband should enter into the covenant in that behalf thereinafter contained. The corresponding operative part of the deed was a covenant by the husband alone, without the usual words "It is hereby agreed," that he and his wife would settle such property, and that until such settlement the husband and wife should stand possessed of the same upon the trusts of the settlement. The wife as well as the husband executed this settlement, and during the coverture property was given to the wife for her separate use: *Held* the operative words were sufficiently ambiguous to enable the court to look at the recitals, and on the whole instrument the wife's after-acquired separate property was bound by the covenant.

Re De Ros' Trust, Hardwicke v Wilmot (1885) 31 Ch D 81; 55 LJ Ch 73; 53 LT 524; 34 WR 36, CA

ANNOTATIONS **Apld** Re Macpherson, Macpherson v Macpherson (1886) 55 LJ Ch 922 **Consd** Re Coghlan, Broughton v Broughton [1894] 3 Ch 76 **Distd** Re Haden, Coling v Haden [1898] 2 Ch 220

889 Wife a party to and executing deed

By an ante-nuptial agreement, signed by the intended husband and wife and the parents of the wife, the parents agreed to appoint a share of certain real estate, which was subject to their life interest and to the appointment of them and the survivor of them, to the wife, and the husband agreed that "he would settle" his wife's reversionary share of the said real estate upon the usual trusts for the husband and wife, and their children. The wife's father having survived her mother, released the power and granted the estate after his death, giving his said daughter a share. The wife predeceased the husband and left two children. The property being still reversionary, an action was brought by the husband and one of the children against the other child, the wife's heir-at-law, for specific performance of the agreement: *Held* the agreement bound the wife as having assented to her father's stipulation, and also her heir-at-law, and specific performance ordered accordingly.

Lee v Lee (1876) 4 Ch D 175; 46 LJ Ch 81; 36 LT 138; 25 WR 225

ANNOTATIONS **Folld** Re De Ros' Trust, Hardwicke v Wilmot (1885) 31 Ch D 81; Re Haden, Coling v Haden [1898] 2 Ch 220 **Consd** Lloyd v Prichard [1908] 1 Ch 265

890 Wife a party to and executing deed

Re De Ros' Trust, Hardwicke v Wilmot no 888 ante

891 Wife a party to and executing deed

A marriage settlement contained a covenant by the husband alone that all the real and personal estate above a certain value which should at any time during the coverture by any means be acquired by the wife or the husband in her right should forthwith be settled upon the trusts of the settlement. The wife was a party to and executed the deed. During the coverture she became entitled under the will of her father to certain real estate: *Held* the property in question was bound by the covenant.

Re Haden, Coling v Haden [1898] 2 Ch 220; 67 LJ Ch 428

ANNOTATION **Consd** Lloyd v Prichard [1908] 1 Ch 265

892 Covenant by husband for "all other necessary parties" — Wife not bound

Re Gray, Pakenham v Maclean (1899) cited in [1900] WN at p 76

ANNOTATION **Folld** Re Smith, Robson v Tidy [1900] WN 75

893 Covenant by husband for "all other necessary parties" — Wife not bound

Re Smith, Robson v Tidy [1900] WN 75

C Covenant by wife alone

894 What property affected — Only property within disposition of wife

Coventry v Coventry no 865 ante

D General words of agreement

LAW See Halsbury's Laws (4th edn) vol 42 para 658

895 Effect of — Actual covenant by husband alone

By the settlement made on the marriage of an English lady with a foreigner, her Bank annuities were settled in trust for her, her husband, and their children; and her real estates were directed to be sold and the produce held on similar trusts, and it was agreed between all the parties, and the husband covenanted, that in case any real or personal estate should vest in the

wife, or in him in her right, he, as far as he lawfully could, would, either alone or in concurrence with his wife, settle the same upon the trusts, and subject to the powers, etc, therein expressed concerning the Bank annuities. Real estates descended on the wife. The husband and some of the children were aliens: *Held* the lands descended were bound by the covenant, and they ought to be sold and the produce invested on the same trusts as the Bank annuities.
Master v De Croismar (1848) 11 Beav 184; 17 LJ Ch 466; 11 LTOS 530; 12 Jur 762; 50 ER 787

896 Effect of — Actual covenant by husband alone

A marriage settlement contained a clause, by which it was agreed, and the husband covenanted that if any real or personal estate should descend or devolve to or vest in the wife or in any person in trust for her, the husband should make, do and execute or cause or procure to be made, done or executed or join or concur with the wife in making doing or executing all such acts, deeds, etc, as should be necessary for settling such property on the trusts of the settlement. A legacy was left to the wife for her separate use: *Held* it did not come within the agreement and covenant to settle, contained in the settlement.
Ramsden v Smith (1854) 2 Drew 298; 2 Eq Rep 660; 23 LJ Ch 757; 23 LTOS 166; 18 Jur 566; 2 WR 435; 61 ER 734

ANNOTATIONS **Distd** Campbell v Bainbridge (1868) LR 6 Eq 269 **Apld** Dawes v Tredwell (1881) 18 Ch D 354 **Consd** Re D'Estampes' Settlmt, D'Estampes v Crowe (1884) 53 LJ Ch 1117 **Apld** Re Macpherson, Macpherson v Macpherson (1886) 55 LJ Ch 922; Re Smith, Robson v Tidy [1900] WN 75

897 Effect of — Actual covenant by husband alone

(1) A deed of settlement to which the wife, the husband and trustees were parties, executed before marriage, contained the following clause: It is hereby declared and agreed by and between the parties hereto, and the husband, does hereby for himself, his heirs, executors and administrators, covenant, promise, and agree to and with the trustees, their executors and administrators that if the wife, or the husband in right of the wife shall, at or upon the marriage, or at any time thereafter, become interested in or entitled to any sum or sums of money, or real or personal estate, etc, which already has or have been, or shall or may at any time or times hereafter be given or bequeathed, or which shall descend to the wife, that then same shall be and remain, etc, upon the same trusts, etc, as are hereinbefore mentioned, etc, of and concerning the trust-moneys, stocks and premiums hereinbefore assigned. The husband died, and after his death certain property in which his wife during his life, had a reversionary interest, fell into possession: *Held* the covenant was binding on the husband alone.

(2) Clause in a marriage settlement relative to the settlement of the wife's after-acquired property: *Held* upon the construction of the language, not to comprise, as against the wife surviving, either property coming to the wife after her husband's death, or property in which a reversionary interest vested in her during the coverture, but which did not vest in possession until after the husband's death.
Reid v Kenrick (1855) 3 Eq Rep 1031; 24 LJ Ch 503; 25 LTOS 193; 1 Jur NS 897; 3 WR 530

ANNOTATION **Consd** Re D'Estampes' Settlmt, D'Estampes v Crowe (1884) 53 LJ Ch 1117

898 Effect of — Actual covenant by husband alone

Dawes v Tredwell no 816 ante

899 Effect of — Covenant by husband on behalf of himself and others

Butcher v Butcher no 708 ante

900 Effect of — Covenant by husband on behalf of himself and others

Townshend v Harrowby no 738 ante

901 Effect of — Covenant by husband on behalf of himself and others

(1) A marriage settlement contained a recital of an agreement that the husband should covenant to settle future property coming to the wife, followed by an agreement by all parties, and a covenant by the husband, that the wife's future property should be settled: *Held* property bequeathed to the wife's separate use was bound by the covenant.

The covenant being to settle "any real or personal estate or effects" on trusts for sale and investment: *Held* (2) no exception could be implied as to specific jewels; (3) the words "any real or personal estate or effects" included trinkets.

(4) Goods *quae ipso usu consumuntur* would not be included, but everything else, unless the election should be against the settlement, must pass to the trustees (*Page-Wood V-C*).
Willoughby v Middleton (1862) 2 John&H 344; 31 LJ Ch 683; 6 LT 814; 8 Jur NS 1055; 10 WR 460; 70 ER 1089

ANNOTATION As to (1) **Apld** De Serre v Clark (1874) LR 18 Eq 587

902 Effect of — Covenant by husband on behalf of himself and others

In a marriage settlement, it was declared, and the husband covenanted, that in case at any time during the coverture any real, personal, or mixed estate of the value of £500 should come to or vest in the wife,

or the husband in her right, at law or in equity, by devise, descent, gift, or otherwise, it should be conveyed and assigned from time to time without delay by the husband, his executors and administrators, and the wife upon the trusts of the settlement: *Held* a legacy given to the separate use of the wife was within the covenant.

Campbell v Bainbridge (1868) LR 6 Eq 269; 37 LJ Ch 634; 19 LT 254; 17 WR 3

ANNOTATION **Consd** Re D Estampes Settlmt, D Estampes v Crowe (1884) 53 LJ Ch 1117

903 Effect of — Covenant by husband on behalf of himself and others

By a settlement executed in contemplation of a marriage between C and W certain stocks were settled by W upon the trusts therein declared, and it was also thereby agreed and declared by and among the parties thereto, and W did thereby covenant with the trustees of the settlement, that all such real and personal estates and effects as C should be at the time of the solemnisation of the intended marriage, or as she, or W in her right, should during the intended coverture become seised or possessed of or entitled to, should or might, when and so soon and so far as the rights, interests, and powers of W and C or either of them, in or over the same would allow, be conveyed, assigned, assured, and made over respectively and vested in the trustees of the settlement upon the trusts therein declared. C at the date of the marriage was entitled to a vested reversionary interest in certain personal property under her father's marriage settlement, subject to her mother's life interest therein. W died in 1872. The mother died in 1883: *Held* the covenant to settle property to which C was entitled at the date of the marriage, or might afterwards become entitled to, was not merely the covenant of the husband, but the words of the covenant applied to both husband and wife, and C's vested reversionary interest was bound by the settlement.

Re D'Estampes' Settlement, D'Estampes v Crowe (1884) 53 LJ Ch 1117; 51 LT 502; 32 WR 978

2 Effect of Married Women's Property Acts

CROSS REFERENCE See HUSBAND & WIFE vol 27(1) (2nd reissue) no 1310 et seq

3 Operation of covenants

CROSS REFERENCE See BANKRUPTCY vol 4(2) (2nd reissue) no 6714, vol 5(1) (2nd reissue) nos 9646, 9647, and vol 5(2) (2nd reissue) 13670, 13672, 13681

904 Whether operating as conversion — No immediate trust — Without request of husband and wife

A settlement contained the usual covenant by the husband and wife to assign after-acquired property of the wife to trustees, with a proviso that it should be lawful for the trustees at the request of the husband and wife during their joint lives and of the survivor during his or her life, and afterwards at the discretion of the trustees, to sell and dispose of such property and invest the proceeds upon the trusts of the settlement. The wife afterwards became entitled to leaseholds and specific personal chattels: *Held* the trustees were not for the present to convert these things without the request in writing of the husband and wife.

Hope v Hope (1855) 1 Jur NS 770; 3 WR 617

ANNOTATION **Consd** Re Van Straubenzee, Boustead v Cooper [1901] 2 Ch 779

905 Whether operating as conversion — Application of rule in Howe v Dartmouth

(1) The rule in *Howe v Earl of Dartmouth* (WILLS vol 50 (reissue) no 265), does not apply in the case of a settlement by deed, and apparently only applies where there is a disposition by will of residuary personal estate given as one fund to be enjoyed by several persons in succession.

(2) The covenant to settle after-acquired property is a contract which has to be performed in strict accordance with its terms (*Cozens-Hardy J*).

Re Van Straubenzee, Boustead v Cooper [1901] 2 Ch 779; 70 LJ Ch 825; 85 LT 541; 17 TLR 755; 45 Sol Jo 738

ANNOTATION As to (1) **Consd** Re Woodhouse, Public Trustee v Woodhouse [1941] Ch 332

906 Whether operating as trust — Post-nuptial settlement

A covenant by a settlor to transfer, convey, and assure property, if any, which he might thereafter acquire, if of a certain value, does not amount either to an imperfect declaration of trust, or to an incomplete assignment of the property, if any, which afterwards came to be acquired, upon which this court will operate.

W, by a post-nuptial settlement, in consideration of natural love and affection, and for divers other good causes and considerations, covenanted to transfer, and convey, and assure all property to which he might thereafter become entitled "at any time or times, by gift, descent, succession, or otherwise, from or through his mother," if of a certain amount in value at any one time, to trustees upon the trusts of that settlement. At the date of the settlement he was entitled to certain interests in remainder, subject to his mother's life interest. Afterwards he became

entitled in reversion to another fund, subject to a life interest given to his mother; and, lastly, his mother died, leaving him property by will: *Held* none of all these funds were in equity affected by the trusts of the settlement by virtue of the covenant.

Quaere: whether any and which of such funds are comprised in the covenant at all?

Wilkinson v Wilkinson (1857) 4 Jur NS 47

907 Whether operating as trust

A covenant to settle after-acquired property upon certain trusts binds such property in equity immediately it becomes receivable into the settlement funds, and even though it is not in fact added to such settlement funds it is nevertheless trust property, and if it can be traced into the possession of a mere volunteer the trustees of the settlement can claim it from such volunteer or his legal personal representatives.

Pullan v Koe [1913] 1 Ch 9; 82 LJ Ch 37; 107 LT 811; 57 Sol Jo 97

908 Whether operating as incomplete assignment

Wilkinson v Wilkinson no 906 ante

909 Effect of bankruptcy of covenantor

Debtor by bill of sale assigned for value to a creditor certain specified chattels at his place of business, "and all other chattels which might be or at any time thereafter be brought thereon in addition to or in substitution thereof." Debtor became bankrupt, and after his order of discharge brought other chattels upon the premises. The creditor did not prove for his debt in the bankruptcy: *Held* the assignment of the after-acquired chattels, although absolute in form, amounted merely to a contract to assign for the breach of which the assignor incurred a liability provable in his bankruptcy, and from which he was released by the order of discharge; consequently the goods brought on the premises after the order of discharge could not be seized by the creditor under his bill of sale. *Quaere*: whether the same rule applies to a covenant in a marriage settlement to settle future property.

Collyer v Isaacs (1881) 19 Ch D 342; [1881–5] All ER Rep 828; 51 LJ Ch 14; 45 LT 567; 30 WR 70, CA

ANNOTATION **Distd** Re Reis, Ex p Clough [1904] 2 KB 769

5 Consideration

i IN GENERAL

LAW See Halsbury's Laws (4th edn) vol 42 para 659

CROSS REFERENCES See FAMILY ARRANGEMENTS, UNDUE INFLUENCE AND VOIDABLE CONVEYANCES vol 25 (2nd reissue) no 581 et seq (resettlements), nos 1596 et seq, 2074 et seq (generally)

910 Grant of estate tail

Llinaston v Lloyd (1622) Palm 213; 81 ER 1048

911 Agreement to free from incumbrances and settle — Death of husband before settlement made

Meredith v Wynne (1710) Gilb Ch 70; Prec Ch 312; 25 ER 49

912 Portion settled on wife — Agreement by husband and wife to release rights — In father's personal estate

A and his wife covenant in articles before marriage, in consideration of £2,000, the wife's portion, to release all the right that might accrue to them out of her father's personal estate, by the custom of London.

In this case there appeared to be a valuable consideration for the agreement in the articles because at the time the £2,000 was given defendant's wife was entitled to no part of the estate of her father and it was given for her advancement in the world (*Lord Hardwicke C*).

Medcalfe & Ives v Medcafe & Johnson (1737) 1 Atk 63; 26 ER 42, LC

ANNOTATION **Consd** Lee v Head (1855) 1 K&J 620

913 Settlement on trust to pay debts etc — Heir in tail joining to charge settled estate

A having an estate in fee of £6,000 a year, and being tenant for life without impeachment of waste of another estate of £5,000 a year, with the reversion in fee after an estate in tail male in B his only son by a former marriage, became indebted by mortgage, annuities, and otherwise, to the amount of near £100,000. A and B joined in conveying both estates to trustees, upon trust by sale or mortgage, sale of timber, or by rents and profits, to pay debts, and to apply so much of the rents and profits of what should remain unsold as should seem meet to them, as a sinking fund and to pay the residue to A and to settle the remaining trust estates, subject to an annuity of £1,000 to B for the joint lives of him and A, upon A for life without impeachment of waste, with power to lease for twenty-one years only; remainder to trustees to preserve, etc, remainder, subject to a jointure to the wife of A and portions for children by her, to the joint appointment of A and B; in default thereof to the appointment of B surviving; in default thereof to B in tail male; remainder to the other sons of A in tail male; remainder to B in tail; remainder to the daughters of A in tail, with cross remainders; remainder to B in fee; with powers of leasing and full powers of management in the trustees, and a

provision for the appointment of new trustees, as vacancies should happen. The trustees raised £50,000 by mortgage of the settled estate, which they applied to the debts; and they paid £2,500 a year to A and £1,000 a year to B from the date of the settlement. Upon the bill of A to set aside the deed, except the trust for the debts, upon a general charge of fraud, misapprehension and misrepresentation or to control the management of the trust, and for an account against the trustees: *Held* B's joining to subject the settled estate was sufficient consideration.

Myddleton v Kenyon (Lord) (1794) 2 Ves 391; 30 ER 689, LC

914 Settlement of estate of intestate — Personalty in consideration of realty — Realty non-existent

On the occasion of the death of a person, intestate, and without wife or children, in one of the colonies, a deed was executed between the parents and brothers and sisters of the intestate, by which it was recited, that the intestate was, at his death, possessed of real and personal estate, and the real estate was settled, in consideration of the settlement of the personal estate, by the eldest brother as heir-at-law; and the personal estate together with other property of the father was settled by the father as sole next of kin, in consideration of the settlement of the real estate. The intestate, as it afterwards appeared, had no real estate: *Held* the possibility of there being real estate was a valuable consideration, sufficient to support the settlement against the father.

Refell v King (1833) 2 LJ Ch 155

915 Covenant to pay premiums — On policy assigned to trustees

Stephens v Green, Green v Knight no 19 ante

Scottish, Irish and Commonwealth Cases

916 Release of dower

The release by a married woman since 1837, of her dower rights, is not a valuable consideration for a settlement of lands on her, so as to defeat a subsequent sale by the settlor, to a purchaser for value.

Conole v Horigan (1882) 8 VLR (Eq) 239 (AUS)

917 Meritorious consideration

A post-nuptial agreement, in writing, by which a father undertook to make a provision for a child, will be specifically executed, being a contract, founded on a meritorious consideration.

Ellis v Nimmo (1835) L&G temp sugd 333 (IR)

918 Meritorious consideration — Natural love and affection

Re Luby's Estate (1908) 43 ILT 141 (IR)

ii MARRIAGE SETTLEMENTS

1 Marriage as consideration

LAW See Halsbury's Laws (4th edn) vol 42 para 660

CROSS REFERENCES See FAMILY ARRANGEMENTS, UNDUE INFLUENCE AND VOIDABLE CONVEYANCES vol 25 (2nd reissue) nos 1604 et seq, 2117 et seq (marriage settlements generally), nos 1671 et seq, 2123 et seq (valuable consideration in case of post-nuptial settlement), nos 2193, 2199, 2119 (consideration ex post facto)

919 Valuable consideration

Watkins v Steevens (1690) Nels 160; 21 ER 815

920 Valuable consideration

Churchman v Harvey (1757) Amb 335; Amb App I 824; 27 ER 225

921 Valuable consideration

The consideration of marriage alone constituted the father a purchaser and the benefit of the trust was part of his contract (*Shadwell V-C*).

Stocken v Stocken (1831) 4 Sim 152; 58 ER 58; on appeal (1833) 2 My&K 489; (1838) 4 My&Cr 95, LC

922 Valuable consideration

Davenport v Bishopp no 962 post

923 Valuable consideration — Marriage without portion

Marriage without a portion is itself a consideration for an agreement.

Ex p Marsh (1744) 1 Atk 158; 26 ER 102, LC

Scottish, Irish and Commonwealth Cases

924 Meritorious consideration

A marriage took place at B between two persons natives of Scotland, the marriage settlement was executed as a deed of indenture in English form. Within four weeks after the marriage another deed of indenture also in English form was executed at Bath, whereby new provisions were settled upon the wife: *Held* the legal import and effect of the latter deed must be judged by the law of England and it formed part of the marriage settlements and was duly executed for meritorious considerations and was irrevocable.

Ramsay v Cowan (1833) 11 Sh (Ct of Sess) 967 (SCOT)

2 Persons within consideration

A In general

LAW See Halsbury's Laws (4th edn) vol 42 para 661

CROSS REFERENCES See FAMILY ARRANGEMENTS, UNDUE INFLUENCE AND VOIDABLE CONVEYANCES vol 25 (2nd reissue) nos 1724 et seq, 2158 et seq

925 Consideration runs through whole settlement

Stephens v Trueman no 964 post

926 Consideration runs through whole settlement

In marriage settlements, etc, on good or valuable consideration, as between the immediate "parties," such consideration will run through all the limitations for the benefit of the remotest persons; even of those in respect of whom the deeds would otherwise have been voluntary.

Jthell v Beane (1749) 1 Ves Sen 215; 27 ER 990, LC

ANNOTATIONS **Consd** Price v Jenkins (1876) 4 Ch D 483; Gale v Gale (1877) 6 Ch D 144

927 Consideration runs through whole settlement

The consideration of marriage runs through the whole settlement: and especially supports every provision with regard to the husband and wife. She is interested in the provision for her husband, enabling him to provide for her and the children, and it is not affected by subsequent events, as the death of the wife without children.

Nairn v Prowse (1802) 6 Ves 752; 31 ER 1291

B Parties to the marriage

928 Wife

A on his marriage agrees and gives bond to settle lands for the benefit of his wife and their issue, and afterwards aliens part of those lands. Jointress decreed to have the deficiency of her jointure made good out of the inheritance of the lands remaining unsold, but that decree was reversed. Where the jointress and the issue claim by the same settlement, they shall contribute proportionably in the discharge of any prior incumbrance on the estate.

Carpenter v Carpenter, Wasborne v Downes (1686) 1 Vern 440; 1 Eq Cas Abr 114; 23 ER 572, LC

929 Wife

Nairn v Prowse no 927 ante

930 Wife — For benefit of children

Husband and wife purchasers by the marriage for their children.

Parkes v White (1805) 11 Ves 209; 32 ER 1068, LC

931 Husband

Nairn v Prowse no 927 ante

932 Husband — Settlement in consideration of wife's fortune — Part consisting of bond not recovered — Husband's representative entitled

The husband upon marriage, in consideration of his wife's fortune, computed at £500, agree to yearly payments to her separate use, that she may dispose of £100 by will in his life time; that if she survive, he is to leave her £200, apparel, plate, etc. Part of her fortune was a bond of £200. The husband dies, having made his will, and plaintiff residuary legatee, but had not recovered the £200 due on the bond; then the wife dies: this bond shall go to the representative of the husband, he being a purchaser of it by the settlement on her.

Adams v Cole (1735) Cas temp Talb 168; 25 ER 720, LC

ANNOTATION **Consd** Lancy v Athol (1742) 2 Atk 444

933 Husband — For benefit of children

Parkes v White no 930 ante

934 Husband — Settling own property — Not purchaser in respect of ultimate limitation in fee

An estate was devised to the eldest son of testator, in fee, charged with four portions of £5,000 each for younger children. The eldest son, on his marriage, settled the estate to the use of his intended wife after his decease, for her life, if she should survive him, with remainder to himself in fee, and covenanted within six months to pay off the four sums of £5,000 and release the estate therefrom. He paid off one sum of £5,000, and died intestate: *Held* the husband was not a purchaser under the settlement, and the covenant in the settlement could not be taken to have been for indemnity only; but, so far as the wife and younger children were concerned, the husband had adopted the portions as his own debt, and he had also made them his debt as between his real and personal representatives.

Barham v Clarendon (Earl) (1852) 10 Hare 126; 22 LJ Ch 1057; 17 Jur 336; 1 WR 96; 68 ER 867

Scottish, Irish and Commonwealth Cases

935 Husband

In an ordinary marriage settlement, when the lands settled are the property of the husband he cannot be considered a purchaser, for value, of the life estate in those lands limited to him by the settlement.

Re Brown's Estate (1863) 13 I Ch R 283; 14 Ir Jur 289 (IR)

C Issue

CROSS REFERENCES See no 534 et seq ante (construction of issue); FAMILY ARRANGEMENTS, UNDUE INFLUENCE & VOIDABLE CONVEYANCES vol 25 (2nd reissue) nos 1725, 1726 (issue of the marriage), no 1727 et seq (issue of former marriage), no 2173 et seq (issue of second marriage), nos 2182, 2183 (illegitimate issue)

936 Issue of the marriage
Carpenter v Carpenter, Wasborne v Downes no 928 ante

937 Issue of the marriage — Posthumous child — Provision for such children as should be living at death of father or mother
A posthumous child within a provision in marriage articles for such children of the marriage, as should be living at the death of the father or mother.
Millar v Turner (1748) 1 Ves Sen 85; 27 ER 907, LC

938 Issue of the marriage — Purchases under both father and mother
An infant is bound by a settlement made on her marriage, where it was made with the approbation of parents and guardians.

Infants may contract marriage, males at fourteen, females at twelve; and these agreements differ from all others; the principal consideration is the marriage; . . . as soon as the marriage is had, the principal contract is executed, and cannot be set aside or rescinded, the estate and capacities of the parties are altered, the children born of the marriage are equally purchasers under both father and mother, and therefore it has been truly said that marriage contracts ought not to be rescinded, because it would affect the interest of third persons, the issue (*Lord Hardwicke C*).
Harvey v Ashley (1748) 3 Atk 607; Wilm 219n; cited in 2 Ves Sen at p 671; 26 ER 1150, LC

ANNOTATIONS **Consd** Buckinghamshure v Drury (1762) Wilm 177; Caruthers v Caruthers (1794) 4 Bro CC 500

939 Issue of the marriage — Grandchild
There can be no doubt that according to the law of England a stipulation on behalf of a grandchild of the marriage would be regarded as within the consideration of marriage and as completely binding as any stipulation in favour of a child (*Lord Herschell C*).
Macdonald v Scott [1893] AC 642, HL

940 Issue of former marriage — Settlement on remarriage
Neeve v Keck (1724) 9 Mod Rep 106; 2 Eq Cas Abr 24; 88 ER 345

941 Issue of former marriage — Settlement on remarriage
The marriage consideration for an ante-nuptial settlement does not extend to the wife's children by a former husband. Such children are "volunteers" in relation to the settlement.
A-G v Jacobs Smith [1895] 2 QB 341; 64 LJQB 605; 72 LT 714; 59 JP 468; 43 WR 657; 11 TLR 411; 39 Sol Jo 538; 14 R 531, CA

ANNOTATIONS **Consd** IR Comrs v Lord Rennell [1963] 1 All ER 803; Re Cook's Settlmt Trustee, Royal Assce v Cook [1964] 3 All ER 898

942 Issue of subsequent marriage
Wollaston v Tribe (1869) LR 9 Eq 44; 21 LT 449; sub nom
Wollaston v Tribe (1869) 18 WR 83

ANNOTATIONS **Consd** Paul v Paul (1880) 15 Ch D 580 **Apld** James v Couchman (1885) 29 Ch D 212 **Dbtd** Tucker v Bennett (1887) 38 Ch D 1

Scottish, Irish and Commonwealth Cases

943 Issue of the marriage
Re Trench's Estate (1856) 8 Ir Jur 406; 7 ICLR 338 (IR)

944 Issue of the marriage
Joyce v Hutton (1861) 12 I Ch R 71; 13 Ir Jur 274 (IR)

945 Issue of the marriage
Re Biron's Contract (1878) 1 LR Ir 258 (IR)

946 Issue of the marriage
Re Bell's Estate, Ex p Hopps (1883) 11 LR Ir 512 (IR)

947 Issue of the marriage
Cumming's Trustee v Cumming (1896) 24 R (Ct of Sess) 153; 34 Sc LR 77; 4 SLT 146 (SCOT)

948 Issue of former marriage — Settlement on remarriage
A widow who contemplated second marriage, settled in the year 1889 by a deed of settlement certain of her property on herself for life, and after her death on two of her children by a former marriage. By the words of the deed this settlement declared to be "in consideration of the said intended marriage." The settlor died in 1891: *Held* the trusts in favour of the children of the former marriage were not within the marriage considerations: the children were mere volunteers: the provisions made in their favour were not made for valuable consideration, and as to real estate could be avoided by 27 Eliz ch 4, by a subsequent conveyance to a purchaser.
National Trustees, Executors & Agency Co of Australasia Ltd v R (1893) 19 VLR 132 (AUS)

949 Issue of former marriage — Settlement on remarriage
Re Deane, Ex p Official Assignee & Deane (1906) 6 SRNSW 560; 23 NSWWN 203 (AUS)

950 Issue of former marriage — Settlement on remarriage
A second marriage, in contemplation of which a father executes a deed providing for children by a former marriage, is not a valuable consideration.
Re Greer (1877) 11 Ir IR Eq 502 (IR)

D Next of kin

CROSS REFERENCES See nos 2889 et seq post, 2908 et seq post (trusts for next of kin)

951 Whether within the consideration — Ultimate trust for next of kin — Right to enforce
Among the trusts of a settlement, the subject of the settlement being property limited to the separate use

of the wife, it was provided that the trustees should effect a policy of assurance to the amount of £3,000 on the life of the wife, and annually pay the premium out of the trust money during the life of the wife, and stand possessed of the assurance in trust after the decease of the wife to invest the £3,000 when received, and pay the interest to the husband for his life, if he should survive the wife, and after the decease of the husband to pay the £3,000 to such person or persons as the wife should by will, notwithstanding her coverture, appoint; and in default of such appointment, to the persons entitled under Statute of Distributions.

There were no children of the marriage, and the wife, having survived her husband, and being unwilling to continue the payment of the annual premium, joined with the surviving trustee of the settlement in making a voluntary assignment of the policy to her cousin, who paid the annual premium during his life, and by his will appointed G his executor and residuary legatee. G continued to pay the premium, and, on the death of the assured, received the value of the policy. On a bill filed by the next of kin of the wife against G and against the executor and residuary legatee of the wife: *Held* the assignment was valid, and G was entitled to the value of the property.

Godsal v Webb (1838) 2 Keen 99; 7 LJ Ch 103; 48 ER 566

952 Whether within the consideration — Ultimate trust for next of kin — Right to enforce

In a marriage settlement, the intended wife being an infant, the husband covenanted that one-half of the wife's personal and of the proceeds of her real property when sold, should be settled upon trust for himself for life, then for her for her life, and then, in default of issue, upon trust for her next of kin. The property was duly vested in the trustees. The husband died, and there was no issue of the marriage: *Held* the trust for the next of kin was not binding against the wife, and she had absolute power to deal with the trust funds.

Gibbs v Grady (1871) 41 LJ Ch 163; 20 WR 257

953 Whether within the consideration — Ultimate trust for next of kin — Right to enforce

By a marriage settlement made in the name of a lady, then an infant, it was agreed that the intended husband and infant, and all other necessary parties would, as soon as the case would admit, assign unto the trustees of the settlement certain personal estate to which the infant became, under her father's will, entitled upon her marriage, upon trust for investment, with the consent of the husband and wife, and to pay the income to the wife for her separate use, and on her death to her husband for life, or until bankruptcy or alienation, and in trust for the issue of the marriage, and in default of issue becoming absolutely entitled in trust for such person or persons as the wife should by deed, with or without power of revocation and new appointment, or by will appoint, and in default of such appointment, if the wife should survive the husband, for the wife absolutely, but if he should survive her, in trust for the persons who, under Statute of Distributions, should be her next of kin. The infant by a deed poll exercised the power of appointment by appointing the property, subject to the trusts in the settlement in favour of herself, husband and issue, to the husband absolutely, reserving to herself a power of revocation and new appointment. The wife died an infant without issue. Her interest in the fund agreed to be settled at the date of the settlement, and at her death still remained reversionary, and no further settlement was made by the husband. The husband went into liquidation, and plaintiff was appointed his trustee, and brought an action claiming the settled property against the next of kin, who also claimed it: *Held* the next of kin were volunteers, and could not, as against plaintiff, obtain specific performance of the covenant to settle the fund.

Re D'Angibau, Andrews v Andrews (1880) 15 Ch D 228; [1874–80] All ER 1184; 49 LJ Ch 756; 43 LT 135; 28 WR 930, CA

ANNOTATIONS **Consd** Re Flavell, Murray v Flavell (1883) 25 Ch D 89 **Folld** Re Plumptre's Marriage Settlmt, Underhill v Plumptre [1910] 1 Ch 609 **Consd** Pullan v Koe [1913] 1 Ch 9 **Apld** Re Hewett, Hewett v Eldridge (1913) 49 L Jo 10; Re Pryce, Nevill v Pryce [1917] 1 Ch 234 **Consd** Re Sutton, Boscawen v Wyndham [1921] 1 Ch 257

954 Whether within the consideration — Ultimate trust for next of kin — Right to enforce

Re Plumptre's Marriage Settlement, Underhill v Plumptre no 665 ante

955 Whether within the consideration — Ultimate trust for next of kin — Right to enforce

A marriage settlement made in 1887 contained a covenant to settle the wife's after-acquired property upon the trusts of the wife's funds, which were in the usual form, and an agreement by the husband to settle any sums to which he became entitled under the will of his father. By a deed of gift in 1904 certain interests in reversion belonging to the husband were assured by him absolutely to his wife. The husband was also entitled to a one-third share in two sums of £9,000 and £4,700 appointed to him by the will of his father in exercise of a special power of appointment contained in a deed of family arrangement come to in 1889. The share of the £9,000 fell into possession in 1891 on the death of his father, and

was paid to him, unknown to the trustees of his marriage settlement, and spent. The interests given by the husband to the wife and his share of the £4,700 came into possession in 1916 on the death of the husband's mother, and were now outstanding in the trustees of his parent's settlement and of the deed of family arrangement respectively. The husband died in 1907, and there was no issue of the marriage. Subject to his widow's life interest in both funds, the ultimate residue of the wife's fund was held in trust for her statutory next of kin, and the husband's fund was held in trust for him absolutely. The widow was also tenant for life under her husband's will.

Upon a summons by the trustees of the marriage settlement to have it determined whether these interests and funds were caught by the provisions of the settlement, and, if so, whether they should take proceedings to enforce them: *Held* (1) they were caught by the covenant of the wife and the agreement by the husband respectively; but (2) the trustees ought not to take steps to recover any of them. In the case of the wife's fund her next of kin were volunteers, who could neither maintain an action to enforce the covenant, nor for damages for breach of it, and the court would not give them by indirect means what they could not obtain by direct procedure.

Re Pryce, Nevill v Pryce [1917] 1 Ch 234; [1916–17] All ER 573; 86 LJ Ch 383; 116 LT 149; 61 Sol Jo 183

ANNOTATION **Follď** Re Kay's Settlement, Broadbent v Macnab [1939] Ch 329

956 Whether within the consideration — Ultimate trust for next of kin

Paul v Paul no 2890 post

957 Whether within the consideration — Ultimate trust for next of kin — Right of settlor to revoke

Paul v Paul no 2890 post

Scottish, Irish and Commonwealth Cases

958 Whether within the consideration — Ultimate trust for next of kin

Day v Day (1870) 18 WR 417 (IR)

E Collaterals

CROSS REFERENCES See FAMILY ARRANGEMENTS, UNDUE INFLUENCE AND VOIDABLE CONVEYANCES vol 25 (2nd reissue) nos 1731, 2160 et seq

959 Whether consideration extends to collaterals

Covenant in marriage settlement, that the settlor would surrender certain copyholds which were intermixed with his freeholds, to be settled upon the issue of the marriage, with limitation to collateral branches of the family; his eldest son, upon his marriage, covenants to suffer a recovery of the freehold, which was done, and to settle the copyhold, to which he was admitted in fee; upon a bill brought by a nephew of the first settlor, on failure of issue of that marriage, for a specific performance of the covenant, to surrender in favour of collaterals: *Held* though the consideration of marriage extended to collaterals, yet the son by the covenants on his marriage, and by his admission in fee, had taken the copyholds discharged of the specific limitations.

Hale v Lamb (1764) 2 Eden 292; 28 ER 910, LC

960 Whether consideration extends to collaterals

The articles made previous to the marriage of F decreed to be carried into execution for the benefit of plaintiff his eldest sister.

Goring v Nash (1744) 3 Atk 186; 26 ER 909, LC

ANNOTATIONS **Consd** Estcourt v Estcourt (1760) 1 Cox Eq Cas 20 **Apld** Davenport v Bishopp (1846) 1 Ph 698 **Consd** Barham v Clarendon (1852) 10 Hare 126

961 Whether consideration extends to collaterals — Settlement on marriage of eldest son — Limitation to second son

A limitation to a second son in remainder in tail, on a settlement made on the marriage of the first son, and in consideration of the wife's portion, makes not the second son a purchaser.

Staplehill v Bully (1703) Prec Ch 224; 24 ER 109

962 Whether consideration extends to collaterals — Trust in default of issue — Party to settlement claiming specific performance — Settlement executed in toto

In a marriage settlement, which comprised only the property of the wife, it was agreed between the intended husband and wife, and each of them covenanted with the trustees, that any property to which the wife might become entitled during the coverture, should be conveyed to such uses as she should by deed or will appoint, and in default of appointment, to the use of herself for life, remainder to the use of the husband for his life, remainder to the use of the wife's children, and in default of such children, to the use of AB, her niece, and her heirs. After the death of the wife without children, and without having exercised her power of appointment, the husband filed a bill against her heir-at-law, praying that a real estate, to which she had become entitled during her lifetime, might be conveyed to the uses of the settlement. On the question whether the decree for specific performance should be confined to the life estate of the husband, or should extend to the limitation to the niece, who was also dead: *Held* it should extend to the latter, on the ground that the right of

the husband to a specific performance of part of the covenant drew with it the right to a specific performance of the whole, at least as against the heir of the settlor, whatever it might have done as against a purchaser for value.

This covenant was entered into for a valuable consideration, namely, the marriage between the parties (*Lord Cottenham C*).

Davenport v Bishopp (1846) 1 Ph 698; 9 LTOS 33; 41 ER 798

ANNOTATIONS **Consd** Barham v Clarendon (1852) 10 Hare 126; Paul v Paul (1880) 15 Ch D 580; Re Cameron & Wells (1887) 37 Ch D 32

963 Whether consideration extends to collaterals — Trust in default of issue — Trustees becoming entitled to other property — In different character

Re Hewett, Hewett v Eldridge (1913) 49 L Jo 10

F Other persons

CROSS REFERENCES See CONTRACT vol 12(1) (2nd reissue) no 3132 et seq (rights and liabilities of strangers to contract); FAMILY ARRANGEMENTS, UNDUE INFLUENCE AND VOIDABLE CONVEYANCES vol 25 (2nd reissue) nos 2158, 2159, 2185, 2186

964 Remainderman

In marriage articles and settlements, on good and valuable considerations, such considerations will run through all the limitations in favour of the remotest remainderman.

Stephens v Trueman (1748) 1 Ves Sen 73; 27 ER 899, LC

965 Remainderman

Bradbury v Hunter (1796) 3 Ves 260; 30 ER 1000, LC

966 Persons usually outside consideration — If participation necessary to persons within

The general rule of law is that the courts will not enforce a marriage settlement in favour of stranger volunteers who are not parties to the contract, on the ground that they are not within the consideration of the marriage. But when the persons who are within the consideration of the marriage take only on terms which admit to a participation with those others who would not otherwise be within the consideration, then, not the matrimonial consideration, but the consideration of the mutual contract extend to and comprehend them.

Mackie v Herbertson (1884) 9 App Cas 303, HL

ANNOTATIONS **Consd** De Mestre v West [1891] AC 264; Macdonald v Scott [1893] AC 642

967 Strangers — Right to enforce settlement

Mackie v Herbertson no 966 ante

968 Volunteers

Residuary estate consisting of money in the funds, was bequeathed to a mother and daughter in trust for the mother for life, and afterwards for the daughter absolutely. By a settlement made in contemplation of the daughter's marriage, the daughter assigned her interest under the will to trustees, upon trust for the issue of the intended marriage, and for a niece of the daughter and the issue of the niece. The daughter's husband died soon after the marriage, of which there was no issue. The mother was not a party to the settlement, but had notice of it before the husband's death: *Held* even if the settlement was voluntary as regarded the trusts in favour of the niece, it was a complete alienation, so as to be capable of enforcement at the instance of the trustees of the settlement against the daughter, and the trustees of another settlement which she made upon a second marriage inconsistent with the former settlement; *quaere* whether the first settlement was voluntary as regarded the trust for the niece.

Kekewich v Manning (1851) 1 De GM&G 176; 21 LJ Ch 577; 18 LTOS 263; 16 Jur 625; 42 ER 519, LJJ

ANNOTATIONS **Distd** Bridge v Bridge (1852) 16 Beav 315 **Apld** Donaldson v Donaldson (1854) Kay 711 **Consd** Voyle v Hughes (1854) 2 Sm&G 18 **Distd** Cramer v Moore (1855) 3 Sm&G 141 **Consd** Gilbert v Overton (1864) 10 LT 900 **Apld** Richardson v Richardson (1867) LR 3 Eq 686 **Consd** Baddeley v Baddeley (1878) 48 LJ Ch 36; Re King, Sewell v King (1879) 14 Ch D 179; Paul v Paul (1880) 15 Ch D 580 **Apld** Re Walhampton Estate (1884) 26 Ch D 391; Johnstone v Mappin (1891) 60 LJ Ch 241; Re Patrick, Bills v Tatham [1891] 1 Ch 82 **Distd** Re Ellenborough, Towry Law v Burne [1903] 1 Ch 697 **Apld** Re Sparks Trusts, Spark v Massey [1904] 1 Ch 451

969 Heirs of settlor — Right to enforce settlement

By a marriage settlement in 1853, certain property was settled upon the usual trusts, and in case there should be no issue on trust for the wife absolutely. There was a covenant by the husband and wife to settle all after-acquired property coming to the wife for any estate or interest whatsoever or over which she should have an absolute power of appointment. By a voluntary settlement in 1873 certain real estate was settled on the wife for life for her separate use without power of anticipation, and after her death to such uses as she should appoint. There was no issue of the marriage, and the wife survived her husband, having made her will in his lifetime, which she did not confirm after his death. The real estate was never settled upon the trusts of the marriage settlement. Upon the wife's death a claim was made by her heir-at-law to the real estate on the ground that it had become subject to the covenant to settle after-acquired property, and so subject to the trusts

of the settlement, and that her will was inoperative to dispose of it as she had not confirmed it since her husband's death, and that, therefore, she died intestate: *Held* though the property was within the terms of the covenant, it had not actually become and could not be treated as subject to the trusts of the settlement in favour of their heir who was not within the consideration of the settlement, and so not entitled to enforce the covenant; therefore, the property passed under the will made in pursuance of the power of appointment in the settlement of 1873.

Re Anstis, Chetwynd v Morgan, Morgan v Chetwynd (1886) 31 Ch D 596; 54 LT 742; 34 WR 483; 2 TLR 335, CA

ANNOTATION **Distd** Re Ralli's Will Trusts, Calvocoressi v Rodocanachi [1963] 3 All ER 940

Scottish, Irish and Commonwealth Cases

970 Brother

A father's voluntary settlement upon his children, otherwise unprovided for by him, may, when neither creditor, purchaser, nor any other having claim on the father's estate is concerned, be carried into execution by a court of equity, as answering the father's natural obligation to provide for his children. But this obligation extends not to the nearest collaterals, consequently, no such settlement, by one brother upon another, can be entitled to the aid of a court of equity.

FitzEdward v Ryves (1735) 7 Bros Parl Cas 419 (IR)

3 Failure of consideration

A What amounts to failure

CROSS REFERENCE See HUSBAND & WIFE vol 27(3) (2nd reissue) no 11022 et seq

971 Incapacity to contract valid marriage

Where a widower married the sister of his deceased wife: *Held* the relation thus constituted imposed upon the widower, claiming the benefit of a settlement made on him by his wife's sister, the onus of showing that at the time of entering into the transaction she was fully, fairly and truly informed of its character and of her legal status. Such a marriage and consequent cohabitation held not a sufficient consideration to support a conveyance by the wife's sister of her property to the widower absolutely.

Coulson v Allison (1860) 2 De GF&J 521; 3 LT 763; 6 Jur NS 1140; 45 ER 723, LC

ANNOTATIONS **Consd** Chapman v Bradley (1863) 33 Beav 61 **Distd** Ayerst v Jenkins (1873) LR 16 Eq 275 **Apld** Phillips v Probyn [1899] 1 Ch 811

972 Incapacity to contract valid marriage

In 1854 A went through the marriage ceremony, in Prussia, with C, his deceased wife's sister. After the marriage, and in consideration thereof, C settled property upon certain trusts, reserving to herself, however, a power of appointment. Subsequently by her will C confirmed the trusts of the settlement. On the death of C both the will and settlement were admitted to probate: *Held* the settlement was valid.

The settlement can in no sense be considered as void and the utmost that can be said of it is that it is an instrument which might have been set aside by the lady herself or by a purchaser for valuable consideration. It is impossible to say that it is not a voluntary settlement (*Stuart V-C*).

Seale v Lowndes (1868) 17 LT 555

973 Incapacity to contract valid marriage

On 30 April 1873, a widower executed a deed, by which, in contemplation of a marriage which "had been agreed upon and was intended shortly to be solemnised" between himself and C, he conveyed real estate to trustees in fee, to the use of himself and his assigns during his life, with remainder to the use of C during her life, "provided she shall remain a widow and unmarried; and from and immediately after her decease or marriage, whichever event shall first happen," to such uses as the settlor should by deed or will appoint, and, in default of appointment, to the use of such person or persons as would be entitled thereto if the deed had not been executed. C was in fact a sister of the settlor's deceased wife, though this was not stated in the deed. On 5 March 1877, he went through the ceremony of marriage with her, and she afterwards lived with him as his wife. He died in November 1891, intestate. He had not exercised the power of appointment by deed reserved to him by the settlement. During the life of his son and heir-at-law C received the rents of the property without objection on his part. Upon a summons taken out after the son's death by the trustees of the settlement against C and the son's heir-at-law and administratrix to determine who was entitled to the property: *Held* the trust for C was illegal and invalid and the property was held on trust for the son's administratrix, she being, under Land Transfer Act 1897 (c 65) (repealed), his real representative.

Phillips v Probyn [1899] 1 Ch 811; 68 LJ Ch 401; 80 LT 513; 15 TLR 324; 43 Sol Jo 456

974 Incapacity to contract valid marriage — Meaning of "solemnise"

JP, previously to going through the ceremony of marriage with his deceased wife's sister, executed a settlement reciting the intended marriage, by which certain property was assigned to trustees in trust for the settlor until the solemnisation of the marriage,

and after the solemnisation thereof, and after the decease of JP, to pay the interest to the intended wife for life, and then for the benefit of his two children by his former wife and such children as he should have by his intended marriage; but if there should be no such child or children, then for JP, his executors, administrators, and assigns: *Held* as no valid marriage could take place between JP and his deceased wife's sister, the trust in favour of himself until the solemnisation of such marriage continued, and the subsequent trusts never having arisen, the property remained in JP, and formed part of his general estate.

Pawson v Brown (1879) 13 Ch D 202; 49 LJ Ch 193; 41 LT 339; 44 JP 233; 28 WR 652

ANNOTATION **Apld** Neale v Neale (1898) 79 LT 629

975 Incapacity to contract valid marriage — Meaning of "solemnise" — Ceremony performed abroad

Testator in this suit executed a settlement in contemplation of his then intended marriage with J, who was his deceased's wife's niece, and "in consideration of that intended marriage, and of his natural love for his children by his then late wife, and for divers other good causes and considerations," assigned certains funds to trustees upon trusts for himself until the said marriage should be solemnised, and from and after the solemnisation thereof for himself and the lady for their lives, with remainder for the children of his late and contemplated marriages. The marriage ceremony was performed in Switzerland according to Swiss law, and testator having died insolvent this suit was instituted by a creditor to administer his estate, and to have the settlement declared void. The master of the Rolls so decreed, on the ground that the two considerations could not be separated and that the intended marriage was a wholly illegal consideration. On appeal, their Lordships affirmed the decree, but on the ground that no marriage had ever been solemnised within the proper meaning of the settlement, and the first trust in favour of the settlor remained therefore in force.

Chapman v Bradley (1863) 4 De GJ&Sm 71; 3 New Rep 182; 9 LT 495; 10 Jur NS 5; 12 WR 140; 46 ER 842, LJJ

ANNOTATIONS **Apld** Pawson v Brown (1879) 113 Ch D 202; A v M (1884) 10 PD 178; Neale v Neale (1898) 79 LT 629 **Consd** Re Garnett, Richardson v Greenep (1905) 74 LJ Ch 570; Re Dewhirst, Flower v Dewhirst [1948] Ch 198

976 Incapacity to contract valid marriage — Meaning of "solemnise" — Admissibility of extrinsic evidence

Neale v Neale no 989 post

977 Nullity of marriage — Allegation of nullity

In an action by the covenantee trustees of a marriage settlement, on a covenant in consideration of marriage therein contained to pay an annuity during the life of the covenantor's intended son-in-law, it is not competent to defendant, the covenantor, as a third party to plead equitably the nullity of the marriage by reason of the husband's impotence and the consequent failure of consideration for the covenant, the parties to the marriage themselves having taken no steps to set the marriage aside on that ground, not elected to treat the contract as void.

Cavell v Prince (1866) LR 1 Exch 246; 4 H&C 368; 35 LJ Ex 162; 15 LT 83; 12 Jur NS 475; 14 WR 968

978 Nullity of marriage — Marriage declared null

Re Garnett, Richardson v Greenep no 987 post

979 Nullity of marriage — Marriage declared null

By a settlement made in contemplation of marriage a father transferred £25,000 to the trustees of the settlement to be held upon trust for him "until the said intended marriage," and thereafter upon the trusts of the settlement. The marriage took place, but afterwards a decree absolute was made declaring it "to be and to have been absolutely null and void" on the ground of the husband's impotence: *Held* "until the said intended marriage" meant a valid and effectual marriage, and as the marriage had been declared null and void *ab initio*, the settlor was absolutely entitled to the settled funds, under the express trust in favour.

Re Wombwell's Settlement, Clerke v Menzies [1922] 2 Ch 298; 92 LJ Ch 18; 127 LT 295

ANNOTATIONS **Consd** Re Ames Settlement, Dinwiddy v Ames [1946] Ch 217; Re Dewhirst, Flower v Dewhirst [1948] Ch 198 **Folld** Re d'Altroy's Will Trusts, Crane v Lowman [1968] 1 All ER 181

980 Nullity of marriage — Marriage declared null

E v E (1893) 37 Sol Jo 250

981 Nullity of marriage — Marriage declared null

By a marriage settlement made in 1908 the intended husband's father covenanted to pay to the trustees within one year from the solemnisation of the marriage the sum of £10,000 to be held upon the usual trusts of a marriage settlement, the husband taking the first life interest. In default of issue who should attain a vested interest the settled funds were to be held in trust for the person who would have been the next of kin of the husband had he died possessed thereof intestate and without ever having

been married. The marriage was solemnised, the money was paid to and invested by the trustees, and the parties lived together until 1926 when a decree of nullity was made on the wife's petition. The settlor died in 1933. The husband continued to receive the income until his death in 1945: *Held* the marriage having been void *ab initio*, there was a total failure of consideration, and the fund was held on a resulting trust for the settlor's executors.
Re Ames' Settlement, Dinwiddy v Ames [1946] Ch 217; [1946] 1 All ER 689; 115 LJ Ch 344; 175 LT 222; 62 TLR 300; 90 Sol Jo 188

ANNOTATION **Consd** Re Dewhirst, Flower v Dewhirst [1948] Ch 198

982 Cohabitation without marriage for several years
By a settlement executed in 1877, in consideration of a then intended marriage, it was declared that a sum of stock, the property of the intended wife, which had been transferred by her to two trustees, should be held by them on trust for the benefit of the intended wife, the intended husband, and the issue of the intended marriage. The marriage was not solemnised, but the parties cohabited without marriage, and three children were born. In 1883 an action was brought by the father and mother against the trustees of the settlement, to obtain a transfer of the fund to the mother: *Held* the contract to marry had been absolutely put an end to, and the court could order the stock to be transferred to the lady.
Essery v Cowlard (1884) 26 Ch D 191; 53 LJ Ch 661; 51 LT 60; 32 WR 518

ANNOTATION **Apld** E v E (1893) 37 Sol Jo 250

Scottish, Irish and Commonwealth Cases

983 Nullity of marriage
Where a man has made a settlement upon his intended wife, followed by the ceremony of marriage and cohabitation, there is a sufficient consideration to support the settlement, so that he cannot, after a decree of nullity on the ground of his impotence, enforce the prior trust of the settlement, *ie* for himself, until solemnisation of the marriage.
Bishop v Smith (1875) 1 VLR (Eq) 313 (AUS)

B Effect of failure

CROSS REFERENCE See BONDS vol 7(1) (2nd reissue) no 3588

984 Rights of beneficiaries defeated
By an indenture, made in contemplation of marriage, certain leasehold property, belonging to the intended wife, was conveyed to trustees on certain trusts; and the trusts of a sum of stock, also belonging to the intended wife, which had been transferred into the names of the trustees, were declared. The marriage did not take effect, and soon after the date of the indenture, the lady married another person. In a suit instituted by the husband and wife against the trustees, it was ordered that the leasehold property should be conveyed to the husband, and the stock transferred into his name.
Thomas v Brennan (1846) 15 LJ Ch 420; 11 Jur 95

ANNOTATION **Distd** Re Gundry, Mills v Mills [1898] 2 Ch 504

985 Rights of beneficiaries defeated — Property remains in settlor
Chapman v Bradley no 975 ante

986 Rights of beneficiaries defeated — Property remains in settlor
Pawson v Brown no 974 ante

987 Rights of beneficiaries defeated — Property remains in settlor — Marriage subsequently declared null
By a settlement made in contemplation of the marriage of his daughter, a father covenanted that if the marriage were "solemnised" his executors would, within twelve months from his death, pay £25,000 to the trustees of the settlement. The marriage took place. Under an order made in an action for the administration of the estate of the father his executors were directed to pay and did pay over the £25,000, being unaware of the fact that on the previous day a decree absolute had been made in the Divorce Court declaring the marriage to have been and to be absolutely null and void on the ground of the impotence of the husband: *Held* inasmuch as the marriage had been declared null *ab initio*, it had never been "solemnised"; consequently the covenant to pay the £25,000 never became operative, and the money in question must be repaid to the executors of testator.
Re Garnett, Richardson v Greenep (1905) 74 LJ Ch 570; 93 LT 117

ANNOTATIONS **Folld** Re Wombwell's Settlmt, Clerke v Menzies [1922] 2 Ch 298 **Consd** Re Ames' Settlement, Dinwiddy v Ames [1946] Ch 217; Re Dewhirst, Flower v Dewhirst [1948] Ch 198

988 Rights of beneficiaries defeated — Property remains in settlor — Marriage subsequently declared null
Re Wombwell's Settlement, Clerke v Menzies no 979 ante

989 Rights of beneficiaries defeated — Heir-at-law entitled
A widow, being about to marry her deceased husband's brother, executed a settlement by which her real estate was conveyed to trustees to hold to her use in fee "until the intended marriage" and "from and after the solemnisation of the intended

marriage" upon trust for her life with remainder in fee to her younger son. She shortly afterwards went through the form of marriage with her deceased husband's brother, and subsequently died intestate: *Held* the words "solemnisation of marriage" could be construed only as meaning a valid marriage, and extrinsic evidence was not admissible to show that this was not the intention of the parties; and the heir-at-law was entitled to the property.

Neale v Neale (1898) 79 LT 629; 15 TLR 20, CA; revsg SC sub nom

Neale v Mitchell & Co (1897) 14 TLR 154

990 Rights of beneficiaries defeated — Heir-at-law entitled

Phillips v Probyn no 973 ante

991 Rights of beneficiaries defeated — Resulting trust for settlor's executors

Re Ames' Settlement, Dinwiddy v Ames no 981 ante

992 Suit to set aside settlement — As founded on illegal consideration — By personal representatives of settlor

A court of equity will not, at the instance of settlor or his legal personal representative, adversely set aside a settlement by which the settlor confers on a stranger the absolute beneficial interest in property legally vested in trustees, although such settlement may have been made for an illegal consideration not appearing on the fact of the instrument.

A widower, two days before going through the ceremony of marriage with his deceased wife's sister, which ceremony was known to both parties to be invalid, executed a deed by which it was recited that he was desirous of making a settlement and provision for the lady, and had transferred certain shares into the names of trustees upon the trusts thereinafter declared, being for the separate and inalienable use of the lady during her life, and after her death as she should by deed or will appoint; and they afterwards lived together as man and wife until the widower's death. Ten years after such death, and some time after the lady had married, the legal personal representative of the settlor instituted a suit to set aside the settlement, as being founded on a bad and illegal consideration: *Held* the suit could not be maintained.

Ayerst v Jenkins (1873) LR 16 Eq 275; 42 LJ Ch 690; 29 LT 126; 38 JP 37; 21 WR 878, LC

ANNOTATIONS **Distd** Pawson v Brown (1879) 13 Ch D 202; Phillips v Probyn [1899] 1 Ch 811

Scottish, Irish and Commonwealth Cases

993 Rights of beneficiaries defeated

No party to a marriage settlement who is himself a contracting party, and has failed to fulfil his part of the contract, can take anything under it.

Houston v Barry (1843) 5 I Eq R 294 (IR)

994 Default in payment of consideration — Whether marriage contract vitiated

Default to payment of the consideration on one part, does not vitiate a marriage contract. But the defaulting party cannot enforce the contract against the party injured by his default.

Crofton v Ormsby (1806) 2 Sch&Lef 583, 602 (IR)

iii SETTLEMENTS ON SEPARATION

CROSS REFERENCES See HUSBAND & WIFE vol 27(1) (2nd reissue) no 3009 et seq (consideration in contracts of separation), no 3404 et seq (effect of reconciliation)

995 Settlement in consideration of separation — Validity as against assignee in bankruptcy of settlor

By a separation deed in 1864, after reciting that differences had arisen between the husband and wife, and that they had agreed to live apart, the husband assigned to trustees leaseholds upon trust to pay the rents to the wife for life for her separate use, and after her death upon trust for sale, and in the events which happened the proceeds were to be in trust for the husband, and the husband covenanted if the rents should not amount to £300 a year to make up the income to £300. There was a proviso for determination if the wife should return to cohabitation, and a covenant by the husband that the wife should live apart from him, but there was no covenant by the wife or trustees either for payment of debts or otherwise. The husband became bankrupt in 1868, and obtained his discharge in the same year, but, as the law then stood, the discharge did not release him from his obligations under the covenant. On the death of the wife in 1899, a large sum was due from the husband's estate under the covenant to make up the income to £300: *Held* the deed, having regard to the recital, was not voluntary, and the trustees were entitled, as against the assignee in bankruptcy of the husband, to retain the trust property until the arrears due under the covenant were satisfied.

Quaere: whether the right claimed by the trustees would not exist even in the case of a voluntary settlement effectually completed so as to be enforceable by the court.

Re Weston, Davies v Tagart [1900] 2 Ch 164; 69 LJ Ch 555; 82 LT 591; 48 WR 467

6 Trustees' administration duties

i DUTIES OF TRUSTEES IN GENERAL

LAW See Halsbury's Laws (4th edn) vol 42 para 664

CROSS REFERENCE See REAL PROPERTY vol 38 (reissue) no 5090

ii POWERS OF MANAGEMENT

LAW See Halsbury's Laws (4th edn) vol 42 para 665

CROSS REFERENCE See INFANTS vol 28(3) (2nd reissue) no 1304 (entry by trustees into possession)

996 Management of land on behalf of minors
Re Quicke's Trusts, Poltimore v Quicke no 1965 post

997 Power not confined to period of minority
Re Gray, Public Trustee v Woodhouse no 3637 post

998 Power not confined to period of minority
Re Robins, Holland v Gillam no 3638 post

iii EXPENSES OF MANAGEMENT

LAW See Halsbury's Laws (4th edn) vol 42 para 666

iv POWERS OF MAINTENANCE AND ADVANCEMENT

LAW See Halsbury's Laws (4th edn) vol 42 para 667

CROSS REFERENCES See INCOME TAX vol 28(2) (2nd reissue) no 3373; TRUSTS vol 48 (reissue) no 3447 (powers of advancement generally)

v DUTY TO INVEST

LAW See Halsbury's Laws (4th edn) vol 42 para 668

CROSS REFERENCE See TRUSTS vol 48 (reissue) no 5439 et seq (investment of trust fund)

vi DUTY IN RESPECT OF POLICIES AND CHOSES IN ACTION

LAW See Halsbury's Laws (4th edn) vol 42 para 669

CROSS REFERENCES See INSURANCE vol 29(1) (2nd reissue) no 380 et seq (insurance generally), vol 29(2) (2nd reissue) no 4361 et seq (position of trustee); CHOSES IN ACTION vol 8(2) (2nd reissue) no 431 et seq (assignments subject to equity)

7 Unauthorised transactions effected under court orders

LAW See Halsbury's Laws (4th edn) vol 42 para 670 et seq

CROSS REFERENCE See TRUSTS vol 48 (reissue) no 4122 et seq (administration by court)

999 Court's power to order transactions — Establishment of maintenance fund for heritage property

The Settled Land Act 1925 s 64(1) provides: "Any transaction affecting or concerning the settled land, or any part thereof, or any other land (not being a transaction otherwise authorised by this Act or by the settlement) which in the opinion of the court would be for the benefit of the settled land, or any part thereof, or the persons interested under the settlement, may, under an order of the court, be effected by a tenant for life if it is one which could have been validly effected by an absolute owner."

A settlement made in 1963 affected a Tudor country house, a substantial agricultural estate and a number of valuable chattels. There was no tenant for life, and the trustees of the settlement were the statutory owners under the 1925 Act. The settlement gave the trustees power to effect without any order of the court any transaction which could have been effected under an order of the court made under s 64.

With a view to minimising liability for inheritance tax, the trustees wished to set up by trust deed a maintenance fund satisfying the requirements of the Capital Transfer Tax 1984 Sch 4 and providing for the maintenance of the country house. The question arose whether that proposal fell within the 1925 Act s 64: *Held* the 1984 Act Sch 4 para 3 imposed a requirement that for 6 years income not applied for the maintenance of the property in question and not accumulated could not be applied otherwise than for the benefit of a body specified in the 1984 Act Sch 3 or a "qualifying charity", *ie* of a charity which itself existed for the maintenance of historic buildings. Paragraph 3 went on to require that none of the property held on the maintenance trusts could, on ceasing to be held on those trusts at any time during the 6 years, devolve otherwise than on any such body or charity. This meant that in order to satisfy the requirements of the 1984 Act Sch 4 para 3, the trusts of the maintenance fund would have to include potential beneficiaries not contemplated by the 1963 settlement.

However, the trustees' proposal would benefit the country house and would also benefit the beneficiaries under the 1963 settlement because of the tax advantages of the proposal. The inclusion, under the trusts of the maintenance fund, of new potential beneficiaries was a necessary and small price to be paid for those tax advantages, and there was no authority to suggest the existence of a general principle preventing the trustees from carrying out any transaction which might confer some benefit on non-beneficiaries under the settlement. accordingly the 1925 Act s 64 was wide enough to authorise the trustees to do as they proposed to do.

Raikes v Lygon [1988] 1 All ER 884; [1988] 1 WLR 281

2 SETTLEMENTS OF LAND UNDER THE SETTLED LAND ACT 1925

1 Settlements within the Act

i "SETTLEMENT"

LAW See Halsbury's Laws (4th edn) vol 42 para 675 et seq

CROSS REFERENCE See no 1045 et seq post (compound settlement)

NOTE By virtue of the Trusts of Land and Appointment of Trustees Act 1996 s 2(1), 37(S) Halsbury's Statutes (4th edn) Real Property (Pt 1), no settlement created after 1 January 1997 is a settlement for the purposes of the Settled Land Act 1925, and no settlement is deemed to be made under that Act after that date. This does not apply to a settlement created on the occasion of an alteration in any interest in, or of a person becoming entitled under, a settlement which is in existence on that date, or derives from any settlement mentioned above: s 2(2). However a settlement created as mentioned in s 2(2) is not a settlement for the purposes of the 1925 Act if provision to the effect that it is not is made in the instrument, or any of the instruments, by which it is created: 1996 Act, s 2(3)

1000 State of affairs in relation to certain land — Brought about by one or more documents

A, being the tenant for life of certain settled estates under a settlement made in 1862, duly disentailed the same in 1920 and limited them to himself in fee simple. The lands in question were subject to a jointure rentcharge, and A sold various portions prior to 1926 subject to the charge but in each case with a covenant of indemnity.

On Settled Land Act 1925 (c 18), coming into force, A applied to the court for the appointment of two persons as trustees under the original settlement of 1862 for the purposes of the Act.

The point having been raised whether such persons on appointment might not, by virtue of Settled Land Act 1925 (c 18) s 31, be trustees for the purposes of the Act not only in respect of the lands to which A was still beneficially entitled in fee simple but also in respect of the lands already sold, a summons was taken out for the determination of this question: *Held* (1) on the coming into force of Settled Land Act 1925 (c 18), the whole of the estate became, by virtue of s 1(1)(v), settled land, but the part vested in A was the subject-matter of one settlement and each part vested in a purchaser was the subject-matter of another settlement, though each settlement was brought about by one and the same document, namely, the original settlement of 1862.

In general, a settlement for the purposes of the Act, is a state of affairs in relation to certain land, brought about or deemed to have been brought about by one or more documents, the particular state of affairs being one or more of those specified in Settled Land Act 1925 (c 18) s 1(1)(i) to (v) (*Romer J*).

(2) The different portions of the land being subject to different settlements, there was nothing in the language of Settled Land Act 1925 (c 18) s 31, which would, under the circumstances, prevent the court from appointing trustees of the one settlement without those trustees thereby becoming trustees of any of the others.

Re Ogle's Settled Estates [1927] 1 Ch 229; 96 LJ Ch 113; 136 LT 300; 70 Sol Jo 953

ANNOTATION **Apprvd** (dictum Romer J) Roome v Edwards [1980] 1 All ER 850

1001 State of affairs in relation to certain land — Brought about by one or more documents — Separate funds — Beneficiaries becoming absolutely entitled to one fund — Liability of trustees of other fund to tax — FA 1965 s 25(3)(11) Sch 10 para 12(1)

A marriage settlement made in 1944 reserved certain powers of appointment to the husband and wife. In 1955, by a deed of appointment and release, part of the settlement was appointed on trust for a daughter

of the marriage absolutely, contingently on her attaining the age of twenty-five. In 1972 an arrangement was made whereby the remainder of the fund subject to the 1944 settlement was held on trust by the original trustees for the wife for life with remainder to her husband for his life, with remainder to their two daughters in equal shares absolutely. The life tenants and the remainderman then assigned their respective interests in the main fund to two companies in the Cayman Islands, for a financial consideration. New trustees, resident in the Cayman Islands, were appointed and the company holding the beneficial interests in the remainder subsequently assigned those interests to the company already holding the life interests, thus making that company absolutely and beneficially entitled to the fund as against the Cayman Island trustees. The Inland Revenue therefore made an assessment to capital gains tax on the chargeable gain thus arising under the Finance Act 1965 s 25(3). However in view of the absence abroad of the trustees, the assessment was made on the trustees of the 1955 fund on the basis of s 25(1), (11) and Sch 10 para 12. The assessment and liability were upheld by the Special Commissioners and the trustees appealed. At first instance the appeal was allowed on the ground that, notwithstanding that the original fund and the 1955 fund constituted a single settlement and the trustees of both funds were to be treated as a single body for the purposes of s 25, tax could not be recovered from the trustees of the 1955 fund as Sch 10 para 12 did not make persons having no control over assets liable for any tax arising on their disposal. On appeal by the Crown, the Court of Appeal affirmed the judge's decision but on different grounds. For tax purposes, it was held, where a settlement originally or as a result of an appointment created different trusts of different properties then there were different states of affairs that thus created different settlements. The 1955 appointment resulted in there being two settlements and tax had to be calculated and charged separately on the two funds. The trustees of the 1955 fund ceased to be the trustees of the main fund when new non-resident trustees were appointed and were not therefore liable to tax in respect of it. The Crown appealed to the House of Lords: *Held* where a power of appointment was exercised to separate specific property from a main trust fund in order to create different trusts of different property, a new and separate settlement was not necessarily thereby created for capital gains purposes. It was clear on the facts that the parties had not intended to create a new and separate settlement and the funds established consequently remained a single settlement. Under s 25 the trustees of both trusts were therefore to be treated as a single body and, pursuant to Sch 10 para 12, that meant that the resident trustees were assessable and chargeable to tax on gains accruing from a deemed disposal of the main fund assets by the non-resident trustees. The absence of legal control over assets did not exempt trustees from tax liability for gains produced by them and persons who accepted appointment as trustees had to ensure for themselves that they were adequately protected against such liabilities.

Roome v Edwards [1981] 1 All ER 736; [1981] 2 WLR 268; [1981] STC 96; 125 Sol Jo 150, HL

ANNOTATION **Apld** Bond v Pickford [1982] STC 403

1002 Meaning of "settlement" — Interest as testator's next-of-kin on partial intestacy

Testator died in 1953. The court held that the disposition made by testator's will of his residuary estate was void for uncertainty and declared that during a specified trust period the residuary estate was to be held on trust for the persons entitled to share in testator's estate on an intestacy, subject to an overriding power to the trustees to apply the income and capital of the residuary estate for the benefit of descendants of testator's parents who might be in need. Under s 49 of Administration of Estates Act 1925, the persons entitled to testator's estate on an intestacy were his four brothers and his sister. Accordingly, by the joint effect of the will and 1925 Act the brothers and the sister were each entitled to one-fifth of the income of the residuary estate during the trust period and to one-fifth of the capital on determination of the trust period, subject to the overriding power to apply the income and capital. One of the brothers died in July 1969. On his death the Crown claimed estate duty on one-fifth of the residuary estate on the ground that for seven years prior to the brother's death, one-fifth of the residuary estate was comprised in a "settlement" and the brother was entitled to a beneficial interest in possession in the residuary estate as "a beneficiary under the settlement", within s 2(1)(*b*)(i) of Finance Act 1894, as substituted by s 36(2) of Finance Act 1969. The Crown contended that there was a "settlement" for the purpose of s 2(1)(*b*)(i) because there was a settlement within s 36(5)(*a*)(i)(*aa*) of 1969 Act, namely a "disposition" whereby the residuary estate was held on trust with a discretionary power for the trustees to make payments out of the income of the estate. The trustees conceded that testator's will was a "disposition" within s 36(5)(*a*)(i)(*aa*) of 1969 Act and accordingly, that at the relevant time there was a "settlement" within s 2(1)(*b*)(i) of 1894 Act, and also conceded that the brother was entitled to a beneficial interest in possession in the residuary estate within s 2(1)(*b*)(i). But the trustees joined issue with the Crown on whether the brother was entitled

as "a beneficiary under the settlement" within s 2(1)(*b*)(i), since he had acquired his interest by virtue of 1925 Act. The judge held that the "settlement" for the purpose of s 2(1)(*b*)(i) consisted of both the will and 1925 Act which together produced the totality of the trusts on which the residuary estate was held and that, accordingly, the brother's interest in the residuary estate was liable to estate duty under s 2(1)(*b*)(i). The trustees appealed: *Held* to constitute a "settlement" within s 2(1)(*b*)(i) of 1894 Act there had to be an instrument such as was described in s 36(4) of 1969 Act or "a disposition" within s 36(5)(*a*)(i) of 1969 Act. Administration of Estates Act 1925 could not be regarded as an instrument which together with the will constituted a "disposition" within s 36(5)(*a*)(i)(*aa*) of 1969 Act, for 1925 Act did not "dispose" of the residuary estate but merely laid down the persons on whom the residuary estate was to devolve under the intestacy. Moreover, for the purposes of s 2(1)(*b*) a distinction had been drawn, in s 36(6)(*a*) to (*c*) of 1969 Act, between a disposition and a devolution. Since 1925 Act did not constitute a "disposition" within s 36(5)(*a*)(i)(*aa*) of 1969 Act, it did not constitute part of the "settlement" within s 2(1)(*b*)(i) of 1894 Act and accordingly, as the brother had acquired his interest in the residuary estate, by virtue of 1925 Act, on the intestacy and not under testator's will, he was not "a beneficiary under the settlement" within s 2(1)(*b*)(i). Appeal allowed.

Re Buttle's Will Trusts, Buttle v IR Commissioners [1977] 3 All ER 1039; [1977] 1 WLR 1200; 121 Sol Jo 493; [1977] STC 459, CA

1003 "Any number of instruments" — Settlement and subsettlement — By appointment in exercise of power

Re Knowles' Settled Estates no 1739 post

1004 "By way of succession" — Limitation to vicar "and his successors" — By award under Inclosure Act

An award, under an Inclosure Act to "A and his successors, vicars of X" of lands in respect of glebe was not an instrument limiting an estate or interest in land "to or in trust for any persons by way of succession" so as to have constituted "a settlement" within Settled Land Act 1882 (c 38) s 2(1) (repealed).

But, where the purchase-moneys of glebe lands, comprised in such an award and afterwards taken by a railway company, were paid into court, then by the combined operation of Settled Land Act 1882 (c 38) s 32 (repealed), and Lands Clauses (Consolidation) Act 1845 (c 18) s 69, and upon the authorities, such moneys might be dealt with as capital moneys arising under Settled Land Acts (repealed); and the court had discretionary jurisdiction under Settled Land Act 1887 (c 30) (repealed), to authorise the application of them in the redemption of terminable rentcharges on the glebe created under Land Improvement Act 1864 (c 114).

Ex p Castle Bytham (Vicar), Ex p Midland Ry Co [1895] 1 Ch 348; 64 LJ Ch 116; 71 LT 606; 43 WR 156; 11 TLR 2; 39 Sol Jo 10; 13 R 24

1005 "By way of succession" — Various interests limited to same person

Real estate stood limited to trustees upon trust for a married woman for her life for her separate use without power of anticipation and after her death to such uses as she should by will appoint and in default to the use of herself in fee; and she contracted to sell the property to a purchaser. The court was not satisfied that these limitations created a "settlement" within Settled Land Act 1882 (c 38) s 2 (repealed), but held, that the married woman had the powers of a tenant for life within s 58(1)(ix) (repealed) of the same Act, and could make a title as such to the purchaser.

Re Pocock & Prankerd's Contract [1896] 1 Ch 302; 65 LJ Ch 211; 44 WR 247, sub nom

Re Pocock & Prankerd & Wisbech Grammar School (Governors) (1896) 73 LT 706

ANNOTATION **Apld** Re Osborne & Brights [1902] 1 Ch 335

1006 "By way of succession" — Property set apart to provide for annuity

Testatrix by her will bequeathed an annuity to A, and directed that a portion of her estate should be set apart to provide for the payment of the annuity, and subject thereto she bequeathed the portion of her estate to B: *Held* the property so set apart to provide for the payment of the annuity was property "standing limited to or in trust for persons by way of succession" within Settled Land Act 1882 (c 38) s 2(1) (repealed).

A-G v Owen, A-G v Coulson [1899] 2 QB 253; 68 LJQB 779; 81 LT 121; 63 JP 611; 15 TLR 381, DC

ANNOTATIONS **Apld** Re St Albans, Loder v St Albans [1900] 2 Ch 873 **Folld** Re Campbell [1902] 1 KB 113

1007 "By way of succession" — Property set apart to provide for annuity

Testator by his will gave certain legacies and annuities, some of which were contingent upon the legatees and annuitants attaining the age of twenty-one. He directed that every legacy and annuity should be primarily payable out of his personalty, and charged his real estate in aid, but not in exoneration, of his personalty with the same, if the personalty should be insufficient. He devised his real estate to the use of his eldest son for life with remainders over. He declared that if his residuary personalty

should be insufficient for payment of his funeral and testamentary expenses, debts, legacies, and annuities, the trustees might raise the deficiency by mortgage of the real estate, but so that the annuities should be paid out of rents and profits, and not by raising a capital sum to provide for the same; and he charged the residuary personalty with the payment of the legacies and annuities, and directed that the ultimate residue of the personalty should be invested and should follow the limitations of the real estate. After testator's death the executors had paid settlement estate duty in respect of the contingent legacies and annuities. There was a probability that the personal estate would be insufficient to pay the funeral and testamentary expenses, legacies, and annuities. The question having arisen as to how the settlement estate duty ought to be borne as between the residuary estate and the legatees and annuitants: *Held* the contingent legacies must be treated as settled.

Re St Albans (Duke) Loder v St Albans (Duke) [1900] 2 Ch 873; 68 LJ Ch 863; 49 WR 74; 44 Sol Jo 690

1008 "By way of succession" — Property set apart to provide for annuity

The object of testator in this case to provide for the payment of certain life annuities and for immediate distribution of the residue, subject to due provision being made for payment of the annuities. For that purpose a special fund was to be created for the protection of the annuitants, and, subject to the trust imposed upon that fund in their favour, the residue of the estate was to be distributed among the residuary legatees. I think that the provisions by which those objects of testator were brought about amounted to a settlement within Settled Land Act 1882 (c 38) s 2(1) (repealed) (*Mathew LJ*).

Re Campbell [1902] 1 KB 113; 71 LJKB 160; 85 LT 708, CA

ANNOTATION **Apld** Berry v Gaukroger [1903] 2 Ch 116

1009 "By way of succession" — Property set apart to provide for annuity — Undivided share in land

Testator directed his trustees to set aside and appropriate sufficient of his property to meet certain annuities bequeathed by his will. By a deed of appropriation the trustees appropriated certain freehold ground rents to meet such annuities. Testator declared that his trustees should be trustees of his will for the purpose of Settled Land Acts 1882 to 1890 (repealed), and he further declared that they could exercise all the powers conferred on a tenant for life by Settled Land Acts 1882 to 1890 (repealed): *Held* (1) notwithstanding that "an undivided share in land" was excepted from the definition of "land" in Settled Land Act 1925 (c 18) s 117(1)(ix), as regards the land appropriated to meet the annuities, the will operated as a settlement within s 1(1) of the Act, and as regards the other land the will operated as a settlement within the same sub-section, and therefore, as regards the whole of the residuary real estate the will operated as a settlement under the Act; (2) the appointment of the trustees of the will as trustees for the purpose of Settled Land Acts 1882 to 1890 (repealed), made them, under s 23(1)(*a*), (*b*) of the Act of 1925, trustees for the purposes of the settlement under that Act, and they could, therefore, exercise the powers of a tenant for life.

Re Bird, Watson v Nunes [1927] 1 Ch 210; 96 LJ Ch 127; 136 LT 346; 70 Sol Jo 1139

1010 "By way of succession" — Family charges

Re Ailesbury (Marquis) & Iveagh (Lord) no 1045 post

1011 "By way of succession" — Family charges — Arising after life estate

Re Mundy & Roper's Contract no 1172 post

1012 "By way of succession" — Family charges

Re Wimborne (Lord) & Browne's Contract no 1069 post

1013 "By way of succession" — Family charges — Remainder to tenant for life in fee — Merger of life estate

By a marriage settlement, land belonging to the settlor was assured to the settlor for life with remainder, subject to a jointure, portions, and portions term thereby charged and limited, to the settlor in fee: *Held* notwithstanding the merger of the life estate, the settlement was a settlement within Settled Land Act 1882 (c 38) s 2(1) (repealed), and the settlor was life tenant within s 2(5) (repealed).

Re Marshall's Settlement, Marshall v Marshall [1905] 2 Ch 325; 74 LJ Ch 588; 93 LT 246; 54 WR 75; 21 TLR 678; 49 Sol Jo 671

ANNOTATIONS **Folld** Re Monckton's Settlmt, Monckton v Calder [1917] 1 Ch 224 **Consd** Re Carnarvon's Chesterfield SE, Re Carnarvon's Highclere SE [1927] 1 Ch 138

1014 "By way of succession" — Family charges — Remainder in fee simple on death of tenant for life

In 1894 lands were by deed settled to the use of A for life, remainder to the use of B, the eldest son of A, in fee simple if he should survive A, with powers for A to create portions terms for his younger children and for B to jointure any wife and to create portions terms for his younger children. In 1896 B married, and in exercise of his power by deed charged a jointure for his wife and created a portions term for his younger children. In 1916 A died, having in exercise of his power created portions terms for his

younger children, and B became tenant in fee simple in possession subject to the several portions terms and the jointure: *Held* (1) in the events which had happened, the lands stood limited to or in trust for persons by way of succession under the deed of 1894, which constituted a "settlement" within the definitions in Settled Land Act 1882 (c 38) s 2(1) (repealed); (2) B was tenant for life of the settlement within s 2(5) (repealed) of the Act, and could exercise all the powers of a tenant for life under the Act.

Re Monckton's Settlement, Monckton v Calder [1917] 1 Ch 224; 86 LJ Ch 187; 115 LT 899

ANNOTATIONS As to (2) **Follld** Re Sutton's Contract (1920) 65 Sol Jo 259. Generally **Consd** Re Carnarvon's Chesterfield SE, Re Carnarvon's Highclere SE [1927] 1 Ch 138

1015 "By way of succession" — Annuities charged on settled land — Remainder to tenant for life in fee

Re Phillimore's Estate, Phillimore v Milnes no 1051 post

1016 "By way of succession" — Annuities charged on settled land — Subsequent limitations

Re Trafford's Settled Estates no 1050 post

1017 "By way of succession" — Settlement of personalty with power to invest in land

A settlement of purely personal property in the names of trustees upon trust for a lady for her life, and after her death for her children on attaining twenty-one or marrying, contained a power to the trustees to invest the trust funds in the purchase of lands to be held by them upon trust for sale, and until sale to apply the rents and profits in accordance with the trusts of the personal property. The trustees invested part of the trust funds in the purchase of lands which were conveyed to them to be held upon the trusts of the settlement. The tenant for life desired to be recouped out of capital moneys for expenditure on improvements upon part of the land so purchased; and the question was raised whether the settlement came within the provisions of Settled Land Act 1882 (c 38) (repealed): *Held* the settlement, although not in its inception a settlement of land, was nevertheless a "settlement" upon trust for "persons by way of succession" within the definition in Settled Land Act 1882 (c 38) s 2(1) (repealed). It also came strictly within s 63 (repealed) of the same Act, and the lady must be deemed a tenant for life within the meaning of the Act.

Re Childs' Settlement [1907] 2 Ch 348; 76 LJ Ch 565; 97 LT 80; 23 TLR 609

1018 "By way of succession" — Limitation for benefit of church

Re Higgs, Symonds v Rhodes [1927] WN 316

1019 "Act of Parliament" — Includes general Act — Thellusson Act (repealed)

(1) The words "Act of Parliament" in the definition clause Settled Land Act 1882 (c 38) s 2(1) (repealed), were not confined to private Acts of Parliament but included general Acts, such as the Thellusson Act 1800 (c 98) (repealed). So where under a will a direction to accumulate was void under the Thellusson Act (repealed) and the accumulations went to the testator's next of kin: *Held* the will and the Act (repealed) together constituted a settlement within Settled Land Act 1882 (c 38) (repealed).

(2) The executrices of deceased next of kin and the surviving next of kin were under the joint operation of the will and the Thellusson Act (repealed) entitled for the life of another to receive the rents directed to be accumulated: *Held* that they had jointly the powers of a tenant for life within Settled Land Act 1882 (c 38) (repealed).

Vine v Raleigh [1896] 1 Ch 37; 65 LJ Ch 103; 73 LT 655; 44 WR 169; 40 Sol Jo 85

ANNOTATIONS As to (2) **Follld** Re Bennet, Bennet v Bennet [1903] 2 Ch 136; Re Johnson, Johnson v Johnson [1914] 2 Ch 134 **Distd** Re Buttle's Will Trusts, Buttle v IR Comrs [1977] 3 All ER 1039

1020 "Agreement" — Consent order under Supreme Court of Judicature (Consolidation) Act 1925 (c 49) s 192 (repealed)

The parties purchased a house out of their joint moneys, the conveyance providing that they were to hold it in fee simple as joint tenants upon trust for sale. In pronouncing a decree *nisi*, which was duly made absolute, a consequential order was made, by consent, under Supreme Court of Judicature (Consolidation) Act 1925 s 192 (repealed), that the husband should secure the house to the wife for her occupation "for her life": *Held* the consent order was an "agreement" within Settled Land Act 1925 (c 18) s 1(1), the effect of which was to create a life tenancy of the house under the Act, which took priority over the trust for sale, and the wife was entitled to the appropriate vesting deed and trust instrument under the Act.

Bacon v Bacon [1947] P 151; [1947] 2 All ER 327; [1948] LJR 530; 63 TLR 509

ii "SETTLED LAND"

LAW See Halsbury's Laws (4th edn) vol 42 para 675 et seq

1021 Sale of interest by reversioner — Before passing of Settled Land Act 1882 (repealed)
Wheelwright v Walker no 1741 post

1022 Title of dignity
Re Rivett-Carnac's Will no 2198 post

1023 Ecclesiastical property
Some houses in a cathedral city had from the time immemorial been granted by the bishop of the diocese for the time being to one of the ecclesiastical dignitaries, for his life. The deed of grant was called a "collation," and the grantee was "inducted" by the registrar of the diocese into possession of the property. By the last deed of collation the bishop granted the houses to the then archdeacon of the city for his life, but so long only as he should continue to be archdeacon. On the deed was indorsed a certificate signed by the registrar that five days after the date of the deed the grantee was duly inducted by him into the actual corporal possession of the property. Upon a summons by the archdeacon, with the approval of the bishop, asking that trustees might be appointed for the purposes of Settled Land Act 1882 (c 38) (repealed), of the settlement created by the deed, the object being that the archdeacon, as tenant for life, or having the powers of a tenant for life under Settled Land Act 1882 (c 38) (repealed), might sell the houses, and the proceeds of sale might be invested in the names of trustees, and the income thereof paid to the persons who would have been from time to time entitled to the rents of the houses if unsold: *Held* this being ecclesiastical property, Settled Land Act 1882 (c 38) (repealed) did not apply to it.
Re Bath & Wells (Bp) [1899] 2 Ch 138; 81 LT 69; 15 TLR 421; sub nom
Ex p Bath & Wells (Bp) (1899) 68 LJ Ch 524

1024 Ground rents
Testator gave his annual ground rents, secured on two estates, to trustees upon trust to collect and apply same in reduction of a mortgage debt thereon, and subject thereto upon trust as to two-fifths of the annual income for J for life, as to other two-fifths for P for life, and as to the remaining one-fifth for L for life. He directed that on the decease of either J, P or L his or her share of the ground rents should go to his or her children. Testator empowered his trustees to sell the ground rents, pay off the mortgage debt, invest the residuary proceeds of sale, and stand possessed thereof upon the trusts declared respecting the annual ground rents should they remain unsold. Testator died in 1891. J had three, and P one, infant children entitled to the ground rents in remainder. The trustees considered it advisable in the interest of all the beneficiaries to retain the ground rents and apply the income in reduction of the mortgage debt thereon, which by January 1901, was reduced to less than half. The mortgage debt became vested in the surviving trustee of the will. Upon a summons taken out by the tenants for life against the surviving trustee and infant remaindermen: *Held* the tenants for life were entitled to immediate possession of the ground rents and to sell them to pay off the mortgage debt and also to delivery up of the documents of title held by the surviving trustee, as trustee, relating to the ground rents.

"The peculiarity in this case is that here the 'settled land' consists entirely of ground-rents" (*Cozens-Hardy J*).
Re Wilkinson, Lloyd v Steel (1901) 85 LT 43

1025 Reversion in fee remaining in settlor
Where under a settlement the trustees took only an estate for their lives, and that of the survivor, the reversion in fee left in the settlor was comprised in "the subject of the settlement" by Settled Land Act 1882 (c 38) s 2(2) (repealed), and a person having the powers of a tenant for life under Settled Land Act 1882 (c 38) (repealed), could sell and make a good title to the fee simple.
Re Hunter & Hewlett's Contract [1907] 1 Ch 46; 76 LJ Ch 26; 95 LT 674

1026 Land subject to trust for sale which may never arise
A trust for sale that might never arise was not a "trust or direction for sale" within Settled Land Act 1882 (c 38) s 63 (repealed).
Re Goodall's Settlement, Fane v Goodall [1909] 1 Ch 440; 78 LJ Ch 241

ANNOTATIONS **Consd** Re Wagstaff's Settled Estates [1909] 2 Ch 201; Re Johnson, Cowley v Public Trustee [1915] 1 Ch 435; Re Smith & Lonsdale's Contract (1934) 78 Sol Jo 173

1027 Land purchased under express power — Settlement of personalty
Re Childs' Settlement no 1017 ante

1028 Land subject to subsisting charge — Settled Land Act 1925 (c 18) s 3
By a disentailing deed of 1924 the property sold was assured to the use of the vendor in fee simple subject to all charges and incumbrances affecting same. When Settled Land Act 1925 (c 18), came into operation the property was vested in the vendor in fee but subject to two family charges which were interests vested in possession, namely, a sum of £8,750 secured by a term of 200 years, limited by a settlement of 1880, and a jointure rentcharge of £4,000 imposed upon the property by a deed of 1925. Before the disentailing deed of 1924 the property had been subject to a compound settlement constituted by the documents, including a disentailing deed of 1914, or some of them,

mentioned in an order of the Chancery Division dated 1 March 1920, under which the trustees of the 1880 settlement were appointed trustees, for the purposes of Settled Land Acts 1882 to 1890, of the compound settlement. By a vesting deed of 1926 it was declared that the property was vested in the vendor in fee simple and that the trustees of the 1880 settlement were trustees of the compound settlement for the purposes of the Settled Land Act 1925 (c 18). In these circumstances the question arose whether, if the purchase price of the property was paid to the existing trustees, the purchaser got a good title discharged from all claims in respect of the £8,750, and the £4,000 jointure rentcharge: *Held* immediately before Settled Land Act 1925 (c 18) came into operation the property was not settled land, but that as it had been subject to a compound settlement under which the £8,750 was still a subsisting charge by Settled Land Act 1925 (c 18) s 3, the settlement was deemed to be subsisting for the purposes of Settled Land Act 1925 (c 18); and under Settled Land Act 1882 (c 38) ss 31, 33, the trustees of the settlement were trustees of it for the purposes of Settled Land Act 1925 (c 18), and a receipt by them of the purchase money would free the land sold from the £8,750.

Re Alington (Lord) & London County Council's Contract [1927] 2 Ch 253; 96 LJ Ch 465; 138 LT 131; 71 Sol Jo 695

1029 Land subject to subsisting charge — Settled Land Act 1925 (c 18) ss 1, 2

Land was, on 31 December 1925, held by two persons under a devise contained in a will, made in 1888, as joint tenants in fee simple absolutely subject to a charge for £1,000 created in 1869 in consideration of marriage: *Held* (1) the land was settled land within Settled Land Act 1925 (c 18) ss 1(1)(v) and 2, and it was excepted from the application of Law of Property Act 1925 (c 20) s 36(1); (2) there was nothing in the context to give to the words "settled land" in Law of Property Act 1925 (c 20) s 36(1), any other meaning than that given by s 205(1)(xxvi).

Re Gaul & Houlston's Contract [1928] Ch 689; [1928] All ER Rep 742; 97 LJ Ch 362; 139 LT 473, CA

1030 Land subject to subsisting charge — Settled Land Act 1925 (c 18) ss 1, 2 — Effect of death of chargee

Trustees of a will purchased certain estates, subject to jointure rentcharges created by V settlements. On 1 January 1926, the estates were held subject to a compound settlement, constituted by the will, the V settlements, and an indenture of 1907. Early in 1927, on the death of the jointress, the last of the jointure rentcharges determined: *Held* on the death of the jointress compound settlement, comprising the V settlements, ceased.

Re Draycott Settled Estate [1928] 1 Ch 371; [1927] All ER Rep 492; 97 LJ Ch 193; 139 LT 59

1031 Land subject to rentcharge — Settled Land Act 1925 (c 18) s 1(1)(v)

(1) A tenant for life of settled estates which were subject to a jointure rentcharge assigned his life estate to a company. A summons was taken out for the determination of the question who was the tenant for life for the purpose of the execution of the vesting deed required by the provisions of Settled Land Act 1925 (c 18): *Held* the words "of full age," as used throughout Settled Land Act 1925 (c 18), and Law of Property Act 1925 (c 20), must be treated as meaning no more than "not being an infant," and they were applicable to a corporation; the tenant for life was, notwithstanding the assignment to the company, the tenant for life for the purpose of the execution of the vesting deed.

(2) A tenant in tail of settled estates, which were subject to a jointure rentcharge, executed a disentailing deed in respect of those estates. He subsequently contracted to sell the fee simple of those estates to a company, subject to the rentcharge: *Held* the property was settled land by virtue, and by virtue only, of Settled Land Act 1925 (c 18) s 1(1)(v), and by virtue of Settled Land Act 1925 (c 18) s 20(1)(ix), the company had the powers of a tenant for life, and was the tenant for life for the purpose of the execution of the vesting deed.

Re Carnarvon's (Earl) Chesterfield Settled Estates, Re Carnarvon's (Earl) Highclere Settled Estates [1927] 1 Ch 138; [1926] All ER 604; 96 LJ Ch 49; 136 LT 241; 70 Sol Jo 977

ANNOTATIONS As to (2) **Folld** Re Alington & LCC's Contract [1927] 2 Ch 253 **Consd** Re Pedley, Wallace v Wallace [1927] 2 Ch 168

1032 Land subject to rentcharge — Settled Land Act 1925 (c 18) s 1(1)(v)

Re Ogle's Settled Estates no 1000 ante

1033 Land subject to payment of perpetual annuity — Settled Land Act 1925 (c 18) s 1(1)(v)

A perpetual annuity, created voluntarily, is a payment of a periodical sum for the "benefit" of the person receiving it within Settled Land Act 1925 (c 18) s 1(1)(v). Therefore land subject to such a charge became, on 1 January 1926, settled land.

Re Austen, Collins v Margetts [1929] 2 Ch 155; [1929] All ER 726; 98 LJ Ch 384; 141 LT 325

1034 Land held upon charitable trust — House devised for use of minister

Re Higgs, Symonds v Rhodes [1927] WN 316

1035 Land subject to immediate binding trust for sale

Under testator's will T became entitled as tenant in tail of the settled land subject only to a jointure rentcharge of £1,500 appointed by a deceased tenant for life to his widow under a power in the will. On her marriage in 1923 T, being then still an infant, obtained an order of the court approving her marriage and authorising her execution of three deeds. By the first T disentailed, and by the second conveyed the settled land, subject to the jointure, to trustees upon trust for sale, with power to postpone, and to stand possessed of the net proceeds of sale and the rents and profits until sale upon the trusts of a settlement of even date, which was the third deed. Under this settlement the income of the proceeds of sale and the rents of profits until sale were applicable in paying life annuities of £5,000 to T, £1,000 to her husband, £3,500 to the jointress, and in paying the balance to T during her life. In 1924 and 1925 two orders were made under Settled Land Act 1884 (c 18) s 7 (repealed), which together gave T power to exercise all the powers of a tenant for life under Settled Land Acts 1884 to 1890 (repealed): *Held* by virtue of Law of Property Act 1925 (c 20) s 2(2), as amended [by Law of Property (Amendment) Act 1926 (c 11) Schedule], the land was subject to an "immediate binding trust for sale," and was not settled land within Settled Land Act 1925 (c 18).

Re Leigh's Settled Estates (No 2) [1927] 2 Ch 13; [1927] All ER 166; 96 LJ Ch 423; 137 LT 378; 71 Sol Jo 369

ANNOTATION **NF** Re Parker's Settled Estates, Parker v Parker [1928] Ch 247

1036 Settlement of undivided moiety — Settlement of remaining moiety — Merger before operation of Law of Property Act 1925 (c 20)

By a voluntary settlement made in 1909 an undivided moiety of a freehold estate was settled upon the usual limitations of a strict settlement, and the settlor having acquired the other moiety afterwards settled it by his will upon the same uses and trusts and with the same trustees as the settlement. The settlor died in 1910 and the tenant for life under the two settlements died in 1930: *Held* the entirety of the land was settled land, the two moieties having completely merged before 1926, and on the death of the tenant for life it vested in his special executors.

Re Egton Settled Estate, Foster v Foster [1931] 2 Ch 180; 100 LJ Ch 273; 145 LT 70

1037 Land subject to trust or direction for sale — Trust for sale of land in building plots, but not otherwise

Re Smith & Lonsdale's Contract (1934) 78 Sol Jo 173

Scottish, Irish and Commonwealth Cases

1038 Land held upon charitable trust — For maintenance of minister

A charitable trust for the maintenance of a minister of religion entitling the incumbent for the time being of a church to the rents and profits of land is a settled estate within Real Property Statute 1864 no 213 s 79.

Re Dehaney's Settled Estates (1888) 14 VLR 712 (AUS)

1039 Estate in land subject to trust

Re Ready [1920] St RQ 87 (AUS)

1040 Estate in land subject to trust

A will contained the following provision: "I *give devise and bequeath* my house property situated at number 12 Valentine Avenue, Horsham to my daughter *Coralie Grace Potter* for her own use and benefit absolutely *provided* that my said son *James Athol Potter* may reside in the said house as long as he so desires." *Held* (1) the daughter was given a fee simple in the land subject to a trust in favour of the son giving him the right as long as he so desires to reside personally in the house not to the exclusion of the daughter and being a right which would terminate if he abandoned it but a right which would, subject to the effect of the Settled Land Act 1958, bind any purchaser or mortgagee of the land with notice of the trust; (2) (*a*) the land is settled land within Settled Land Act 1958; (*b*) the daughter has the powers of a tenant for life under that Act; (*c*) the daughter can exercise the power of sale under the Act, subject to her complying with the provisions of the Act including, *inter alia*, ss 38 and 107 thereof; (*d*) the daughter and the son would be interested in the proceeds of any such sale which must be held by the daughter in compliance with the provisions of the said Act including, *inter alia* s 75 thereof.

Re Potter [1970] VR 352 (AUS)

1041 Land subject to annuity

Land devised subject to annuities charged thereon is not settled land within Settled Estates and Settled Land Act 1909.

Re Podmore, Union Trustee Co of Australia Ltd v Allnutt [1914] VLR 423 (AUS)

1042 Land subject to annuity

Testator devised lands upon trust "to allow my wife so long as she remains my widow and no longer the use and occupation and the rents, issues, and profits for her own use absolutely," and he directed that upon re-marriage or death of his wife the land should be sold and the proceeds divided among his children. He died in 1897, and in January 1906, his widow leased the land for five years with right of renewal, and died in April 1906. The lease was registered in December 1906. The executors of testator received the rent monthly after the death of the widow till February 1907, when they sold the land: *Held* the land was a settled estate within Settled Estates Act RSO 1897 (c 71).

National Trust Co v Shore (1908) 16 OLR 177; 11 OWR 228 (CAN)

1043 Land subject to annuity

In order that land may be subject to a trust or direction for sale within Settled Land Act 1882 s 63, it is not necessary

that there should be an express trust or direction for sale. An implied trust or direction for that purpose, arising from a devise on trust to pay debts is sufficient.
Re M'Curdy's Settled Estate (1891) 27 LR Ir 395 (IR)

1044 Part of estate settled land
The fact that part of an estate is settled land, within the Acts, does not render the entirety so.
Re Bective Estate (1891) 27 LR Ir 364 (IR)

iii "TENANT FOR LIFE"

CROSS REFERENCE See no 1780 et seq post

iv "COMPOUND SETTLEMENT"

LAW See Halsbury's Laws (4th edn) vol 42 para 675 et seq

CROSS REFERENCES See nos 1758 et seq post; 2039 post et seq (effect of absence of notice to trustees), 1729 et seq post (who may be appointed)

1045 Series of instruments forming one settlement — Instruments exercising powers of appointment — Disentail and resettlement
(1) By indentures of settlement dated respectively in 1796, 1826, 1863, and 1885, the A family estates became limited in 1885 to the use of E, Marquis of A, for life, with remainder to uses (*inter alia*), to secure the payment of certain jointure rentcharges, and then to the use of the present Marquis of A for life, with remainders over. The first jointure was created under powers contained in the indentures of 1796 and 1826; the last jointure by the indenture of 1863; while the existing life estate was created by the indenture of 1885. Upon a sale by the tenant for life under the powers of Settled Land Act (repealed): *Held* the whole series of deeds constituted a "settlement" within Settled Land Act 1882 (c 38) s 20 (repealed), and consequently by virtue of that section the tenant for life had power to convey the estates freed and discharged from the jointure rentcharges; the purchaser was not entitled to require the concurrence in the conveyance either of the jointresses or the trustees of the terms by which the jointures were secured; and upon payment of the purchase-money to trustees for the purposes of Settled Land Act (repealed) of the settlement created by the series of instruments, the income of the investments of such purchase-money would be applicable first in payment of the jointure rentcharges, as the income of the estates, if not sold, would have been applicable.

(2) The Marquis of A does not desire that the money should be paid into court and there are at present no trustees for the purposes of Settled Land Acts (repealed) except those nominated by the deed of 16 July 1885. They are trustees only of the settlement created by that deed and are not trustees of the settlement made by the deeds of 1863 and 1885, still less of that made by a series of instruments beginning in 1796 and ending in 1885. I understand, however, that they do not object to be appointed such trustees, and if so I am willing to appoint them on the present application (*Stirling J*).

Re Ailesbury (Marquis) & Iveagh (Lord) [1893] 2 Ch 345; 62 LJ Ch 713; 69 LT 101; 41 WR 644; 9 TLR 324; 37 Sol Jo 326; 3 R 440; sub nom
Re Ailesbury (Marquis) & Iveagh (Lord), Riddell v Riddell (1893) 62 LJ Ch 713; 41 WR 644

ANNOTATIONS As to (1) **Expld** Re Du Cane & Nettlefold's Contract [1898] 2 Ch 96 **Apprvd** Re Mundy & Roper's Contract [1899] 1 Ch 275 **Apld** Re Phillimore's Estate, Phillimore v Milnes [1904] 2 Ch 460; Re Trafford's SE [1915] 1 Ch 9

1046 Series of instruments forming one settlement — Instruments exercising powers of appointment — Disentail and resettlement
Testator by his will, made in 1828 gave his real estate to his granddaughter for her life, with remainder to her first and other sons successively in tail made; and he empowered her, either before or after her marriage with any husband, by deed or will to appoint to such husband for his life, to take effect immediately after her decease, a yearly rentcharge not exceeding £600 to be charged on the devised property, with power to limit a term for securing the same; and also by deed or will to charge the property with portions for the younger children of the granddaughter to the extent of £10,000 with power to limit a term for the raising and securing of the portions. After the death of testator the granddaughter married three times. By the settlement made on her first marriage, she exercised the power of charging the estates with portions for younger children, and limited a term of one hundred years to trustees for the purpose. By the settlement made on her second marriage, she demised the property to trustees for ninety-nine years, if she should so long live, on trust out of the income to raise an annual sum of £1,500 for her benefit, and then to pay the premiums on some policies of assurance on her own life, which policies were thereby settled. She also charged the property with an annual rentcharge of £600 for the benefit of her second husband. By a settlement made after her third marriage she appointed a yearly rentcharge of £600 to her third husband during his life, if he should survive her, and limited to trustees a term of 300 years from her own death to secure the rentcharge; and by the same deed she demised the property to trustees for ninety-nine years if she should so long live, upon trust out of the income to pay £1,500 a year to her, and then to pay the premiums on some

policies of assurance and subject as aforesaid to permit her third husband, during the joint lives of himself and herself, to receive the income. In 1866, the entail created by the will was barred and the property was resettled to such uses as the third husband, the wife and her son by the first husband should appoint, and in default of appointment to the uses of testator's will. By a settlement made in 1871 on the marriage of the daughter of the granddaughter by her second husband, the third husband and his wife demised part of the settled property to trustees for one hundred years from the date of the daughter's marriage, if her mother should so long live, upon trust to raise out of the income two annual sums, to be held respectively on the trusts of a settlement of even date. In 1894 the court appointed two trustees for the purposes of Settled Land Act (repealed), of the will of testator and the resettlement of 1866. The granddaughter and her third husband, as tenants for life, desired to sell part of the settled estates. The married daughter was still living: *Held* the will of original testator, the three settlements made by the granddaughter, the deed of resettlement and the settlement made on the marriage of the daughter, together constituted the settlement of the estates, and in order that the tenants for life might be able to exercise the powers conferred by Settled Land Act (repealed), trustees for the purposes of the Act must be appointed of that compound settlement. The trustees appointed in 1894 were accordingly so appointed.

Re Tibbits' Settled Estates [1897] 2 Ch 149; 66 LJ Ch 660; 77 LT 88; 46 WR 3; 41 Sol Jo 640

ANNOTATIONS **Distd** Re Du Cane & Nettlefold's Contract [1898] 2 Ch 96; Re Keck & Hart's Contract [1898] 1 Ch 617

1047 Series of instruments forming one settlement — Instruments exercising powers of appointment — Disentail and resettlement

Re Mundy & Roper's Contract no 1172 post

1048 Series of instruments forming one settlement — Instruments exercising powers of appointment — Disentail and resettlement

Re Cornwallis-West & Munro's Contract no 1073 post

1049 Series of instruments forming one settlement — Instruments exercising powers of appointment — Jointure and portions

Re Monckton's Settlement, Monckton v Calder no 1014 ante

1050 Series of instruments forming one settlement — Will charging annuities — Disentail and resettlement

(1) A disentailing deed executed by a tenant in tail in possession of settled land was not an "assignment, by operation of law or otherwise, of his estate or interest under the settlement" within Settled Land Act 1882 (c 38) s 50(1) (repealed).

(2) The words "stands for the time being limited to or in trust for any persons by way of succession" in s 2(1) (repealed) of the Act of 1882 included the case of annuities charged on the settled land followed by subsequent limitations although not secured by any term or trust.

E by his will, dated in 1889, devised certain freehold estates to the use of his son S for life and from and after the decease of S to the use of his first and other sons successively, according to their respective seniorities, in tail male with remainders over, and he charged his settled estates with the payment of certain annuities, some of which were still subsisting. E died in 1892. S, the tenant for life, died in 1912, and his eldest son, W, thereupon became tenant in tail in possession of the settled estates on 8 April 1914. W executed a disentailing deed, which was duly enrolled, limiting the settled estates to his own use in fee simple. On 17 April 1914, he executed a resettlement on his marriage of a part of the estates originally settled by the will to the use of himself for life with remainders over: *Held* (3) W having ceased to be tenant in tail of the estates not comprised in the resettlement, could no longer exercise the powers of a tenant for life in respect of them; (4) as regarded the estates comprised in the resettlement, by reason of the subsistence of the annuities there was a compound settlement consisting of the will, the disentailing deed, and the resettlement, although there was no term limited to secure them nor any trust for their payment.

Re Trafford's Settled Estates [1915] 1 Ch 9; 84 LJ Ch 351; 112 LT 107

ANNOTATIONS As to (2) **NF** Re Alington & LCC's Contract [1927] 2 Ch 253. As to (3) **Consd** Re Carnarvon's Chesterfield SE, Re Carnarvon's Highclere SE [1927] 1 Ch 138

1051 Series of instruments forming one settlement — Settlement in exercise of power — Ultimate limitations declared by will

By a deed dated 3 August 1886, certain real and leasehold property was assured to trustees upon trust for such persons as P should by deed appoint. By deed dated 4 August 1886, P appointed that this property should be held upon trust for himself for life, and subject thereto to pay certain annuities to five persons for their respective lives, and subject thereto in trust for P absolutely. P died in February 1887, having by his will given his residuary estate, which included the interest he had retained in the property subject to the annuities, upon trusts equivalent to a strict settlement, under which plaintiff was tenant for life and his infant son tenant in tail in remainder: *Held*

the deeds of 3 and 4 August 1886, and the will formed a compound settlement under Settled Land Acts (repealed), and plaintiff, as tenant for life under this compound settlement, could sell the property discharged from the annuities.

Re Phillimore's Estate, Phillimore v Milnes [1904] 2 Ch 460; 73 LJ Ch 671; 91 LT 256; 52 WR 682; 48 Sol Jo 640

ANNOTATIONS **Apld** Re Marshall's Settlmt, Marshall v Marshall [1905] 2 Ch 325; Re Trafford's SE [1915] 1 Ch 9 **Consd** Re Carnarvon's Chesterfield SE, Re Carnarvon's Highclere SE [1927] 1 Ch 138

1052 Series of instruments forming one settlement — Will creating original settlement — Disentail and conveyance on trust to sell — Intervening disentailing deed and resettlement

A tenant for life to whom under a resettlement a life estate is limited in restoration of his life estate under a preceding will, is for the purposes of Settled Land Act 1925 (c 18), a tenant for life under the original will; and as such can by virtue of s 22(2) of the Act exercise not only the powers conferred upon him as tenant for life under the will but also any additional powers conferred on a tenant for life by the resettlement. Where therefore under the original will constituting a settlement, a subsequent disentailing deed, a resettlement, another disentailing deed, whereby the tenant in remainder became tenant in fee simple in remainder, and a conveyance of the remainder to trustees upon trust to sell and hold the proceeds upon the trust of a deed of even date, being a settlement executed on the marriage of the remainderman, lands stand limited in trust for persons by way of succession, all the aforesaid instruments constitute a compound settlement within Settled Land Act 1925 (c 18) s 1, and by virtue of s 31(1) the trustees of the settlement under the will, when appointed for the purposes of the Act, become trustees of such compound settlement for the purposes of the Act and as such are the proper persons to execute the principal vesting deed required by the second schedule, para 1(2).

Re Cradock's Settled Estates [1926] Ch 944; 95 LJ Ch 364; 135 LT 370

ANNOTATIONS **Consd** Re Cowley SE [1926] Ch 725; Re Curwen, Curwen v Graham [1931] 2 Ch 341

1053 Series of instruments forming one settlement — Will creating original settlement — Disentail and conveyance on trust to sell — Resettlement pending sale

Re Leigh's Settled Estates no 1875 post

1054 Series of instruments forming one settlement — Settlements of several estates — First instrument the same in each case

S, by his will, made in 1873, settled his freehold lands in the county of S, hereinafter called the S estates, to the use of J for life, with remainder to such uses for the benefit of the children or remoter issue of J as F should by deed or deeds or by will appoint, with remainders over in default of appointment.

Testator died in 1878, and about the year 1910 freehold lands at R, hereinafter called the R estate, were purchased out of proceeds of sale of parts of the S estates. The R estate together with the remaining unsold parts of the S estates and the capital moneys settled by the will of S were appointed by J in exercise of his power, as follows: (*a*) by deed dated 25 February 1924, the R estate was appointed to the use of his son B for life, with remainders to B's sons and daughters in tail, with remainders over, which did not exhaust the fee simple; (*b*) by a codicil to his will, dated 8 May 1924, the property then remaining unappointed which comprised the parts of the S estates then remaining unsold and capital moneys were appointed upon limitations identical with those upon which the B estate was settled by the deed of 25 February 1924. The whole of the R estate and parts of the S estates settled by the codicil and specific parts of the capital moneys had, before those appointments, been charged under a deed dated 23 June 1913, by J in exercise of his power of appointment, with a sum of £10,000 in favour of his daughter, and had by the same deed been demised to trustees for a term of years to secure that sum: *Held* (1) each of the estates was settled by a compound settlement consisting, in the case of the R estate, of the will of S and the deed of appointment of 25 February 1924, and in the case of the S estates, of the will of S, and the codicil of J notwithstanding that the first instrument in each case was the same; (2) the trustees of the will of S, who were trustees of the settlement thereunder for the purposes of Settled Land Act 1925 (c 18), were by virtue of s 31 of that Act, trustees for those purposes of each of the compound settlements; (3) by force of s 91(1)(ii), as "trustees of the settlement of the aggregate estate for all the purposes of the Act," they had power, at the direction of B, the tenant for life, to discharge the £10,000 which was charged upon the whole of the R estate and on part of the S estate out of capital moneys, whether already charged or not, in exoneration of those estates; (4) no order of the court was required, because both settlements were without the provisions of s 91(2), the lands comprised in neither settlement being subject to a charge to which the lands in the other settlement were not subject; (5) the transaction being one which was "otherwise authorised by the Act,"

no order of the court was required under s 64 of the Act; (6) the trustees of the compound settlements were the proper persons to execute vesting deeds in favour of B, the tenant for life, of the settled lands respectively comprised in those settlements.

Re Symons, Symons-Jeune v Bunbury [1927] 1 Ch 344; 96 LJ Ch 220; 136 LT 441

1055 Series of instruments forming one settlement — Effect of trust for sale — Under Law of Property Act 1925 (c 20) Sch 1

Three vendors to whom land had been conveyed in 1924 in fee simple as tenants in common subject to but with an indemnity against a jointure rentcharge, charged thereon and on other lands in 1869, contracted in 1926 to sell the same land subject to the rentcharge but with the benefit of the indemnity, and proposed to convey the same as being the persons in whom the land "not being settled land" had vested as joint tenants upon the statutory trusts by virtue of the transitional provisions of Sch 1 Pt IV para 1(2) to the Law of Property Act 1925 (c 20).

The purchaser took the objection that by reason of the rentcharge the land became settled land on 1 January 1926, within s 1(1)(v) of Settled Land Act 1925 (c 18), and that para 1(3), and not para 1(2) of Sch 1 Pt IV to Law of Property Act 1925 (c 18), applied, and that the land was vested, not in the vendors, but in the other persons or person specified in para 1(3): *Held* (1) in Sch 1 Pt IV to Law of Property Act 1925 (c 20) para 1(2), and paragraph 1(3) constituted alternative provisions, the former applying to land which was not, and the latter to land which was, settled land under the law existing previously to the commencement of the Act; (2) inasmuch as the rights of the jointress were undisturbed by the sale, she was not a person interested in the land within Law of Property Act 1925 (c 20) s 35, whose incumbrance would attach to the net proceeds of sale, and the vendors, therefore, were not bound to exercise the statutory powers of a tenant for life vested in them by s 28 of the same Act so as to convey free from the rentcharge, even if they could do so as trustees of a compound settlement which was doubtful, and that even if the land were held from and after 1 January 1926, under a compound settlement, they could, in the circumstances of this case, convey subject to the rentcharge by virtue of Law of Property (Amendment) Act 1926 (c 11) s 1; (3) the land in question, "not being settled land," vested by virtue of para 1(2) of Sch 1 Pt IV to the Law of Property Act 1925 (c 20), in the vendors as joint tenants upon the statutory trusts, and they had shown a good title according to the contract.

Quaere: whether the documents creating the rentcharge could be coupled with the statutory trust for sale under Law of Property Act 1925 Sch 1 Pt IV para 1(2) so as to form a compound settlement within s 1 of Settled Land Act 1925 (c 18), especially in view of subs (7), added to that section by Law of Property (Amendment) Act 1926 (c 11).

Re Ryder & Steadman's Contract [1927] 2 Ch 62; [1927] All ER 506; 96 LJ Ch 388; 137 LT 281; 43 TLR 578; 71 Sol Jo 451, CA

ANNOTATIONS As to (1) **Consd** Re Pedley, Wallace v Wallace [1927] 2 Ch 168 **Apld** Re Catchpool, Harris v Catchpool [1928] Ch 429 **Consd** Re Gaul & Houlston's Contract [1928] Ch 689

1056 Series of instruments forming one settlement — Effect of trust for sale

Under the will of testator who died in 1888 an estate was settled on A for life, with remainder to his first and other sons in tail, with power to A to jointure and charge portions. In 1901 A, on his marriage, appointed by deed a jointure rentcharge to his wife, if she survived him, without power of anticipation, and, subject thereto, he charged the land with payment of certain portions to the younger children of the marriage, and limited to trustees a term of a thousand years from his death to support the portions charge. There was one younger child only, and he was an infant on 1 January 1926. A's elder son B disentailed in 1924, and two further deeds were executed in that year. By one, A and B and A's wife, notwithstanding her restraint on anticipation and the trustees of the portions term, who had no power to release their term, conveyed the land to trustees on trust at A's request to sell the same. The trusts of the proceeds of sale were declared by a second deed, the income being payable during A's life in each year, as to the first £500 to A, as to the surplus up to a specified sum to B, and as to the balance to A. Provision was also made for A's wife and the younger children: *Held* (1) notwithstanding the trust for sale, on the coming into operation of Law of Property Act 1925 (c 20), and Settled Land Act 1925 (c 18), the land was settled land under a compound settlement constituted by the will, the deed of 1901, and the three deeds of 1924; (2) A was the sole tenant for life; (3) so long as the land remained so settled no order appointing or approving the trustees for sale would affect the position.

Re Parker's Settled Estates, Parker v Parker [1928] 1 Ch 247; [1927] All ER 546; 97 LJ Ch 161; 138 LT 360; 71 Sol Jo 981

1057 Series of instruments forming one settlement — Effect of trust for sale

On 31 December 1925, certain land stood limited to the use of A for life, and after his death, subject to certain jointure rentcharges for life, and subject to certain portions which had been charged upon

the estate, and which had been further secured by the limitation of a legal term, to the use of trustees upon trust for sale. The settlement under which the land so stood limited was a compound settlement, consisting of various documents, including two deeds of 1911 and 1913. In due course a vesting deed was executed in favour of A. A died on 4 December 1926, and probate, limited to the settled land, was granted to the trustees of the compound settlement as his special representatives, on the footing that that settlement did not come to an end on his death. There were separate trustees of the two deeds of 1911 and 1913. Clause 11 of the 1911 deed gave to the trustees thereof all the powers conferred on a tenant for life by Settled Land Acts 1882 to 1890 (repealed): *Held* (1) the whole legal estate, the subject-matter of the settlement, was not held upon trust for sale; (2) in view of clause 11 of the 1911 deed the trustees of the two deeds of 1911 and 1913 were persons on whom Settled Land Act 1925 (c 18) s 23(1), conferred the powers of a tenant for life, and they were statutory owners under the compound settlement; and when they sold the land they would sell it as statutory owners and not as trustees for sale, and they must pay over the proceeds of sale to the trustees of the compound settlement.

Re Norton, Pinney v Beauchamp [1929] 1 Ch 84; 98 LJ Ch 219; 140 LT 348

ANNOTATION As to (1) **Consd** Re Sharpe's Deed of Release, Sharpe v Fox [1938] 3 All ER 449

1058 Series of instruments forming one settlement — Effect of trust for sale

Under a deed of release dated 10 March 1818, certain property was limited upon trusts (*inter alia*) to pay from its rents and profits £1,000 a year for 1,000 years, to be held upon trusts to be declared by a deed executed the next day, 11 March 1818. The property was subject also to a covenant by its owner, in a marriage settlement dated 2 March 1830, for the payment of £400 a year for 500 years. The owner died in 1863, leaving the property to his son in fee simple, subject to the annuities. The son devised it to trustees in trust for his son (the owner's grandson) absolutely, subject to further annuities: and the grandson died in 1917, having devised all his estate on trusts for sale, investment of the proceeds of sale and payment of a legacy and an annual charge; and he left the residue in trust for his son (the owner's great-grandson) absolutely. Eventually those who were trustees of the son's will (one of whom was the great-grandson) were at the same time trustees of the grandson's will. This summons (on which, as amended during the hearing, the trustees of the wills were plaintiffs) asked (*inter alia*) whether the property was settled land within Settled Land Act 1925 (c 18), as amended by Law of Property (Amendment) Act 1926 (c 11), under a compound settlement consisting of all or any of the deeds and wills; if it was, whether plaintiffs were Settled Land Act trustees and statutory owners under the compound settlement; if it was not, whether it was land held on trust for sale within Law of Property Act 1925 (c 20) s 2(2), as amended by Law of Property (Amendment) Act 1926 (c 11); if necessary, that plaintiffs might be appointed Settled Land Act trustees of the compound settlement or, alternatively, might be approved as trustees for sale of the property under Law of Property Act 1925 (c 20), as amended by Law of Property (Amendment) Act 1926 (c 11), whether the legal estate in fee simple in the property vested in plaintiffs as trustees of the son's will; and whether it ought to be vested in them by a proper conveyance or vesting instrument as statutory owners under the compound settlement, or as trustees for sale, or on any trusts: *Held* (1) the effect of the marriage settlement was to create, not a legal rentcharge, but an active trust for the payment of an annual sum; and those to whom the annual sum was payable had not a legal estate by virtue of the Statute of Uses, the settlement creating only an equitable interest in it; (2) plaintiffs, as trustees of the son's will, held the property, first, on trust to pay annually the £100 payable under the deed of release and the £400 payable under the marriage settlement, and secondly, to pay the annuity under the will, and, subject thereto, in trust for the grandson's estate; and plaintiffs did not, by reason merely of their happening to be trustees of the wills of the son and the grandson, hold the property on trust for sale within Settled Land Act 1925 (c 18) s 1(7), a sub-section, introduced by Law of Property (Amendment) Act 1926 (c 11), because, had the trustees of the grandson's will been, at the date of the summons, persons not also trustees of the son's will, a trust for sale would not have been included in the trusts on which the trustees of the son's will held the legal estate in the property, and the trustees of the grandson's will would have held on trust for sale only the beneficial interest in the property given by the son's will to the grandson; (3) the settlement under which the property was settled at the date of the summons was a compound settlement comprising the deed of release, the marriage settlement and the wills of the son and grandson, but not the deed of 11 March 1818, declaring the trusts of the annuity of £1,000; (4) plaintiff who was the great-grandson was not a person having the powers of a tenant for life within the definition in Settled Land Act 1925 (c 18) s 20(1)(viii); (5) plaintiffs were not trustees of the compound settlement for the purposes of the Settled Land Act (c 18); (6) the legal estate was vested in plaintiffs as trustees of the son's will and (an order having been made appointing

plaintiffs trustees of the compound settlement) ought to be vested in them as statutory owners by a vesting instrument.

Re Sharpe's Deed of Release, Sharpe v Fox [1938] 3 All ER 449; 54 TLR 109; sub nom *Re Sharpe's Deed of Release, Sharpe & Fox v Gullick* [1939] Ch 51; 108 LJ Ch 27; 82 Sol Jo 696

1059 Series of instruments forming one settlement — Disposition by reference to trusts of other estate — Will settling property on limitation of earlier will

Where estates were settled by one will on the limitations and trusts of an earlier will of some other person, such earlier will did not form part of a compound settlement consisting of the later will, a subsequent disentailing deed and a resettlement.

Re Adair, Adair v Treherne (1927) 71 Sol Jo 844

ANNOTATION **Follo** Re Shelton's Settled Estates [1928] WN 27

1060 Series of instruments forming one settlement — Disposition by reference to trusts of other estate — Trusts not set out at length

Re Shelton's Settled Estates [1928] WN 27

1061 Series of instruments forming one settlement — Private Act and three conveyances

On the death intestate of the tenant in tail in possession of an estate settled by a private Act and three conveyances, it was held that the Act and conveyances together constituted one settlement and the court appointed two trustees for the purposes of the Settled Land Act 1925 (c 18), and gave them liberty to apply for a grant of administration limited to the settled lands.

Re Hereford's Settled Estates, Hereford v Devereux [1932] WN 34; 173 LT Jo 115; 73 L Jo 153

1062 Original settlement at an end — No interests or charges prior to settlement

By his will dated in 1891 testator appointed trustees, and empowered his wife by deed, will, or codicil to appoint as she might think fit all or any part of his property, and in default he gave all his freehold estates to the use of his wife for life, with remainder to the use of G for life, with divers remainders over; and testator empowered his trustees to sell any part of his freehold estates thereinbefore given. Testator died in 1891, and by her will his widow appointed G her sole executor, and in exercise of her power of appointment appointed the real estate devised by her husband's will to the use of G for life with remainder to the use of his first and every other son successively in tail male, with remainders over. Testatrix died in 1892. In 1912 G, in exercise of his powers as tenant for life in possession, contracted to sell part of the settled estate. The purchaser objected that, there being no trustees for the purposes of Settled Land Acts (repealed), the vendor could not make a good title: *Held* the general power of appointment having been fully exercised by the widow, there was a resettlement of the estate, and there being no existing interests or charges having priority over that resettlement, the original settlement created by testator's will was at an end, and consequently there were no trustees having a power of sale, and trustees for the purposes of Settled Land Acts (repealed) of the widow's will must be appointed.

Re Gordon & Adams' Contract, Re Pritchard's Settled Estate [1914] 1 Ch 110; 83 LJ Ch 172; 109 LT 725; 58 Sol Jo 67, CA

1063 Necessity for appointment of trustees

Wheelwright v Walker no 1741 post

1064 Necessity for appointment of trustees

Re Gordon & Adams' Contract, Re Pritchard's Settled Estate no 1062 ante

1065 Necessity for appointment of trustees — Compound settlement

Re Tibbits' Settled Estates no 1046 ante

1066 Necessity for appointment of trustees — Compound settlement

(1) As a general rule it is not necessary, whenever a deed has been executed affecting the interests created by an original settlement, so that that settlement is no longer the only instrument "under or by virtue of which the land stands limited for the time being to or in trust for persons by way of succession," to appoint trustees of a compound settlement constituted by the original settlement and the subsequent deed.

(2) Settled Land Act 1890 (c 69) s 4 (repealed), was not to be read as providing that an assignment made by a tenant for life of settled land in consideration of marriage or by way of family arrangement, was to be deemed one of the instruments creating the settlement for all the purposes of the Act (repealed). It was limited to the purpose of excluding the operation of Settled Land Act 1882 (c 38) s 50 (repealed), altogether.

(3) Upon a sale, under the powers of Settled Land Acts (repealed), by a tenant for life who had made such an assignment, it was not necessary to appoint trustees of the settlement constituted by the original deed and the instruments effecting the assignment; but the trustees of the original settlement, having powers of sale, or appointed for the purposes of Settled Land Acts (repealed), were competent to receive and give receipts for the purchase-money.

(4) Upon a sale by a tenant for life who had alienated for value, the purchaser was in general entitled under Settled Land Act 1882 (c 38) s 50 (repealed),

to ask for evidence of the consent of the assignee, but if the assignment contained a general consent beforehand, all the powers of the tenant for life under Settled Land Act 1882 (c 38) (repealed), would remain unfettered.

(5) It is quite plain that one instrument may constitute a settlement, although it is to be admitted that several instruments may, under the same definition in the parts (Settled Land Act 1882 (c 38) s 2(1) (repealed)), which I have not read, also constitute a settlement (*Stirling J*).

(6) Suppose, for example, that under a power contained in a settlement the tenant for life has charged portions on the estate in favour of his younger children: of course, he may then be taken to know the particulars of the instrument executed by himself, but Settled Land Act 1882 (c 38) s 20(2) (repealed), appears to me to show that he may sell the estate discharged from those portions so long as they have not been actually raised, and there is nothing in the Act (repealed) to show that the framers of it contemplated that by a charge of portions persons who for the time being were trustees, either with powers of sale as expressly named for the purposes of the Settled Land Act 1882 (c 38) (repealed), would be deprived of the power of receiving and giving receipts for the purchase-money, and that resort should be had to the powers conferred on the court by s 38 [repealed], before a sale can be completed (*Stirling J*).
Re Du Cane & Nettlefold's Contract [1898] 2 Ch 96; 67 LJ Ch 393; 78 LT 458; 46 WR 523; 42 Sol Jo 468

ANNOTATIONS As to (4) **Consd** Re Dickin & Kelsall's Contract [1908] 1 Ch 213. As to (5) **Apprvd** Re Mundy & Roper's Contract [1899] 1 Ch 275

1067 Necessity for appointment of trustees — Compound settlement
Re Mundy & Roper's Contract no 1172 post

1068 Necessity for appointment of trustees — Compound settlement
Re Cornwallis-West & Munro's Contract no 1073 post

1069 Necessity for appointment of trustees — Compound settlement
Testator devised freeholds to the vendor for life, with remainders in strict settlement. The property was subsequently disentailed, resettled, and appointed so as to extinguish the vendor's life estate, but the original settlement created by the will was still subsisting in respect of a jointure and portions charged under the powers thereof: *Held* the vendor could sell under the will alone, so that it was unnecessary to appoint trustees of the compound settlement created by the will and subsequent deeds.

The original settlement created by the will is still subsisting, as by reason of the jointure and portions charged and remaining to be raised thereunder the lands still stand limited to persons by way of succession under that instrument (*Swinfen Eady J*).

An original settlement and compound settlement may subsist side by side, and the mere fact that the life tenant has parted with his life estate does not prevent him from exercising his statutory powers under the original settlement (*Swinfen Eady J*).
Re Wimborne (Lord) & Browne's Contract [1904] 1 Ch 537; 73 LJ Ch 270; 90 LT 540; 52 WR 334; 48 Sol Jo 246

ANNOTATION **Consd** Re Carnarvon's Chesterfield SE, Re Carnarvon's Highclere SE [1927] 1 Ch 138

v CO-EXISTING SETTLEMENTS PRIOR TO 1926

LAW See Halsbury's Laws (4th edn) vol 42 para 679

1070 General rule
Re Du Cane & Nettlefold's Contract no 1066 ante

1071 General rule
Re Mundy & Roper's Contract no 2339 post

1072 General rule
Re Wimborne (Lord) & Browne's Contract no 1069 ante

1073 Restoration of life estate on resettlement — Exercise of powers under compound settlement
In 1850 lands stood limited under a will to the use of A for life with remainder to his first and other sons successively in tail male. In 1872 A upon his marriage and in exercise of a power given by the will by deed charged the lands with a jointure in favour of the wife. He also created mortgages on his life estate. In 1895 A and his only son by a disentailing assurance conveyed the lands to such uses as A and his son should by deed jointly appoint; and by a deed of even date they appointed the lands to the use of A for life "in restoration and continuation of his former life estate under the will," with remainder to the son in fee simple, and by this deed trustees were appointed for the purposes of Settled Land Acts (repealed). A, as tenant for life under the resettlement of 1895, contracted to sell part of the lands, the jointress and mortgagees being willing to concur and release their interests in the conveyance to the purchaser: *Held* A's life estate under the will was still subsisting; the will, jointure deed, disentailing assurance, and resettlement together constituted one compound settlement of which there were no trustees for the purposes of the Settled Land Acts (repealed), and therefore A could not make a good title.

It seems clear that the settlement within the meaning of the Settled Land Acts (repealed)—the only settlement in short under which the vendor is able to exercise his statutory power of sale—must be the compound settlement (*Farwell J*).

Re Cornwallis-West & Munro's Contract [1903] 2 Ch 150; 72 LJ Ch 499; 88 LT 351; 51 WR 602; 47 Sol Jo 418

ANNOTATIONS **Distd** Re Wimborne & Browne's Contract [1904] 1 Ch 537 **Consd** Re Constable's SE [1919] 1 Ch 178

1074 Restoration of life estate on resettlement — Exercise of powers under compound settlement

At the date of a disentailing deed lands were settled by a will to the use of G for life, with remainder to his son C in tail male. In 1895 G, under powers in the will, appointed a jointure to his wife and portions for his younger children. In July 1912, G and C disentailed the estate by a deed by which it was conveyed subject to charges and incumbrances and to G's life estate, to such uses as G and C should jointly appoint and in default of appointment to the uses and upon the trusts of the will. In October 1912, a deed of resettlement was executed by G, C, and the trustees, by which the property was appointed and conveyed, subject to the mortgages on the inheritance and the same jointure and portions, to such uses and subject to such powers and provisions as G and C should jointly appoint, and subject to any such appointment to the use of G for life "in restoration and by way of confirmation of" his life estate under the will and all powers of jointuring and charging portions and all other statutory powers annexed to or exercisable during the continuance of that life estate, and so that they might be exercisable with the same overreaching effect as if the disentailing deed and the deed of appointment had not been executed, with remainder to the use of C for life with remainder to the use of his sons successively in tail male. This deed also declared that the persons or person who should for the time being be constituted or be the tenant for life of the settlement under Settled Land Acts (repealed), might exercise over the settled lands certain specified powers by way of extension or enlargement of the powers and provisions of those Acts (repealed), as if conferred thereby, the facts being admittedly indistinguishable from those in *Re Cornwallis-West and Munro's Contract* (no 1073 ante): *Held* (1) G was tenant for life under the resettlement of the property thereby settled, and as such could exercise over that property the powers by Settled Land Acts 1882 to 1890 (repealed), and by the resettlement conferred on a person for the time being tenant for life within the meaning of those Acts (repealed).

(2) The object of inserting the clause containing the words "in restoration and by way of confirmation" of a previous life estate was to keep alive the powers incident to the estate and conferred on the tenant for life by the original instrument. Such a clause showed an intention to keep alive the old powers, but was ineffectual to restore the original life estate when the operative words of the deed were sufficient to pass it. *Alexander v Mills* (no 2240 post), showed that it was unnecessary to restore the old life estate in order to keep alive the powers. If and so far as *Re Cornwallis-West and Munro's Contract* (no 1073 ante), determined that the vendor in that case was tenant for life under the will and not under the resettlement, and that he could not, as tenant for life under the resettlement with concurrence of the jointress and mortgagees joining to release their interests, convey the property in fee to a purchaser, that decision was erroneous.

Re Constable's Settled Estates [1919] 1 Ch 178; 88 LJ Ch 89; 120 LT 326; 35 LTR 144; 63 Sol Jo 135, CA

ANNOTATIONS As to (1) **Consd** Re Meeking, Meeking v Meeking [1922] 2 Ch 523; Parr v AG [1926] AC 239. As to (2) **Apld** Re Cope & Wadland's Contract [1919] 2 Ch 376

1075 Restoration of life estate on resettlement — Exercise of powers under resettlement

Re Cornwallis-West & Munro's Contract no 1073 ante

1076 Restoration of life estate on resettlement — Exercise of powers under resettlement

Re Constable's Settled Estates no 1074 ante

1077 Restoration of life estate on resettlement — Exercise of powers under resettlement

Re Cradock's Settled Estates no 1074 ante

1078 Restoration of life estate on resettlement — Exercise of powers under original settlement

Re Constable's Settled Estates no 2179 ante

1079 Restoration of life estate on resettlement — Exercise of powers under original settlement — No portions or jointure existing thereunder

Re Cope & Wadland's Contract no 1759 post

1080 Restoration of life estate on resettlement — Exercise of powers under original settlement — Including additional powers of resettlement

Re Cradock's Settled Estates no 1052 ante

1081 Original settlement still subsisting — In respect of jointure and charges — Original

life interest not restored — Powers of life tenant under original settlement
Re Wimborne (Lord) & Browne's Contract no 1069 ante

Scottish, Irish and Commonwealth Cases

1082 Restoration of life estate on resettlement
Re Domvile & Callwell's Contract [1908] 1 IR 475 (IR)

vi SETTLEMENTS BY DIFFERENT INSTRUMENTS ON THE SAME LIMITATIONS

LAW See Halsbury's Laws (4th edn) vol 42 para 682

CROSS REFERENCE See no 2137 et seq post (application of capital moneys in case of discharge of incumbrances)

1083 Whether compound settlement effected — Will and deed — Limitations almost identical
Land was devised by will on limitations in strict settlement. Testator also by a deed declared that the trustees, to whom he had transferred a money fund, should hold it on trust to lay it out in the purchase of land, which was to be settled on limitations identical with those of the will, except that two terms of years were interposed. The trusts of these two terms had become satisfied. The powers conferred by the two instruments were not precisely the same. The same persons were trustees of both the will and the deed. Upon the application of the tenant for life in possession under both instruments: *Held* although the limitations of the one instrument were not declared by reference to those of the other, but each set of limitations was stated independently, the principle of *Re Mundy's Settled Estates* [1891] 1 Ch 399, CA, applied, and the will and the deed constituted one compound settlement, so that capital money arising under the deed could be applied in paying the cost of improvements executed upon land devised by the will.
Re Byng's Settled Estates [1892] 2 Ch 219; 61 LJ Ch 511; 66 LT 754; 40 WR 457

ANNOTATIONS **Consd** Re Monson's SE [1898] Ch 427 **Apld** Re Stafford's Settlmt & Will, Gerard v Stafford [1904] 2 Ch 72 **Consd** Re Coull's SE [1905] 1 Ch 712

1084 Whether compound settlement effected — Will and deed — Identical limitations
The tenant for life of estate A, which was unincumbered, settled estate B, subject to a mortgage, upon trusts, which in the events which happened were identical with those upon which estate A was settled. The mortgagee of estate B having given notice requiring payment off of the mortgage, the tenant for life took out a summons asking for a declaration that he had power to raise the sum required by a mortgage of both estates: *Held* the tenant for life had power to raise the sum required by a mortgage of both estates.
Re Monson's (Lord) Settled Estates [1898] 1 Ch 427; 67 LJ Ch 176; 78 LT 225; 46 WR 330; 14 TLR 247; 42 Sol Jo 289

ANNOTATION **Consd** Re Coull's SE [1905] 1 Ch 712

1085 Whether compound settlement effected — Will and deed
Re Coull's Settled Estates no 1770 post

2 Vesting deeds and trust instruments

LAW See Halsbury's Laws (4th edn) vol 42 para 685 et seq

1086 Expression includes vesting deeds — Different parcels of settled land in separate deeds
Interpretation Act 1889 (c 63) s 1 provides that in every Act passed after 1850, unless the contrary intention appears, words in the singular shall include the plural. As no contrary intention appears in Settled Land Act 1925 (c 18), the expression "vesting deed' includes vesting deeds, and therefore, in the case of a settlement subsisting at the date of the commencement of the Act, it is not necessary that the whole of the settled land should be comprised in one single principal vesting deed. Different parcels of the settled land may be comprised in separate principal vesting deeds. No vesting deed is required in respect of capital moneys subsisting at the date of the commencement of the Act. The Act only contemplates a vesting deed in respect of land, and capital moneys are not land within the Act.
Re Clayton's Settled Estates [1926] Ch 279; 95 LJ Ch 169; 134 LT 568; 70 Sol Jo 427

1087 Necessity for — Not for capital moneys
Re Clayton's Settled Estates no 1086 ante

1088 Necessity for — Legal tenant in tail in possession — Remainders over — No overriding trusts or incumbrances
On 16 December 1925, defendant A became entitled to settled estates as adult legal tenant in tail in possession, with remainders over, but without any overriding trusts or incumbrances. On 1 January 1926, when the new property legislation came into force, he automatically became estate owner, holding the legal fee simple in trust for himself as equitable tenant in tail with remainders over, but still without any overriding trusts or incumbrances: *Held*

if he barred his equitable entail, and so put an end to the settlement, he could make a valid disposition of the property as absolute legal owner in fee simple, without first obtaining a vesting deed pursuant to Settled Land Act 1925 (c 18) s 13, which section, having regard to s 112(2), applies only to dispositions under that Act.

Re Alefounder's Will Trusts, Adnams v Alefounder [1927] 1 Ch 360; 96 LJ Ch 264; 137 LT 16; 71 Sol Jo 123

1089 Right to have executed — Tenant for life under Settled Land Act 1884 (c 18) s 7 (repealed) — Otherwise entitled under Settled Land Act 1925 (c 18) s 20(1)(viii)

Re Leigh's Settled Estates no 1875 post

1090 Compound settlement — Execution by trustees of original will — Settled Land Act 1925 (c 18) Sch 2 para 1(2)

Re Cradock's Settled Estates no 1052 ante

1091 Refusal to execute — Order of court under Settled Land Act 1925 (c 18) s 12(1)(a)

Re Shawdon Estates Settlement no 2002 post

1092 Contents — Vesting deed on resettlement — Compound settlement

X and Y, the trustees of an indenture of resettlement dated 26 August 1915, by which certain property was settled subject to a jointure, executed on 1 May 1926, a vesting deed reciting the resettlement and purporting to vest the property in the tenant for life. On 31 December 1925, X was the sole surviving trustee for the purposes of the Settled Land Acts of an indenture of settlement dated 12 July 1882, which together with the resettlement and two other documents formed the compound settlement of the property. On 5 July 1926, the tenant for life entered into four contracts for the sale of a portion of the property to a purchaser. The purchaser raised objections to the title on the ground that the vesting deed was not framed in accordance with the provisions of the Settled Land Act 1925 (c 18): (*a*) as it only dealt with the resettlement and not with the compound settlement; (*b*) as it was not executed by the trustees of the compound settlement; and (*c*) as it did not contain the names of the persons who were the trustees of the compound settlement. The tenant for life took out a summons for a declaration that a good title to the property had been shown: *Held* the vesting deed did not comply with the requirements of the 1925 Act with reference to the compound settlement and the tenant for life was not able to exercise his statutory powers as tenant for life in respect of the disposal of his property; and the summons must be dismissed.

Re Cayley & Evans' Contract [1930] 2 Ch 143; 99 LJ Ch 411; 143 LT 405

ANNOTATIONS **Distd** Re Curwen, Curwen v Graham [1931] 2 Ch 341

1093 Contents — Description of trustees as trustees of principal settlement — Sufficiency

A vesting deed, executed with the intended object of giving effect to the provisions of Settled Land Act 1925 (c 18), with regard to the vesting of settled land in a tenant for life, contained a statement that the trustees, who were executing the deed, were trustees of the principal settlement, but it contained no reference to the fact that they were trustees of a compound settlement, consisting of the principal settlement and other documents: *Held* the trustees were sufficiently described, and the vesting deed was a valid and effectual principal vesting deed, made pursuant to Settled Land Act 1925 (c 18), in respect of the land comprised in the compound settlement, constituted by the various documents.

Re Curwen, Curwen v Graham [1931] 2 Ch 341; 100 LJ Ch 387; 146 LT 7

3 Duration and determination of settlements

LAW See Halsbury's Laws (4th edn) vol 42 para 705 et seq

1094 "Under the settlement" — Meaning

Re Draycott Settled Estate no 1030 ante

1095 Settled land — Termination of settlement on death of tenant for life

Administration of Estates Act 1925 (c 23) s 22(1) does not apply where the settlement comes to an end on the death of the tenant for life, and his executor when constituted can sell, and he is not deemed to have appointed the sole surviving trustee of the settlement as his special executor pursuant to such section.

Re Bridgett and Hayes' Contract [1928] Ch 163; [1927] All ER 191; 97 LJ Ch 33; 138 LT 106; 44 TLR 222; 71 Sol Jo 910

ANNOTATION **Distd** In the Estate of Taylor [1929] P 260

1096 Order for distribution where death is presumed

In September 1892, P who was then twenty-four years of age disappeared, and he had never since been heard of. Under his father's will he was entitled to a share of the residuary estate in the event of his surviving testator. Testator died in June 1893. Upon a summons taken out by the trustees in 1900 to have

it determined how P's share ought to be dealt with: *Held* P must be presumed to be dead, and in the absence of proof that he has survived testator without making any declaration as to the date of P's death, liberty would be given the trustees to distribute his share on the footing that he had predeceased testator.

If he is to be presumed to be dead, the onus of proof is on his administrator (*Joyce J*).

Re Benjamin, Neville v Benjamin [1902] 1 Ch 723; 71 LJ Ch 319; 86 LT 387; 18 TLR 283; 46 Sol Jo 266

ANNOTATIONS **Consd** Hansell v Spink [1943] Ch 396; Re Taylor's Estate & Will Trusts, Re Taylor's Estate & Will Trusts, Taylor v Taylor [1969] 1 All ER 113

1097 Restrictions on dispositions of settled land — Recovery of possession — Oral tenancy — Landlord's title

The registered freehold owner of a house, D, left the house on her death to R in trust for life. Many years before her death, R made on oral agreement for a weekly letting of a flat in the house to the appellant. On R's death, the respondent, her executrix, refused to accept rent from the appellant. Agents appointed by the trustees of the settlement (who had not called upon the respondent to convey the legal title to them) to manage the property issued a new rent book to the appellant, describing D's executors as the landlords. The agents accepted rent from the appellant. When the respondent sought possession for the appellant, the latter contended that a new tenancy had been created between herself and the executors: *Held* as tenant for life, R could not create any estate in the land exceeding her own beneficial life interest unless she did so in accordance with the Settled Land Act 1925, in particular s 42. She had not done so and her own beneficial interest ceased on her death. By virtue of the 1925 Act, s 8(1)(*a*), the effect of the arrangement between the agents and the appellant was that the trustees, as statutory owners, entered into an agreement to grant a weekly tenancy to the appellant. There was no contractual tenancy valid against the respondent. The respondent had validly served notice to quit on the appellant and she was entitled to possession.

Bevan v Johnston [1990] 28 EG 113, CA

1098 Land held in undivided shares — Created by deed or event later than instrument

Re Hind, Bernstone v Montgomery no 1121 post

1099 Land held in undivided shares — Meaning of settled land

Re Cugny's Will Trusts, Smith v Freeman no 1116 post

1100 Land held in undivided shares — Meaning of settled land

Re Thomas no 1117 post

1101 Sale by tenant for life of one share — Necessity for concurrence of owner of other share

The tenant for life of an undivided moiety of land, where the other undivided moiety is out of settlement, cannot sell the moiety of which he is tenant for life without the concurrence of the owner of the other undivided moiety.

Re Collinge's Settled Estates (1887) 36 Ch D 516; 57 LJ Ch 219; 57 LT 221; 36 WR 264

ANNOTATIONS **Consd** Williams v Jenkins (1894) 13 R 92 **Overd** Cooper v Belsey [1899] 1 Ch 639

1102 Sale by tenant for life of one share — Necessity for concurrence of owner of other share

Where under a will land was devised in moieties and each moiety was separately settled by the will itself the tenant for life of one undivided moiety could sell his moiety under the powers of Settled Land Act 1882 (c 38) (repealed), without the concurrence of the person or persons entitled to or having the power or right of disposition over the other undivided moiety.

Cooper v Belsey [1899] 1 Ch 639; 68 LJ Ch 258; 80 LT 69; 47 WR 443; 43 Sol Jo 295, CA

1103 Application of Law of Property Act 1925 (c 20) Sch 1 Pt IV — Necessity for two elements — No antecedent freehold estate — Present beneficial enjoyment by possession

Re Stamford & Warrington (Earl) Payne v Grey no 1876 post

1104 Application of Law of Property Act 1925 (c 20) Sch 1 Pt IV — Alternative provisions — Land not "settled land" — Conveyance of land subject to rentcharge

Re Ryder & Steadman's Contract no 1055 ante

1105 Application of Law of Property Act 1925 (c 20) Sch 1 Pt IV — Alternative provisions — Settled land

By the will of testator, who died in 1884, his real estate was devised to trustees upon trust to permit his widow to receive the rents thereof during her life, and after her decease upon trust to pay same to or for the benefit of such of his two daughters, E and M, as should be then living and should for the time being be single and unmarried in equal shares if more than one, and when both should be married upon trust as to both capital as well as income for all testator's children in equal shares. Testator's widow died in 1889, and on the death of E, in 1927, questions arose as to the respective interests of E and M and testator's children in the income and capital of the real estate. The court having decided that E and M were entitled to the income of the real estate

during their joint lives in equal shares, and upon the death of E her sister M became entitled to the whole of the income during her spinsterhood, and upon her marriage or death the whole estate would become divisible in equal shares between the children of testator, the further question arose whether, on Law of Property Act 1925 (c 20) coming into force, the devised real estate vested in the then surviving trustee of the will upon the statutory trusts under Sch 1 Pt IV para 1(1), or in her or the Public Trustee under para 1(3): *Held* (1) as the purposes of the trusts of testator's will were such as might continue beyond the life of his widow, the real estate devised by the will was, at the date of Law of Property Act 1925 (c 20), coming into force, by the effect of Wills Act 1837 (c 26) s 31, vested in the then surviving trustee of the will in fee simple in trust for E and M, who were then beneficially interested in equity until one of them should marry or die in undivided shares vested in possession; (2) although their interests were not absolute interests, the case fell within Sch 1 Pt IV para 1(1), and the real estate thereupon vested in the trustee of the will upon the statutory trusts; (3) when a case fell within para 1(1) it did not become necessary to consider whether it fell within any of the subsequent sub-paragraphs.

Re Dawson's Settled Estates [1928] Ch 421; [1928] All ER 472; 97 LJ Ch 343; 139 LT 94

ANNOTATION As to (2) **Follld** Re Barrat, Body v Barrat [1929] 1 Ch 336

1106 Application of Law of Property Act 1925 (c 20) Sch 1 Part IV — Alternative provisions — Settled land

Testator, who died on 16 June 1881, leaving a widow and eight children, by his will gave all his estate to his wife and four children, whom he appointed executors, and trustees, upon trust to pay his debts, etc, and bequeathed the remainder of his personal effects to his wife and the income of his freeholds and leaseholds, subject to certain payments, and after her decease to pay such income to his four sons and daughters in certain shares, which were to cease at death, with a proviso as to four quarterly payments to widows of sons, and, subject thereto, gave his estate to the longest liver of his children absolutely. The widow died in 1900, and on the coming into force the Law of Property Act 1925 (c 20), the defendant and daughter, who had since died, were the surviving trustees. All parties interested in the estate now desired a sale, and the question raised by this summons was first, whether plaintiff and defendant R, the surviving trustee, were together tenant for life for the purposes of the Settled Land Act. Secondly, if it be not settled land, whether the entirety was now vested in the surviving trustee, or in the Public Trustee on the statutory trusts: *Held* Law of Property Act 1925 (c 20) Sch 1 Pt IV para 4, added by the amending Act of 1926, was not applicable to the case; and, secondly, having regard to Wills Act 1837 (c 26) s 31, and following *Re Dawson's Settled Estates* (no 1105 ante), the entirety was now vested in the surviving trustee under para 1(1), upon the statutory trusts.

Re Barrat, Body v Barrat [1929] 1 Ch 336; 98 LJ Ch 74; 140 LT 328

1107 Application of Law of Property Act 1925 (c 20) Sch 1 Pt IV — One trustee only — Three of the persons entitled to undivided shares life tenants

Immediately before the commencement of Law of Property Act 1925 (c 20), certain freehold land stood vested in J as personal representative of the last surviving trustee of a will in trust as to three undivided fourths for three life tenants with remainders to their respective children and as to one-fourth for a deceased life tenant's children absolutely: *Held* although there was only one trustee or personal representative, and three of the persons entitled in undivided shares were only life tenants, the case fell within Sch 1 Pt IV para 1(1) to the above Act, so J held the land upon the statutory trusts, and on appointing a new or additional trustee to act with him, he and the new or additional trustee could make a good title and give a good receipt to a purchaser.

Re Myhill, Hull v Myhill [1928] 1 Ch 100; [1928] All ER 218; 97 LJ Ch 81; 138 LT 486; 72 Sol Jo 86

ANNOTATION **Consd** Re Robins, Holland v Gillam [1928] Ch 721

1108 Application of Law of Property Act 1925 (c 20) Sch 1 Pt IV — Land held under one and same settlement — Vesting in trustees — Who are trustees

Where immediately before the coming into operation of Law of Property Act 1925 (c 20), the entirety of the land is settled land held under one and the same settlement, it vests in the trustees, if any, of the settlement under the old law as joint tenants upon the statutory trusts. If there are no such trustees then, pending their appointment, the land vests in the Public Trustee upon the statutory trusts.

Re Catchpool, Harris v Catchpool [1928] Ch 429; [1928] All ER 606; 97 LJ Ch 181; 139 LT 17; 72 Sol Jo 226

1109 Application of Law of Property Act 1925 (c 20) Sch 1 Pt IV — What amounts to incumbrance — Right of pre-emption

Testator who died in 1920 gave his property to trustees, and settled the entirety upon trusts for various beneficiaries in undivided shares. He empowered the

trustees at any time to sell any part of his estate, subject to a right of pre-emption thereby given to his son A over property B at a price to be fixed by the trustees' valuer before sale. On 1 January 1926, the land vested in the trustees on the statutory trusts for sale, etc, under Law of Property Act 1925 (c 20) s 1(3) Sch 1 Pt IV: *Held* (1) on the construction of the will, the right of pre-emption was only intended to attach to an exercise of the power of sale under the will, and not to a sale under the statutory trusts or any other extraneous powers; (2) even if the right of pre-emption was intended to attach to any sale whatever by the trustees, it was not enforceable against the statutory trusts of s 35 either as an "equitable interest or power" within s 3 and s 205(1)(x); or as an "additional or larger power" conferred by the will on the trustees within s 28(1) 1, as amended by the 1926 Act Schedule, or as an "incumbrance" within Sch 1 Pt IV s 1(9); the trustees on executing the statutory trusts could disregard the right of pre-emption.

Re Flint, Flint v Flint [1927] 1 Ch 570; [1927] All ER 304; 96 LJ Ch 248; 137 LT 178

ANNOTATIONS Generally **Distd** Re Armstrong's Will Trusts, Graham v Armstrong [1943] Ch 400 **Consd** Re Fison's Will Trusts, Fison v Fison [1950] 1 All ER 501

1110 Application of Law of Property Act 1925 (c 20) Sch 1 Pt IV — What amounts to incumbrance — Annuity

(1) By his will, dated 13 November 1909, testator directed that from and after the death of his wife his trustees should stand possessed of certain hereditaments, which he described as the share of his daughter E, upon trust to pay to her husband an annuity of £500 for life, which in certain events might be determined, and he empowered the husband by will or codicil to charge the share with the payment of any sum not exceeding £10,000 for the benefit of one or more of the issue of his daughter, and directed his trustees to raise the money by a sale or mortgage of the share and hold it in trust for the person or persons entitled. Subject as aforesaid, the trustees were to stand possessed of the share and the net income thereof in trust, in the events that happened, for the children of E in equal shares. Testator died in 1910, his wife in 1911, and E before the date of the will, leaving a husband surviving. E had four children who all survived testator and attained vested interests. The trustees, who were also executors, were given no power of sale by the will and were not trustees of the will for the purposes of Settled Land Acts 1882 to 1890 (repealed). Testator declared that any executor or trustee of his will who was a solicitor, or a person engaged in any profession or business, might individually, or through his firm, act in the course of his profession or business on behalf of the executors and trustees, and charge for so doing: *Held* immediately before Law of Property Act 1925 (c 20) came into operation the legal estate in E's share was vested in the trustees of the will and, subject to the annuity of £500 and the power to charge, the land was held in four undivided shares vested in possession. The case therefore fell within Law of Property Act 1925 (c 20) Sch 1 Pt IV para 1(1), and the land was vested in the trustees upon the statutory trusts, the incumbrances being divested under paragraph 1(1)(*a*). The annuity was an incumbrance within Law of Property Act 1925 (c 20) s 205(1)(vii), and the consent of the annuitant to any sale would have to be obtained under para 1(9) of Pt IV. The power to charge, which might never be exercised, was not an incumbrance. If and when exercised it would operate on the proceeds of sale in the hands of the trustees.

(2) Any executor or trustee of the will who was a solicitor or a person engaged in a profession or business was entitled under the will to charge for work or business done in the execution of the statutory trusts, because such work or business would be done on behalf of the executors and trustees.

Re Pedley, Wallace v Wallace [1927] 2 Ch 168; 96 LJ Ch 438; 137 LT 636; 71 Sol Jo 583

1111 Application of Law of Property Act 1925 (c 20) Sch 1 Pt IV — What amounts to incumbrance — Right of executor or trustee to charge for services

Re Pedley, Wallace v Wallace no 1110 ante

1112 Application of Law of Property Act 1925 (c 20) Sch 1 Pt IV — Land settled upon trust for sale — After happening of future event

Re Robins, Holland v Gillam no 3630 post

1113 Application of Law of Property Act 1925 (c 20) Sch 1 Pt IV — Only one trustee — Vesting of land in Public Trustee

Under and by virtue of the will of a testator who died in 1921, and of subsequent dispositions, Acts in the law and events, the legal estate in certain freehold land was, immediately before the commencement of the Law of Property Act 1925 (c 20), vested in two persons for their lives share and share alike, the legal estate in remainder expectant upon the lives of those persons and the life of the survivor of them being vested in a single trustee upon trust after the death of the surviving tenant for life to sell the land and divide the proceeds between the testator's nephews and nieces. Upon a summons by the tenants for life, who were desirous of selling the land, to have it determined in whom, upon the coming into force of the Law of Property Act 1925 (c 20), the land was vested: *Held* (1) as immediately before the commencement of that Act the land was held at law

and in equity in undivided shares, vested in possession, and the entirety thereof was settled land, Law of Property Act 1925 (c 20) Sch 1 Pt IV para 1(3), would apply, if there were more than one trustee of the settlement constituted by the will, in whom the land could vest as joint tenants; but that, as there was only one trustee, the land vested, under clause (i) of the proviso to that sub-paragraph, in the Public Trustee upon the statutory trusts; (2) if, before the Public Trustee accepted the trust, the present trustee (who before the commencement of the Law of Property Act 1925 (c 20), was the trustee of the settlement constituted by the will for the purpose of the Settled Land Acts then in force) appointed an additional trustee or trustees of that settlement, the land would vest in the trustees of the settlement as joint tenants upon the statutory trusts.

Re Price, Price v Price [1929] 2 Ch 400; 98 LJ Ch 417; 141 LT 511

1114 Application of Law of Property Act 1925 (c 20) Sch 1 Pt IV — Only one trustee — Appointment of additional trustee — Before acceptance by Public Trustee

Re Price, Price v Price no 1113 ante

1115 Application of Law of Property Act 1925 (c 20) Sch 1 Pt IV

Immediately before the commencement of the Law of Property Act 1925 (c 20), the legal estate in land was outstanding in the personal representatives of the settlor and held upon the trusts of a marriage settlement which, in the events which had then happened, were for two daughters of the settlor in undivided shares absolutely: *Held* as the personal representatives then held the land in trust for the daughters in undivided shares vested in possession, they held it, after the Act came into force, upon the statutory trusts, by virtue of Sch 1 Pt IV para 1(*b*) to the Act, with the result that the settlement trustees were not entitled, as, but for Pt IV, they would be to call for a conveyance of the legal estate; but the personal representatives held the land on trust for sale and were entitled to sell the same, unless the daughters elected to call for a conveyance.

Re Forster, Somerville v Oldham [1929] 1 Ch 146; 98 LJ Ch 27; 140 LT 277; 72 Sol Jo 761

1116 Application of Law of Property Act 1925 (c 20) Sch 1 Pt IV — What is "settled land" within para 2

Under a settlement contained in a will the settled property was directed to be held, after the death of the first tenant for life, in trust, as to both *corpus* and income, for the children and issue of the first tenant for life in equal shares as therein mentioned. The first tenant for life died in 1929, having by her will appointed to be her executors and trustees two persons who, at the date of her death, were trustees of the settlement and of the will containing it. On a summons by the executors and trustees as plaintiffs for the determination (*inter alia*) of the question whether, for the purpose of vesting in themselves the land the subject of the settlement contained in the will, they should, as executors of the first tenant for life, execute in favour of themselves, as trustees of the will containing the settlement, a vesting assent upon the statutory trusts for sale of the land the subject of the settlement, or should apply for a grant to themselves of probate of the will of the first tenant for life limited to that land: *Held* Settled Land Act 1925 (c 18) s 36 applied, and plaintiffs, as executors of the first tenant for life, ought, pursuant to that section, to execute a vesting assent in favour of themselves as trustees of the will containing the settlement.

Re Cugny's Will Trusts, Smith v Freeman [1931] 1 Ch 305; 100 LJ Ch 145; 144 LT 525

1117 Application of Law of Property Act 1925 (c 20) Sch 1 Pt IV — What is "settled land" within para 2

JT made his will on 25 August 1913. He appointed his wife, AT, his executrix, and gave and bequeathed to her his real and personal estate for her sole use and benefit during her life, and after her death to be equally divided between his surviving children. JT died on 3 December 1915, and on 9 March 1916, probate was granted to his widow, AT. His residuary estate included two dwelling-houses in Anglesey. JT left five children surviving him, and one of them died on 20 August 1918, intestate and a bachelor. AT died intestate on 21 November 1931, and on 18 April 1932, letters of administration to her estate were granted to ER. On 14 October 1938, letters of administration with the will annexed were granted in respect of the estate of JT to JLA. JLA claimed that by virtue of s 30(3), and s 36(1), of Settled Land Act 1925, he was the trustee of the settlement created by the testator's will and was entitled to call upon ER to assent to the two dwelling-houses vesting in him. ER refused, contending that, having regard to the limitations of the will and the events which had happened, JLA was not entitled to have the property vested in him: *Held* although the land was held in trust for persons entitled in possession in undivided shares, it must still be regarded notionally as settled land. JLA, as personal representative of JT, had the right to call upon ER to assent to the land vesting in him.

Re Thomas [1939] Ch 513; [1939] 1 All ER 379; 108 LJ Ch 233; 83 Sol Jo 277

1118 Application of Law of Property Act 1925 (c 20) Sch 1 Pt IV — Effect on interest of

tenant for life under condition to reside on premises

Testator died in 1922, having by his will made in 1915 directed (*inter alia*) that plaintiff should pay the net income of his freehold farm and lands and of his share of minerals thereunder equally between herself and his nephew until testator's youngest or only daughter should attain the age of twenty-one and thereafter between herself for life or until marriage, the nephew for life "or so long as he shall reside upon and assist in the management of my said farm," and testator's two daughters for their lives and the survivor of them for her life. Subject thereto testator devised the farm and lands to the children of his daughters as in the will mentioned. Testator's nephew lived with him at the farm, and assisted in its management until the testator's death, after which he continued to live there and to manage it. Accordingly, upon the coming into force of the Law of Property Act 1925 (c 20), the property vested in plaintiff upon the statutory trusts. On a summons taken out by plaintiff in 1931 and asking (*inter alia*) whether, upon a sale of the farm and lands under the statutory trusts, or upon the exercise by her of any power of leasing conferred on her by statute or by the will, and in particular upon the exercise of any such power in favour of testator's nephew, his interest in the income would determine: *Held* upon the true construction of Law of Property Act 1925 (c 20) s 35, the nephew's life interest would not be forfeited upon any exercise in his lifetime of the statutory trusts.

Re Davies' Will Trusts, Bevan v Williams [1932] 1 Ch 530; [1931] All ER 655; 101 LJ Ch 301; 147 LT 334

1119 Application of Law of Property Act 1925 (c 20) Sch 1 Pt IV — Real property held by partners

A partnership firm in 1932 contracted to sell certain plots of freehold land to a county council. There was no special stipulation of as to the commencement of title, but on examination by the purchasers it appeared that the land had been sold in 1892 to six named persons then carrying on the partnership firm, the *habendum* of the conveyance being to hold the hereditaments "unto and to the use of the purchasers . . . as joint tenants in trust for them the purchasers . . . as part of their co-partnership estate." On 1 January 1926, the land in question was vested in three of the original purchasers in fee simple as joint tenants in trust as mentioned in the conveyance of 1892. The vendors to the county council were the four present partners, and included two of the three original purchasers living on 1 January 1926, one of those purchasers having died since that date. Questions having arisen whether the land being on 1 January 1926 partnership property, was held on the statutory trusts, and therefore whether the present vendors or any of them could make a good title as trustees for sale by reason of the Law of Property Act 1925 (c 20) Sch 1 Pt IV: *Held* the words of that Schedule applied, and on 1 January 1926, the property was held by the three original purchasers then living on the statutory trusts and the two survivors could make a good title as trustees for sale upon the statutory trusts.

Re Fuller's Contract [1933] Ch 652; 102 LJ Ch 255; 149 LT 237

1120 Life interest in land — Sale by tenant for life — Whether option to purchase exercisable after death of tenant for life

A testator by his will made in 1899 gave to his wife a life interest in land and to his son an option, exercisable within twelve months after his wife's death, to buy the land for £5,000. In 1900 the testator died. His widow, as tenant for life, sold and otherwise dealt with parts of the land. She died in 1942, and over £19,000 was due to be received in respect of her dealings with the land. Three days after her death the son purported to exercise his option: *Held* the son had validly exercised the option and was entitled to the moneys receivable in respect of his mother's sales of and other dealings with the land or to the investments representing them.

Re Armstrong's Will Trusts, Graham v Armstrong [1943] Ch 400; [1943] 2 All ER 537; 112 LJ Ch 335; 169 LT 268; 59 TLR 420; 87 Sol Jo 310

ANNOTATION **Apld** Re Fison's Will Trusts, Fison v Fison [1950] 1 All ER 501

1121 Application of Settled Land Act 1925 c 18 s 36 — "Trust instrument" — Undivided shares created by deed or event later than instrument

A name and arms clause in a will dated 14 February 1863 provided that if any tenant for life or in tail of testator's N estates for the time being in possession refused to continue the use of the name and arms of H, the interest of that tenant for life or in tail and the limitations dependent thereon should cease. The tenant in tail in remainder (hereinafter called "the remainderman"), whose father was tenant for life in possession, mortgaged to plaintiff the N estates discharged as far as possible from his estate tail and from all estates to take effect after its determination or in defeasance of it: and the mortgage irrevocably appointed plaintiff the remainderman's attorney in his name and on his behalf to convey the property to plaintiff accordingly, but subject to the right of redemption under the mortgage. As this was done without the tenant for life's consent, only a base fee

was created. By a conveyance dated 3 April 1914, the remainderman granted and released unto plaintiff one undivided moiety of the N estates, to hold unto and to the use of plaintiff, his heirs, executors, administrators and assigns, with provisions as to barring the entail similar to those in the mortgage, but free from all right of redemption thereunder; and the remainderman covenanted also to perfect the disentail of the property within seven days of the tenant for life's death during his life. The tenant for life died on 18 February 1929. The remainderman did not perfect the disentail within seven days, so that what was comprised in the mortgage immediately after the death was the base fee, half of it being vested in plaintiff subject to the mortgage and the conveyance of 1914. On 3 March 1929, the remainderman wrote informing the trustees of the will that he decided to cease using the name of H and to take another. On 8 April 1929, he wrote to them a letter confirming that decision; and on the same date, after the confirmatory letter had been written, there was executed by plaintiff as his attorney a deed of confirmation supplemental to the mortgage and to the conveyance of 1914, whereby the remainderman conveyed to plaintiff the hereditaments, moneys and investments secured by the mortgage upon limitations similar to those in the mortgage, to the intent that the base fee or other estate created and subsisting by virtue of the mortgage should be enlarged into an equitable fee simple, and that the mortgage should take effect out of the enlarged interest and the base fee be enlarged for all purposes; and the remainderman conveyed to plaintiff one undivided moiety of the hereditaments or proceeds of sale thereof in equitable fee simple or absolutely, to the intent that, subject to the mortgage, one undivided moiety should belong to plaintiff and the other to the remainderman in equitable fee simple or absolutely. By deed dated 8 September 1930, the remainderman recorded his change of name: *Held* (1) on the true construction of Settled Land Act 1925 (c 18) s 36(1), the conveyance of 1914 came within the expression "trust instrument" in that sub-section; (2) settled land may be held "on trust for persons entitled in possession under a trust instrument" in undivided shares created by a deed or event later than the instrument, which is nevertheless "the . . . instrument creating the trust"; (3) the words "entailed interest" in the Law of Property (Entailed Interests) Act 1932 (c 27) do not apply to a base fee; (4) the court could not construe Settled Land Act 1925 (c 18) s 36(6), so as to give effect to the name and arms clause, which was therefore inoperative.

Re Hind, Bernstone v Montgomery [1933] Ch 208; 102 LJ Ch 91; 148 LT 281

1122 Application of Settled Land Act 1925 c 18 s 36 — "Trusts . . . requisite for giving effect to the rights of the persons interested" — Name and arms clause

Re Hind, Bernstone v Montgomery no 1121 ante

1123 Application of Settled Land Act 1925 c 18 s 36 — "Trusts . . . requisite for giving effect to the rights of the persons interested" — Law of Property (Entailed Interests) Act 1932 (c 27) s 1 — Whether "entailed interest" includes base fee

Re Hind, Bernstone v Montgomery no 1121 ante

1124 Appointment of new trustees — Land vested in Public Trustee — Who may appoint — Trustees for sale

Where land was held in four equal undivided shares, the owner of one share and the trustees for sale of the three remaining shares appointed new trustees in the place of the Public Trustee: *Held* the trustees for sale were "persons interested in more than an undivided half of the land or the income thereof," and the appointment of new trustees was valid.

Re Cliff Contract [1927] 2 Ch 94; [1927] All ER 553; 96 LJ Ch 278; 137 LT 372; 71 Sol Jo 389

ANNOTATION **Folld** Re Hayward, Merson v Hayward (1927) 71 Sol Jo 845

1125 Appointment of new trustees — Land vested in Public Trustee — Who may appoint — Trustees for sale

The words "persons interested" in Law of Property Act 1925 (c 20) s 1(4)(iii) Sch 1 Pt IV, were the question of shares is under consideration, are not confined to persons beneficially interested, but include persons interested by being trustees for sale.

Re Hayward, Merson v Hayward [1928] 1 Ch 367; 71 Sol Jo 845; 97 LJ Ch 197; 138 LT 735

1126 Power of sale given by will — Subject to right of pre-emption — Right of pre-emption attaches to sale under power — Not to sale under statutory trust for sale

Re Flint, Flint v Flint no 1109 ante

1127 Power of sale given by will — Subject to right of pre-emption — Power of trustees to disregard right of pre-emption — On sale under statutory power

Re Flint, Flint v Flint no 1109 ante

1128 Possibility of future estate in undivided shares — Land remains settled land — Where subject-matter of "settlement within Law of Property Act 1925 (c 20) s 1(1)"

Re Bird, Watson v Nunes no 1009 ante

1129 Application of Law of Property Act 1925 (c 20) s 34 — Land settled upon trust for sale — After specified period

The trustees of a will, which came into operation after the commencement of the Law of Property Act 1925 (c 20), were directed to stand possessed of testator's residuary real and personal estate upon trust to pay out of the income thereof four life annuities, and while any annuity remained payable to divide the surplus income amongst such of testator's grandchildren as should be living for the period during which any annuity remained payable; and, on cesser of all the annuities, to stand possessed of the residuary estate in trust for his grandchildren and the issue then living of any then dead, as tenants in common according to the stocks. By a codicil power was conferred upon the trustees after the expiration of five years from the testator's death to sell his residuary estate or any part thereof by public auction but not by private contract. Upon a summons raising questions, whether the trustees or the persons entitled to the surplus income until cesser of the annuities were the proper persons in whom the land ought to be vested by the executor; and if the trustees were the proper persons, whether the annuitants were persons whose wishes ought to be given effect to by the trustees for sale: *Held* (1) the land was held in equity in undivided shares; (2) the land was devised in undivided shares within Law of Property Act 1925 (c 20) s 34(3), with the result that it was devised to the trustees, who were trustees for the purposes of the Settled Land Act 1925, upon the statutory trusts; (3) those trustees were the persons in whom the land ought to be vested.

Re House, Westminster Bank v Everett [1929] 2 Ch 166; 98 LJ Ch 381; 141 LT 582

1130 Open space held in undivided shares — Meaning of open space — Any land unbuilt upon — Back yard

The expression "an open space of land" in Law of Property Act 1925 (c 20) Sch I Pt V para 2, means any land that is unbuilt upon.

A small yard and ashes place at the rear of two houses in a town was, immediately before the commencement of the Act, held in undivided shares by the owners of the houses with rights of access and user over same: *Held* the yard and ashes place were an open space within the paragraph and have vested in the Public Trustee. Leave given to the Public Trustee to sell same.

Re Bradford City Premises [1928] Ch 138; 138 LT 517; sub nom

Re Bradford City Premises, Scaife v Public Trustee (1928) 97 LJ Ch 84

ANNOTATION **Consd** Re Townsend, Townsend v Townsend [1930] 2 Ch 338

1131 Open space held in undivided shares — Meaning of open space — Any land unbuilt upon — Private railway siding

A private railway siding consisted partly of freehold land, vested in the trustees of a will, and partly of leasehold land held for a long term by trustees of a lease containing a declaration of trust subsequently varied by deed. Neither set of trustees held upon trust for sale or had any power of sale. All rights of access to and user of the siding were vested, at the commencement of Law of Property Act 1925 (c 18), in lessees of adjoining property, licensees, and other persons entitled under the declaration of trust, and rents were paid by all parties interested for such user: *Held* that the siding was not an open space vested in undivided shares in right whereof each owner had rights of access and user thereof and did not therefore vest in the Public Trustee under Law of Property Act 1925 (c 20) Sch I Pt V para 2, but was vested in the respective sets of trustees upon the statutory trusts.

Re Townsend, Townsend v Townsend [1930] 2 Ch 338; 99 LJ Ch 508; 143 LT 608

1132 Open space held in undivided shares — Meaning of open space — Any land unbuilt upon — Gated pasture

Re Brotherton Marsh Pasture, West Riding of York, Public Trustee v Yorkshire Electricity Board (1965) 112 Sol Jo 48

4 Beneficial interests

i TRADITIONAL LIMITATIONS

1 Interests in remainder

LAW See Halsbury's Laws (4th edn) vol 42 para 713 et seq

1133 Interests in remainder

Re Gosset's Settlement, Gribble v Lloyds Bank no 591 ante

1134 Whether cross-remainder implied — Settlement created by deed

Cole v Levingston (1672) 1 Vent 224; 86 ER 151

ANNOTATIONS **Consd** Doe d Burden v Burville (1773) 2 East 48n; Doe d Tanner v Dorvill (1794) 5 Term Rep 518

1135 Whether cross-remainder implied — Settlement created by deed

Articles on marriage, for settling land to be bought with money on all the children of the marriage and

their respective issues; and for default of such children and their issue, over: *Held* there should be cross-remainders by implication.

I am clear there cannot be cross-remainders by implication in a deed (*Lord Camden*).

Twisden v Lock (1768) Amb 663; 27 ER 430, LC

1136 Whether cross-remainder implied — Settlement created by deed

Cross-remainders cannot be implied in the construction of a deed.

Doe d Tanner v Dorvell (1794) 5 Term Reps 518; 101 ER 291

ANNOTATIONS **Apld** Doe d Foquett v Worsley (1801) 1 East 416 **Consd** Driver v Frank (1814) 3 M&S 25

1137 Whether cross-remainder implied — Settlement created by deed

Cross-remainders cannot be implied in a deed; and can only be raised by proper words of limitation; however plainly expressed the intention of the parties may be.

Under a limitation in a marriage settlement to the use of all and every the daughter and daughters of, etc, to be begotten, share and share alike, equally to be divided between them and of the heirs of the body and bodies of all and every such daughter and daughters; and for default of such issue to the right heirs, etc: *Held* there were no cross-remainders between the daughters or their issue.

Doe v Foquett v Worsley (1801) 1 East 416; 102 ER 161

ANNOTATIONS **Consd** Doe d Littledale v Smeddle (1818) 2 B&Ald 126; Doe d Clift v Birkhead (1849) 4 Exch 110

1138 Whether cross-remainder implied — Settlement created by deed

Levin v Weatherall (1819) 1 Brod&Bing 401; 4 Moore CP 116; 129 ER 777

1139 Whether cross-remainder implied — Settlement created by deed

Cross-remainders cannot be implied in a deed, and are not created as to accruing shares by a limitation of the entire estate to an only surviving child and his issue, or by a gift over of the entire estate in remainder after the failure of all issue, or by an express creation of cross-remainders as to the original shares.

Edwards v Alliston (1827) 4 Russ 78; 6 LJOS Ch 30; 38 ER 734

ANNOTATION **NF** Doe d Clift v Birkhead (1849) 4 Exch 110

1140 Whether cross-remainder implied — Settlement created by deed

By deeds of lease and release, being the settlement made on the marriage of EMH and WB by which deeds and a fine levied in pursuance of the covenants contained in the release, certain lands of which E, the wife of WH and mother of EMH, was then seised in fee, a settlement was made after the solemnisation of the marriage, to the use of WH for his life, with remainder to the use of E, the wife of WH for her life, and then with remainder for the use of WB for his life; and then for the use of EM his intended wife for her life, with remainder to the use of all and every the children of the body of WB on the body of EMH his intended wife to be begotten, to be equally divided among them, share and share alike, to take as tenants in common; and not as joint tenants, and of the several and respective heirs of the bodies of all and every such children lawfully issuing; and in case one or more of such children should happen to die without issue of his or their body or bodies, then as to the share or shares of him or them so dying without issue, to the use of the survivors or others of them, share and share alike; to take as tenants in common and not as joint tenants, and the several and respective heirs of their bodies lawfully issuing; and in case all such children but one should happen to die without issue, or if there should be but one such child, then to the use of such surviving or only child and of the heirs of his or her body lawfully issuing, and for default of such issue, then to the use of EMH the wife of WH and their heirs and assigns for ever. The marriage was duly solemnised. There was issue of it eight children, three of whom died infants, unmarried and in the lifetime of their parents. EM, the wife of WB, survived her husband as well as WH, and at the time of her death the limitation in favour of the issue of the marriage came into operation: *Held* cross-remainders were here created by apt words in the deed, and the word "share" must be understood as embracing accruing as well as original shares.

Doe d Clift v Birkhead (1849) 4 Exch 110; 18 LJ Ex 411; 13 LTOS 529; 154 ER 1145

ANNOTATIONS **Distd** Douglas v Andrews (1851) 14 Beav 347 **Consd** Goodwin v Finlayson (1858) 25 Beav 65; Dutton v Crowdy (1863) 33 Beav 272

1141 Whether cross-remainder implied — Settlement created by deed

Leaseholds for life were settled by deed on the parents for life, with remainder to the children of the wife equally and the heirs of their bodies, and if but one child then to such child and the heirs of his body, and in default of such issue, to the heirs of the wife: *Held* there were no cross-remainders between the children, and on the death of a child without issue and without having made any disposition, his share went to the heir of the wife.

Bainton v Bainton (1865) 34 Beav 563; 55 ER 752

1142 Whether cross-remainder implied — Settlement created by will

Cole v Levingston (1672) 1 Vent 224; 86 ER 151

ANNOTATIONS **Consd** Doe d Burden v Burville (1773) 2 East 48n; Doe d Tanner v Dorvell (1794) 5 Term Rep 518

1143 Whether cross-remainder implied — Agreement to settle — Remainder over on default of children and issue

Twisden v Lock no 1135 ante

1144 Construction of express provision — Survivorship among tenants in common

The limitations in deed were to trustees to the use of A and B for their lives, remainder to the use of the child or children of B in tail as tenants in common; "and in case any such child or children should die without issue of his, her, or their bodies, then the part of such child should be and remain to the use of the surviving child or children of B and the heirs of his, her, or their bodies issuing, and in case all the children should die without issue," etc, then to A in fee: *Held* the deed created cross-remainders between the children of B; and on the death of one without issue, his share vested in a surviving child and the heir of one deceased, as tenants in common.

Doe d Watts v Wainewright (1793) 5 Term Rep 427; 101 ER 240

ANNOTATIONS **Consd** Edwards v Alliston (1827) 4 Russ 78 **Apld** Cole v Sewell (1848) 2 HL Cas 186 **Consd** Holland v Allsop (1861) 29 Beav 498; Hurry v Morgan (1866) LR 3 Eq 152

1145 Construction of express provision — Survivorship among tenants in common

A by marriage settlement, conveyed certain estates to trustees with remainder to his children of the marriage, share and share alike, as tenants in common; and for default of such issue and if any of such children, there being more than one, shall happen to die without issue before twenty-one, that in every such case, the share of such child, should go to the survivors, as tenants in common; and in case all such children should die without issue, then to the use of the settlor in fee: *Held* there were no cross-remainders between the children of the marriage, except in the case of a child having died without issue, and under twenty-one; and one of the children having died without issue, but after twenty-one, his share vested in the settlor, and not in the survivor.

Meyrick v Whishaw (1819) 2 B&Ald 810; 106 ER 561

1146 Construction of express provision — Survivorship among tenants in common

Doe d Clift v Birkhead no 1140 ante

1147 Construction of express provision — Application to accruing shares

Edward v Alliston no 1139 ante

1148 Construction of express provision — Application to accruing shares — Meaning of "share"

Doe d Clift v Birkhead no 1140 ante

1149 Construction of express provision — Survivorship among class — Must include as many objects as possible

In construing limitations to a parent for life, and afterwards to his children, with a provision relating to survivorship annexed, whether occurring in wills or settlements, the rule for determining both the class who are to take and the contingency to which the survivorship refers is to lean to that construction which will include as many objects of the gift as possible, consistently with the declared purpose of the author of the instrument.

Bouverie v Bouverie (1847) 2 Ph 349; 1 6 LJ Ch 411; 9 LTOS 469; 11 Jur 661; 41 ER 977, LC

ANNOTATIONS **Consd** Evans v Evans (1858) 25 Beav 81; Jackson v Dover (1864) 2 Hem&M 209

1150 Construction of express provision — "Survivor"

Cole v Sewell no 571 ante

1151 Construction of express provision — "Survivor"

Re Palmer's Settlement Trusts no 572 ante

Scottish, Irish and Commonwealth Cases

1152 Whether implied — Settlement created by deed

Gaussen & French v Ellis [1930] IR 116 (IR)

2 Resettlements

A In general

LAW See Halsbury's Laws (4th edn) vol 42 para 718

1153 Validity — Settlement on trusts of will — Trust in default of appointment void

All testator's children had executed a settlement reciting that the trust in default of appointment was void, and declaring that the son's shares should be held on the trusts of the will: *Held* this was a valid resettlement, by the sons on themselves until bankruptcy, and their children at twenty-five.

Re Sprague, Milley v Cape (1880) 43 LT 236

1154 Validity — Effect of failure to understand nature of instrument

Plaintiff was entitled to a settled estate as tenant in tail male in remainder, subject to two preceding life interests of his aunt, the protector of the settlement, and his mother.

Plaintiff attained twenty-one on 10 December 1878, and shortly after that date it was thought by his mother very desirable and important that some resettlement of the estate should be made. Accordingly, he executed two deeds, both dated 2 January 1879, to which the protector of the settlement was a party, one being the usual disentailing deed and the other a resettlement. The estate was thereby relimited to the use of plaintiff for life, with remainder to uses in favour of the issue of plaintiff, and in default of issue, then in favour of his cousins, children of the protector of the settlement, as tenants in common, with ultimate remainder to plaintiff in fee.

An action was brought by plaintiff claiming to have the resettlement cancelled and set aside or modified in effect.

The question was whether plaintiff had been made sufficiently aware of the nature and effect of the deed, and had had the proper amount of independent advice which is necessary, in order that such a resettlement, executed by a person who has just attained his majority, should be upheld.

The plaintiff admitted in his evidence he understood that by the deed he was giving his property to his cousins in the event of his death without issue; but he stated that he did not understand, and it was not explained to him, that the deed was an irrevocable instrument, and he believed that it was something in the nature of a will which he supposed it was his duty to execute upon attaining twenty-one. He had a short time previously executed a disentailing deed, and made a will in favour of his cousins in reference to another estate belonging to him.

On the other hand, the evidence of defendants went to show that plaintiff understood generally what he was executing, but that he declined an offer made by his legal adviser to have the deed read over to him, on the ground that he should not understand it if it was read. It did not appear that plaintiff's attention had been specifically called in detail to the nature and effect of the several clauses of the deed: *Held* as plaintiff had an accurate general knowledge of what he was doing, and only refused to receive a detailed explanation of the provisions of the deed because he trusted his solicitor to look into those details on his behalf, he was as much bound as if he were himself a lawyer, and had drawn the deed with his own hand.

Lovell v Wallis (No 2) (1884) 50 LT 681

1155 Validity — Effect of misrepresentation — To heir in tail

The House of Lords set aside deeds and documents by which the entailed estates of M and R were disentailed and resettled on the ground that the heir in entail had been induced to enter into the transactions by representations inconsistent with the facts made to him, not fraudulently nor with intent to deceive by his father's legal adviser.

Menzies v Menzies (1893) 9 TLR 347, HL

1156 Validity — Re-settlement under power in will — In favour of infant

Testator by his will settled a legacy of £50,000 upon usual trusts for A, his wife and issue, and declared that if no issue of A should attain a vested interest then the legacy should fall into and form part of his, testator's, residuary estate, and testator empowered the trustees on A's marriage and with his consent to revoke the trusts and to resettle the legacy upon such trusts for the benefit of A, his wife and issue and with such powers and provisions as the trustee should deem proper. By a codicil testator bequeathed a sum of £50,000 to his trustees to be held by them upon the trusts and with powers for the benefit of B, her husband and issue, similar to those for the benefit of A, his wife and issue, declared in his will concerning the £50,000 thereby settled, except that no part of the capital was to be paid or advanced to or for the benefit of B.

Both A and B were infants at the date of the will. After the death of testator B married, being still an infant, and by a deed executed in contemplation of her marriage the trustees with her consent and in exercise of the power conferred on them by the will and codicil revoked the trusts of her legacy and resettled the same upon trusts for her benefit, and her husband and issue, which varied somewhat from those declared in the will; in particular the ultimate trust in default of her issue was for her absolutely. On the question whether the resettlement was valid having regard to the fact that B was an infant: *Held* (1) upon the true construction of the will and codicil testator intended to confer a power on B during her minority to consent to an exercise by the trustees of their power of revocation and resettlement, and he could lawfully confer such a power upon her; (2) the ultimate trust in the resettlement, in default of B's issue for B absolutely, was prohibited by the codicil, and therefore not authorised by the power to resettle.

Re Sutton, Boscawen v Wyndham [1921] 1 Ch 257; 90 LJ Ch 71; 124 LT 526; 65 Sol Jo 155

B Effect of resettlement

LAW See Halsbury's Laws (4th edn) vol 42 para 718

1157 On charge created by settlement — In favour of volunteer

Three powers by settlement, first to husband and wife jointly to raise and appoint £3,000, secondly to husband alone to raise and appoint £2,000, thirdly to survivor to raise and appoint such sum as would with the sum before raised make £5,000. The wife joining in raising £3,000, under the joint power for the husband, he covenanted not to charge by the power reserved to him alone or any other power whatsoever during her life, and so long as said £3,000 should remain unpaid, without her consent. After her death he by deed poll did charge with £2,000 more, to be paid to his executors for debts, etc, and otherwise in performance of his will, or as he should appoint by it; and died, leaving his second wife executrix, without taking notice by his will of the charge: but the deed poll was found uncancelled among his papers: the £2,000 well charged, and went to the executrix without a special appointment. Charge well created by settlement, though for a volunteer, not revoked by general revocation of the uses under a power for the mere purpose of partition of joint estate, and resettling to the same uses the separate part to be taken on partition.

Uxbridge (Earl) v Bayly (Lady) (1792) 4 Bro CC 13; 1 Ves 499; 29 ER 753

1158 On powers in original settlement — Whether extinguished — Power of sale — Where new powers created

Lands were settled, subject to a power of sale in trustees, with the consent of the tenant for life. A recovery was afterwards suffered, in which the tenant in tail under the settlement was vouched, and by the recovery deed it was agreed that the recovery should enure in confirmation of the estates created by the settlement, which were antecedent to the estate tail, and in confirmation of the powers annexed to those estates, and subject thereto, to such uses as the tenant for life and tenant in tail should appoint. The tenant for life and tenant in tail afterwards exercised their power of appointment, and the trustees concurred with them in a conveyance of the lands, and they thereby created new powers of sale: *Held* the power of sale in the original settlement was not destroyed.

Roper v Halifax (1817) 8 Taunt 845; 129 ER 612

ANNOTATION **Consd** Hill v Pritchard (1854) Kay 394

1159 On powers in original settlement — Whether extinguished — Power of sale

By marriage settlement, dated December 1806, certain manors and lands were limited to the husband for life; remainder to the wife for life; remainder to the use of the first and other sons of the marriage successively in tail male; remainder in case the wife should survive the husband, to her in fee; but if she should die in the lifetime of her husband, remainder to the daughters successively in tail male; remainder to the use of such persons related by blood or consanguinity, and in such estates or interests, and in such manner, and charged with sums of money in favour of such persons so related, as she by her will might appoint; and in case of no such appointment to her in fee. The settlement also contained a power for the trustees there named, at the request, and by the direction of the husband and wife, or the survivor, to sell or exchange the settled estates, and for the purpose, to revoke all and any of the uses contained in the settlement; and also a convenant by the husband for further assurance on his part, and that of his wife, and all persons claiming under him. In pursuance of this settlement, certain fines were levied. By deed dated March 1807, reciting the settlement, and the fines levied in pursuance thereof, and the limitations therein contained, and further, that the wife was desirous of acquiring an absolute power of appointment over the manor, etc, comprised in the settlement, in the event of her surviving, or dying in the lifetime of her husband, and there being a general failure of issue of her body, inheritable to the manors, etc, under the settlement, the husband and wife covenanted to levy certain fines, *sur conusance de droit come ceo*, with proclamations, to JG and his heirs, of all the manors, etc, comprised in the settlements: which fines were to operate, and to be taken to operate first for corroborating the uses contained in the settlement antecedently to the limitations to the use of the wife in fee simple, and subject thereto to the use of such persons, etc, as the wife by will or deed might appoint. In pursuance of this latter deed, several fines *come ceo* were levied by the husband and wife: *Held* under these circumstances, these latter fines did not operate to extinguish, destroy, or suspend the right or power of the husband and wife, and the survivor of them, to request and direct a sale or exchange of the settled estates under the powers for that purpose contained in the settlement, so as to prevent an exercise of those powers by the trustees.

Jersey (Earl) v Deane (1822) 5 B&Ald 568; 106 ER 1298

ANNOTATIONS **Consd** Davies v Bush (1825) M'Cle&Yo 58; Tyrrell v Marsh (1825) 3 Bing 31

1160 On powers in original settlement — Whether extinguished — Power of sale — Where powers expressed to be preserved

An estate was devised to uses to secure certain annuities, and subject thereto in strict settlement, with power for trustees to sell at the request of the tenant for life under the will. The estate was disentailed and resettled, the existing life estate being postponed to

certain charges and the powers of the will being expressed to be kept alive: *Held* the trustees for sale and the tenant for life could make a good title.

Re Wright's Trustees & Marshall (1884) 28 Ch D 93; 54 LJ Ch 60; 51 LT 781; 33 WR 304

ANNOTATIONS **Consd** Re Cornwallis-West & Munro's Contract [1903] 2 Ch 150; Re Constable's SE [1919] 1 Ch 178; Re Meeking, Meeking v Meeking [1922] 2 Ch 523; Parr v A-G [1926] AC 239

1161 On powers in original settlement — Whether extinguished — Power of sale

Re Wimborne (Lord) & Browne's Contract no 1069 ante

1162 On powers in original settlement — Whether extinguished — Power of sale — Where life estate extinguished

Re Cope & Wadland's Contract no 1759 post

1163 On powers in original settlement — Whether extinguished — Power to charge

A, tenant for life, and B, tenant in tail, of estates subject to prior charges, suffered a recovery, and by a deed of 1793, resettled the estates in strict settlement, and power was given to A to charge the estates with £3,000, and to B to charge the estates with £6,000 respectively, for their own benefit. The deed contained a joint power to A and B of revocation and new appointment. A and B by deed revoked "all the uses, trusts, limitations, intents and purposes," by the deed of 1793 limited; and declared that the estates, "subject to the several charges and incumbrances created," should enure to the new uses: *Held* the power to charge the £3,000 and £6,000 was not thereby revoked.

Evans v Evans (1853) 22 LJ Ch 785; 21 LTOS 14; 1 WR 215, LC&LJJ

1164 On powers in original settlement — Whether extinguished

Re Constable's Settled Estates no 1074 ante

1165 On proviso in original settlement — Condition for determination of limitations — Of one of two estates

Harrison v Round no 1614 post

1166 On restraint on anticipation — Insertion of clause ordered — On application for payment out of trust funds

Under a marriage settlement trust funds, in the events which had happened and by virtue of an appointment, stood limited upon trusts for A for life, for her separate use without power of anticipation, remainder to B absolutely. The trust funds had been paid into court in a suit instituted to carry out the trusts of the settlement. On B attaining twenty-one, A and B executed a resettlement by which the trust funds were limited upon trusts for A for life, remainder to B absolutely. On a petition for payment out of the trust funds to the trustees of the resettlement, the court made the order subject to the insertion in the resettlement of a clause, similar to that contained in the original settlement, restraining A from anticipating her life interest.

De Martana v De Martana (1875) 33 LT 685; 24 WR 220

1167 On estate under original settlement — Life estate

Re Wright's Trustees & Marshall no 1160 ante

1168 On estate under original settlement — Life estate

Re Cornwallis-West & Munro's Contract no 1073 ante

1169 On estate under original settlement — Life estate

Re Constable's Settled Estates no 1074 ante

1170 On estate under original settlement — Life estate

Under the will of testator, who died in 1870, real estate was devised to the use of A for life, and after his death to the use of his sons successively in tail male. On 4 November 1895, executing a disentailing assurance conveying the property to a grantee to hold to such uses as A and B should jointly appoint. By a settlement dated 19 December 1895, the property was appointed and conveyed to such uses and upon such trusts and subject to such powers as A and B should jointly appoint, and in default of such appointment to the use of A for life by way of restoration and confirmation of his life estate under testator's will, and subject thereto to the use of B for life with remainder to the use of his sons successively in tail male. A died in 1920 possessed in his own right of real and personal estate. The Crown claimed that on A's death his own estate and the settled property fell to be aggregated under Finance Act 1894 (c 3) s 4, so as to form one estate for the purposes of estate duty. Defendants contended that the settled property passed on the death of A, not under the resettlement, but under the will of testator, who died before 1 August 1894, and that by virtue of s 12(2) of the Finance Act 1900 (c 7) s 12(2), and Finance Act 1907 (c 13) s 16 (repealed), the settled property did not fall to be aggregated with A's own estate, but was liable to estate duty as an estate by itself: *Held* (1) the life estate devised to the use of A for life by the will of testator was not disturbed by the resettlement; but the settled estate passed on the death of A under the resettlement, and therefore A's free

estate, and the settled estate of which he was tenant for life fell to be aggregated.

Parr v A-G [1926] AC 239; [1925] All ER 578; 95 LJKB 417; 134 LT 321; 42 TLR 217, HL; affg SC sub nom

A-G v Parr [1924] 1 KB 916, CA

1171 On estate under original settlement — Tenancy in tail — Right to rent-charge

By his will dated 16 June 1910, testator settled the B estates to the same uses as were limited by a settlement of 21 July 1893, of other estates under which they stood limited at testator's death to the use of his daughter V in tail male with remainder to her sister F in tail male with divers remainders over. He also devised other property to the use that his trustees should receive a rentcharge "during such period or periods continuous or discontinuous" as either of them, the said V and F, "shall be tenant for life in possession or tenant in tail male or in tail in possession under this my will" of the B estates and pay the same to such one of them, the said V and F, "as shall for the time being, be tenant for life in possession or tenant in tail male or in tail in possession under this my will" of the B estates. By a disentailing assurance dated 22 July 1918, V disentailed the B estates and resettled them to such uses as she should appoint or in default of and until and subject to any such appointment to the uses which immediately before the execution of the disentailing assurance were subsisting or capable of taking effect: *Held* V did not as a result of the disentailing assurance cease to be tenant in tail male in possession of the B estates under testator's will, and, therefore, the rentcharge given to her by the same will had not been determined by the execution of the disentailing assurance.

Re Meeking, Meeking v Meeking [1922] 2 Ch 523; 92 LJ Ch 68; 128 LT 585

1172 On statutory power of sale

By deed dated in 1861, lands were settled to the use of A for life with remainder to his first and other sons successively in tail male. In exercise of a power reserved to him by this deed, A, upon his marriage in 1865, by deed charged the lands with a jointure rentcharge for his wife, and with portions for his younger children, both charges being secured by terms of years in the usual way. In 1889, in order to carry out a family arrangement, A and B, his eldest son, by deed No 1 disentailed the lands, and by deed No 2, in exercise of a power contained in deed No 1, appointed them to the use of A for life, with remainders over, without, however, in terms expressing that this life estate was limited to A in restoration or continuation of his former life estate: *Held* (1) deed No 2 of 1889 should not under the circumstances be treated as the only settlement of the property, but should be treated as constituting, together with the previous deed of 1861, 1865 and 1889, a "settlement" within Settled Land Act 1882 (c 38) ss 2 and 20 (repealed); and accordingly it was competent for A to sell and make good title to the lands discharged from the jointure and portions, upon trustees of the settlement being appointed to receive the purchase-money.

(2) The words in Settled Land Act 1882 (c 38) s 2(1) (repealed) "stands for the time being limited to or in trust for any persons by way of succession," had no technical force, and, according to their natural meaning, included the case of a jointure and portions for younger children limited to arise on or after the death of a tenant for life and the terms of years limited to trustees to secure them.

(3) There may be at the same time a more comprehensive settlement consisting of several deeds, and a less comprehensive settlement constituted by one only of the deeds.

(4) The effect of Settled Land Act 1882 (c 38) s 50 (repealed), was that the statutory power of sale given to a tenant for life by the Act of 1882 (repealed) was not annexed to his estate as in ordinary conveyancing, but was vested in him once for all by the Act, was incapable of being assigned or released, and continued exercisable by him notwithstanding assignment by him of his estate: so that, although the life estate of A must have been treated as a new life estate arising under the resettlement, the statutory power of sale vested in A before the resettlement was not affected by it.

(5) Mortgagees who have actually lent their money on the security of the land are regarded as strangers to the settlement and are not to have the security which they bargained for on the land itself transferred to the purchase-money at the will of the tenant for life (*per curiam*).

Re Mundy & Roper's Contract [1899] 1 Ch 275; 68 LJ Ch 136; 79 LT 583; 47 WR 226; 43 Sol Jo 151, CA

ANNOTATIONS As to (1) **Apld** Re Wimborne & Browne's Contract [1904] 1 Ch 537; Re Monckton's Settlmt, Monckton v Calder [1917] 1 Ch 224 **Consd** Parr v A-G [1926] AC 239. As to (2) **Apld** A-G v Owen, A-G v Coulson [1899] 2 QB 253; Re Campbell [1902] 1 KB 113 **Consd** Re Carnarvon's Chesterfield SE, Re Carnarvon's Highclere SE [1927] 1 Ch 138. As to (4) **Apld** Re Cope & Wadland's Contract [1919] 2 Ch 376. As to (5) **Consd** Re Dickin & Kelsall's Contract [1908] 1 Ch 213 **Expld** Re Davies & Kent's Contract [1910] 2 Ch 35

3 Referential trusts and powers

LAW See Halsbury's Laws (4th edn) vol 42 para 719 et seq

CROSS REFERENCE See TRUSTS vol 48 (reissue) no 755 et seq (referential trusts arising)

1173 Construction of referential trusts — Referential trusts in same instrument

Testator bequeathed his residuary estate, referred to as "the residuary trust funds," as to two-thirds in trust for the children and remoter issue of his son as his son should appoint, and in default of appointment for the children of his son as therein mentioned, but so that no appointee should take any part of the trust funds remaining unappointed without bringing the share appointed into hotchpot, and as to a moiety of the other third upon "the like trusts" in favour of his son and issue as had previously been declared of the two-thirds. In the events which happened A became entitled to the two-thirds under an appointment, and to a share in the one-third in default of appointment: *Held* there was no presumption or rule of law applicable to a case of this kind, and upon the true meaning and effect of the will the hotchpot clause applicable to the two-thirds had no reference to anything except the two-thirds, and the hotchpot clause referentially incorporated in the trusts of the moiety of the one-third had reference only to the moiety of the one-third, so that A could take her share in the one-third without bringing the two-thirds into hotchpot.

Re Wood, Wodehouse v Wood [1913] 2 Ch 574; 83 LJ Ch 59; 109 LT 347; 57 Sol Jo 835, CA

ANNOTATION **Distd** Re Fraser, Ind v Fraser [1913] 2 Ch 224

1174 Construction of referential trusts — After variation of original settlement

Testator bequeathed his residuary estate upon trust for his children in equal shares and declared that as to the share of his son E a moiety thereof should be held upon trust to pay and make over the same to the trustees of a settlement dated 23 September 1916, to be held by them upon the trusts of such settlement, so far as the same should be then applicable and capable of taking effect. By the settlement so referred to, which was made after the marriage of E with his wife G, a certain fund was vested in the trustees thereof under which E took the first life interest and upon his death G took an interest during her widowhood with remainders over upon trusts for E's children by his wife G or any future wife. Testator died in 1917, and in 1928 the marriage was upon G's petition dissolved, and an order was made under which the trusts of the settlement were varied; the effect of this variation being to deprive E of any interest under the original trusts thereof, to give G an immediate life interest, and to vest the settlement fund after her death in P, the only child of her marriage with E: *Held* upon the proper construction of testator's will, the share of E in his father's residuary estate ought to be held upon the trusts of the settlement as originally framed without regard to the other varying those trusts.

Re Gooch, Gooch v Gooch [1929] 1 Ch 740; [1929] All ER 394; 98 LJ Ch 285; 141 LT 150

1175 Whether accretion to original trust — Separate instrument

Where testator gave a share of his residuary estate to the trustees of his will upon trust for his married daughter, and declared that his trustees should hold the same "upon the same trusts and with and subject to the same powers" as were in her marriage settlement contained with respect to the funds thereby settled: *Held* inasmuch as there are different instruments, different settlors, different funds, and different sets of trustees, the rule of construction to be applied was to read into the will the trusts and powers of the settlement as though they were therein set out, and there was consequently no accretion to the funds of the settlement, but testator had by his will created a new and distinct settlement.

Re Beaumont, Bradshaw v Packer [1913] 1 Ch 325; [1911–13] All ER 144; 82 LJ Ch 183; sub nom *Re Beaumont, Bradshaw v Packer* [1913] 1 Ch 325; 181; 57 Sol Jo 283

ANNOTATIONS **Consd** Re Campbell's Trusts, Public Trustee v Campbell [1922] 1 Ch 551; Re Hickman's Will Trusts, Re Playfair, Palmer v Playfair [1950] 2 All ER 285

ii RENTCHARGES AND ANNUITIES

1 Pin money

LAW See Halsbury's Laws (4th edn) vol 42 para 722

CROSS REFERENCES See HUSBAND & WIFE vol 27(1) (2nd reissue) no 1459 et seq (savings out of pin money), no 1919 et seq (nature of pin money), nos 1968, 1996, 1997 (recovery of arrears)

2 Jointure

LAW See Halsbury's Laws (4th edn) vol 42 para 723

CROSS REFERENCE See HUSBAND & WIFE vol 27(1) (2nd reissue) no 3079 (release of jointure in separation deed: necessity for acknowledgment)

1176 Nature of — Benefit to wife — Taking effect before or after death of husband

The popular notion of a jointure [is] something from which [the wife] derives no benefit till her husband's death (*Pollock CB*).

Jamieson v Trevelyan (1854) 10 Exch 269; 23 LJ Ex 281; 156 ER 445

ANNOTATION **Consd** Re De Hoghton, De Hoghton v De Hoghton [1896] 2 Ch 335

1177 Nature of — Benefit to wife — Taking effect before or after death of husband — Life estate

Primâ facie, a jointure is an estate to the wife for life to take effect on the death of the husband.

It is true that the word [jointure] is not necessarily confined to a provision only to commence at the death of the husband (*Stirling J*).

Re De Hoghton, De Hoghton v De Hoghton [1896] 2 Ch 385; 65 LJ Ch 667; 74 LT 613; 44 WR 635; 40 Sol Jo 514

ANNOTATION **Consd** Schlesinger v Schlesinger [1960] 1 All ER 721

1178 What amounts to valid limitation — Life estate in remainder

(1) A limitation to the husband for life, remainder to B for life, or to the use of A for life, remainder to the wife for life is no jointure, though A dies, leaving the husband.

(2) So of an estate to the wife for the life of another.

(3) An estate to husband and wife and the heirs male of their bodies, or to the wife during her widowhood, or in fees, are good jointures.

(4) On eviction off a jointure in fee, the widow shall be endowed for life only.

Vernon's Case (1572) 4 Co Rep 1 a; 3 Dyer 317 a; 76 ER 845

1179 Jointure charged on reversionary life interest — Liability on becoming interest in possession — As against incumbrancers without notice

A tenant for life, on his marriage, appointed, in pursuance of a power, a jointure and portions payable after his death. By another deed he charged an additional jointure and portions on certain estates "to which he would become entitled on the death of his father," and covenanted to convey such estates and all other hereditaments to which he might be entitled for an estate of freehold to trustees to such uses for securing the additional jointure and portions as were contained in the first settlement: *Held* in the absence of any fraud or misrepresentation, the wife and children were not entitled as against incumbrancers without notice to any lien or charge on the settlor's life estate.

Ford v Tynte (1865) 2 De GJ&Sm 557; 6 New Rep 51; 34 LJ Ch 452; 12 LT 512; 11 Jur NS 402; 46 ER 492; sub nom

Ford v Tynte, Ford v Adams, Jones v Tynte, Adams v Tynte, Hodge v Tynte (1865) 13 WR 643, LJJ

1180 Exoneration of jointure from deductions — What deductions included — Fluctuating charges

(1) Where a person had a power to make a jointure without any deduction for any charges imposed, or to be imposed, parliamentary or otherwise; this does not mean only such as are fixed and certain, but the land tax, though a fluctuating one, is clearly within the power.

(2) Articles are considered in this court as minutes only, which the settlement may explain more at large.

(3) No difference between articles unexecuted *in toto* or in part, for the ground the court goes upon is what is covenanted to be done is considered as done.

Blandford (Marchioness) v Marlborough (Dowager Duchess) (1743) 2 Atk 542; 26 ER 725

1181 Appointment free of duty

By his will made in 1871, a testator who died in 1872 gave power to the life tenant of his estate by deed or will "to appoint to any woman whom he may marry . . . for her life or for any less period a yearly rent charge . . . by way of jointure . . . not exceeding in the whole . . . the yearly sum of £1,500 to be charged upon all or any of the said . . . hereditaments hereinbefore devised in strict settlement . . ." By a settlement dated 6 October 1923, the life tenant in exercise of the said power appointed to his wife in case she should survive him during the residue of her life "the yearly rent charge of £1,000 by way of jointure to be charged upon all the . . . hereditaments and premises now subject to the subsisting limitations of the said will . . . to be paid without any deduction (except for succession duty if any) . . .". In 1953 the life tenant died and estate duty became leviable on the settled property. Under Finance Act 1894 (c 30) s 14(1), a proper rateable part of the estate duty might be recovered by the person who had paid the duty from the person "entitled to any sum charged on such property . . . under a disposition not containing any express provision to the contrary". On the questions whether the proper rateable part of the estate duty leviable on the death of the life tenant was recoverable from the jointress, and if not, whether the jointure was valid: *Held* (1) the direction in the settlement of 1923 that the rent charge was to be paid "without any deduction (except for succession duty if any)" was an "express provision to the contrary" within Finance Act 1894 (c 30) s 14(1), and the settlement was a disposition under which the jointure was charged within s 14(1), notwithstanding that the jointure was created by the joint effect of testator's will and of the exercise of the power of appointment by the settlement; consequently s 14(1)

was excluded and jointress was not liable to bear any part of the estate duty; (2) the disposition, so operating, was within the power of jointuring conferred by testator's will.
Re Lonsdale's Will Trusts, Lowther v Lowther [1960] Ch 288; [1959] 3 All ER 679; [1959] 3 WLR 879; 103 Sol Jo 939, CA

ANNOTATION **Distd** Re Pauler's Will Trusts [1967] 1 All ER 854

1182 Rights — Right to estate for life — Beneficial title in settlor — Defective legal title
Newcastle (Earl) v Suffolk (Earl) (1630) 1 Rep Ch 50; 21 ER 504

1183 Rights — To hold over on paying off mortgage
Where a jointress was of land mortgaged between B and S; decreed that the jointress paying the mortgage, she should hold over till she and her executor should be repaid with interest.
Bertue v Stile (1676) 1 Cas in Ch 271; 22 ER 796

1184 Rights — To lease
Power of jointress to make leases not expressed cannot be implied.
Roe d Bolton (Duke) v Grantham (1761) 3 Burr 1259; 97 ER 820

1185 Rights — To allowance for children — Jointure and maintenance in arrear — Appropriation of payments on account generally
A is entitled to a rentcharge issuing out of a real estate, and to an allowance out of the same estate for the maintenance of her children during their minority. The tenant for life suffers both the rentcharge and the maintenance to run greatly in arrear, but from time to time pays money to A on account generally. In this case, A is entitled to carry the money so received to such of the two accounts as she pleases.
Morgan v Jones (1785) 1 Bro Parl Cas 32; 1 ER 397, HL

1186 Rights — Effect of prior deed of separation — Granting annuity
By articles of separation, dated in June 1834, defendant agreed that he would, on or before 1 February 1835, effectually, by a charge on freehold estates, or by investment of an adequate sum of money, or by the best means which might then be in his power, secure to plaintiff, his wife, an annuity of £1,000. In December 1834, a deed of arrangement was executed between defendant and his son, by which certain family estates were conveyed to trustees to raise money for the payment of various incumbrances, afterwards to such uses as defendant and his son should appoint, and in default of appointment to defendant for life, and then to his son absolutely, with a power for defendant to jointure his then present or any future wife to the extent of £1,000 per annum: *Held* plaintiff was entitled to have her jointure raised out of the estates, as against defendant and his son.
Wellesley v Wellesley, Mornington (Countess) v Mornington (Earl) (1849) 17 Sim 59; 18 LJ Ch 442; 13 LTOS 419; 60 ER 1050; affd (1852) 1 De GM&G 501, LJJ; subsequent proceedings (1853) 4 De GM&G 537, LJJ

Scottish, Irish and Commonwealth Cases

1187 Nature of — Benefit to wife after husband's death
Langley v Langley (1839) 2 I Eq R 313 (IR)

1188 What property liable — Jointure charged on two properties
Sullivan v Sullivan (1845) 8 I Eq R 685; 2 Jo&Lat 769 (IR)

1189 Priority
Creed v Carey (1857) 7 I Ch R 295; 10 Ir Jur 128 (IR)

1190 Priority
A jointure does not necessarily take precedence of other estates in a settlement.
Re Annaly's (Lord) Estate, Scottish Equitable Assurance Co Ltd, Petitioners (1889) 23 LR Ir 481 (IR)

1191 Priority
Re Creagh's Estate, Lane, Petitioner (1890) 25 LR Ir 128 (IR)

1192 Whether interest payable on arrears
Re Ussher's Estate [1918] 1 IR 259 (IR)

1193 What amounts to valid exercise
Purcell v Purcell (1842) 2 Dr&War 217 (IR)

1194 What amounts to valid exercise
A had a power by deed or will to charge a jointure, not exceeding £100 a year for every £1,000 which he had actually and *bonâ fide* received with his wife. On his marriage, a life estate of his wife in a chattel interest in lands was conveyed to him for life. A received before the date of the will about £2,000 out of the rents of said lands: *Held* the charge by his will of a jointure of £200 a year was valid if £2,000 was received, and if said sum was not received the jointure should abate proportionally.
Brereton v Barry (1860) 11 I Ch R 97 (IR)

1195 When power arises
Declaration that tenants for life "shall and may at his or their marriage" have certain powers of jointuring and settling portions: *Held* such powers arise so soon as the marriage takes place, and may be exercised at any subsequent period.
Re Creagh's Estate, Lane, Petitioner (1890) 25 LR Ir 128 (IR)

3 Annuities

LAW See Halsbury's Laws (4th edn) vol 42 para 724

CROSS REFERENCE See RENTCHARGES & ANNUITIES vol 39(1) (reissue) no 1957 et seq

iii PORTIONS

1 Nature of portions

LAW See Halsbury's Laws (4th edn) vol 42 para 725

CROSS REFERENCE See EQUITY vol 20(3) (2nd reissue) no 1770 et seq (presumption against double portions)

1196 Nature and definition — An advancement

Jenks v Holford (1682) 1 Vern 61; 23 ER 311, LC

ANNOTATION **Consd** Hume v Edwards (1746) 3 Atk 450

1197 Nature and definition — Chargeable on real estate

A provision for younger children is chargeable on the real estate.

Sarth v Blanfrey (Lady) (1695) Gilb Ch 166; 25 ER 117

1198 Nature and definition — Estate in land

The word portion, with respect to younger children, includes an estate in land as well as in money, and this land, in the computation of the estate to be distributed, is to be added to, and computed with other parts of it; but with respect to the eldest son, whatever land came to him from his father by descent, or otherwise, he is to have his share, without any consideration of the value of such land (*Lord Cowper C*).

Lloyd v Twitsham (1715) 2 Eq Cas Abr 438; 11 Vin Abr 192; 22 ER 373, LC

1199 Nature and definition — Estate in money

Lloyd v Twitsham no 1198 ante

1200 Nature and definition — Surplus rents not considered as portion

Surplus cannot be considered as such [portion], for being for all the children it takes in the elder also, and the elder, if alone surviving, would have the whole (*Lord Hardwicke C*).

Vane v Vane (1747) 1 Ves Sen 57; 27 ER 889, LC

1201 Nature and definition — Sum secured to children — Out of property settled upon parents

(1) Where a gift to children was not made or secured to them out of property springing from or settled upon their parents, and there was nothing in the nature or context of the instrument to impress upon the gift the character of a portion, it was not a portion within Accumulations Act 1800 (c 98) s 2 (repealed), and the circumstances, that the gift was a part of the estate of which the parent was the residuary legatee, had not the effect of giving to the gift the character of a portion.

(2) There was no reason, and it was contrary to the policy of Administration Act 1800 (c 98) (repealed), to put a strained or forced construction on the term "portions for children" contained in Accumulations Act 1800 (c 98) s 2 (repealed).

Jones v Maggs (1852) 9 Hare 605; 22 LJ Ch 90; 19 LTOS 213; 16 Jur 325; 68 ER 654

1202 Discharge of land from portion — Insolvency of trustee after raising amount

Trustee appointed for raising and paying a portion of £500 to A. Trustee enters and gives judgment to A for paying the £500 to A when raised; the trustee raises the £500 and more, and becomes insolvent. *Quaere*: whether the land is discharged.

Harrison v Cage (1688) 2 Vern 85; 23 ER 664

1203 Portion charged on two estates — Contribution from both

By a settlement, two estates, one in Norfolk, and the other in Suffolk, are subjected to the raising of a portion of £2,000 to a daughter, by a term of 500 years, commencing after the respective decease of two several lives; one life upon the Suffolk estate, and the other upon the Norfolk estate. The life on the Suffolk estate fell, and the daughter bringing her bill for the £2,000, J to whom that estate was come, paid the £2,000. Afterwards the life on the Norfolk estate fell, and the fee simple thereof descended to the daughter. J that paid the £2,000 shall have contribution out of the Norfolk estate, in proportion to its value, only the Suffolk estate shall be valued as an estate in possession, and the Norfolk estate as an estate in reversion.

Heveningham v Heveningham (1697) 2 Vern 355; 23 ER 824, LC

1204 Decree for raising portions — Assignability

Walter v Saunders (1703) 1 Eq Cas Abr 58; 21 ER 872

ANNOTATION **Consd** Ineson v Moulston (1742) 9 Mod Rep 373

1205 Term for raising portions — Conditions precedent to term — Whether happening of contingency immaterial

Andrews v Stroud (1706) Holt KB 623; 11 Mod Rep 88; 90 ER 1245; sub nom

Strode v Andrews (1706) 6 Bro Parl Cas 46, HL

1206 Portion limited after estate tail — Barring of entail — Security for portion

Frewin v Charleton (1712) 1 Eq Cas Abr 386; 21 ER 1121, LC

ANNOTATIONS **Consd** Barnard v Large (1781) 1 Bro CC 534; Moody v Walters (1809) 16 Ves 283

1207 Charge in nature of portion

A on the marriage of his son, settles his estate in the usual manner, but subject to a proviso, that if A did not, in his lifetime, dispose of his daughters in marriage, or raise portions for them out of the profits of his estate, he might at any time, during his life, by will, deed, or other writing, charge the estate so settled, with £1,500, as portions for his daughters. At the time of making this settlement, A had two daughters, both of whom afterwards, and in his lifetime, married; but instead of giving them any portions in hand, he executed a deed, charging the estate with £750 apiece, payable to their respective husbands: *Held* the husbands were entitled to recover these portions with interest.

Odell v Graydon (1721) 6 Bro Parl Cas 64; 2 ER 935, HL

1208 Payment — Presumption of payment — After long period

Portions which became due in 1673, sued for this court in 1717, such a length of time creates a strong presumption they are paid, and it almost amounts to proving a negative to induce the court to believe they are still unpaid.

Standish v Radley (1741) 2 Atk 177; Barn Ch 463; 26 ER 511, LC

1209 Payment — On settlement being made — Whether interdependent conditions

Agreed in marriage articles, that a portion shall be paid, and a settlement made; but that payment is to be withheld, unless the settlement be made within a limited time. After the marriage, the settlement is not proceeded with: *Held* the latter clause could only be intended to hasten the marriage settlement, and the right to the portion is independent of its observance.

Hendrick v Winter (1754) 3 Keny 96; 96 ER 1321, LC

1210 Costs of raising portion — Payable out of estate

Michell v Michell no 1309 post

1211 Investment of fund to satisfy portions — Payable on death of tenant for life — Right to dividends during life of tenant for life

£25,000, part of the produce of a sale under Incumbered Estates Act, having been set aside by the commissioners and invested in Consols to satisfy portions of that amount, which were payable out of the estate upon the death of the tenant for life: *Held* the tenant for life was entitled as against the portioners to the dividends in the meantime.

Wellesley v Mornington (Earl) (1857) 27 LJ Ch 150; 6 WR 177; sub nom

Mornington v Wellesley (1857) 4 Jur NS 6

1212 Ultimate trust for sum raised as portion — Sum devolves as personalty

T by a settlement covenanted with the trustees that, in the event of his dying in the lifetime of his daughter C before she should have attained twenty-one or married, his heirs, executors, or administrators should within six months after his decease pay to the trustees £10,000 with interest thereon from the day of his decease; and it was declared that, in the event of C having no child who should attain twenty-one or marry, then the fund, after her decease, should form part of T's personal estate. By the same deed T charged all his real estate with this sum. T afterwards, in consequence of a requisition made by persons who were advancing him money on mortgage, paid the £10,000 to the trustees, who released the estate from it. The trustees subsequently lent part of this sum to T himself, on mortgage of part of the estates originally subject to the charge, and the rest of it, to other persons. T died leaving a will, by which he bequeathed his personal estate to plaintiff and his real estate to the defendant. C died an infant and unmarried within five months after his death: *Held* no part of the £10,000 belonged to the devisees of the real estate, but that the whole belonged to the legatee of the personalty.

Tucker v Loveridge (1858) 2 De G&J 650; 27 LJ Ch 731; 31 LTOS 351; 4 Jur NS 939; 6 WR 786; 44 ER 1142, LJJ

ANNOTATION **Consd** Re Somerset, Tynne v St Maur (1886) 55 LT 753

1213 Whether raisable out of life estate

Ford v Tynte no 1179 ante

1214 Merger — Life tenant heir of deceased portionist — No intention to keep portion alive

The owner of the fee simple of certain real estate created a term to secure the raising of certain sums charged in favour of two of his younger sons if and when they should respectively attain the age of twenty-one years, to be paid on their respectively attaining that age, or on the death of their father, whichever should happen last. By the same settlement he covenanted with the trustees that the annual value of his settled estate should never fall below a certain sum. One of the sums vested in one of the sons on his attaining twenty-one years, but he subsequently died intestate during the lifetime of his father, leaving his father his sole next-of-kin. The

father did not take out administration to his son. The father subsequently died, having by his will devised the property out of which the charges were raisable, but without having made any mention of the existence of the charges: *Held* under the circumstances, there was no indication of any intention on the part of the father to treat the portion coming to him as sole next-of-kin of his son as still subsisting; it was to the benefit of the father that the portion should sink back into the fee simple; and it had so sunk back accordingly.

Re French-Brewster's Settlements, Walters v French-Brewster [1904] 1 Ch 713; 73 LJ Ch 405; 90 LT 378; 52 WR 377

2 Children entitled to portions

A Generally

LAW See Halsbury's Laws (4th edn) vol 42 para 726 et seq

1215 Power to raise portions for daughters on failure of issue male — Son surviving and dying without issue

Goodwin v Clark (1661) 1 Lev 35; 83 ER 284; sub nom

Goodier v Clerke (1661) 1 Keb 73, 78

ANNOTATION **Consd** Andrews v Stroud (1706) Holt KB 623

1216 Trust for children unmarried or unprovided for at death of settlor — Slight provision for eldest son on marriage — Death without issue in lifetime of settlor — Portion passing to widow

Corbet v Morris (1665) 1 Rep Ch 254; 21 ER 565

1217 Settlement by widower to raise portions — Children of subsequent marriage entitled

Brathwaite v Brathwaite no 1279 post

1218 Portionist becoming entitled to inheritance — Whether portion merged

By a marriage settlement, lands are limited to the husband and wife, with remainder to their first, etc, son, and then a term for years to secure portions for daughters. The husband dies, leaving only a daughter, upon whom the inheritance descends. The daughter dies an infant and indebted, and disposes of her portion by her will. Equity relieves against the merger of the portion.

Powell v Morgan (1688) 2 Vern 90; 1 Eq Cas Abr 269 pl 11; 23 ER 668

1219 Portionist becoming entitled to inheritance — Whether portion merged

A daughter's portion secured by a trust term not extinguished by a devise of the lands to the daughter in tail.

Laurence v Blatchford (1703) 2 Vern 457; 23 ER 893

1220 Portionist becoming entitled to inheritance — Whether portion merged

Lands charged with a portion, afterwards descend to the party entitled to the portion; but this is no extinguishment of the charge, although the value of the lands greatly exceed the amount of the portion.

Rushout v Rushout (1725) 6 Bro Parl Cas 89; 2 Eq Cas Abr 655 pl 8; 2 ER 952, HL

ANNOTATIONS **Distd** Chester v Willes (1754) Amb 246. That case was attended with such particular circumstances that it could not be a precedent in any other (Lord Hardwicke C)

1221 Portionist becoming entitled to inheritance — Whether portion merged

(1) Certain estates stood settled upon A for life, with remainder to F for life, with divers remainders over for life, and in tail, with ultimate reversion to F in fee, with power to every tenant for life, either before or when he should become entitled to the actual freehold, to charge the estates with portions for younger children, but any exercise of the power by a tenant for life before becoming entitled to the actual freehold was to be ineffectual, unless he or his issue subsequently became so entitled. F, by his will, after referring to the power, "in exercise of the power and of all other powers," charged portions for his younger children, and made no disposition of the reversion. F died without issue in A's lifetime, whereby the intended exercise of the power failed. The intermediate remainders having also failed: *Held* as against F's heir, the ultimate reversion was well chared with the portions of F's will.

(2) A young child becoming the eldest son, but not living to enter into possession of the estates, held to be a younger child for the purpose of receiving a portion.

(3) Portions having been charged on a reversion in fee, and a person entitled to one of the portions having become also entitled to the reversion, the court refused to presume an intention to merge his portion, it appearing that the effect might be to give priority to those entitled to the remainder of the portions.

Sing v Leslie (1864) 2 Hem&M 68; 4 New Rep 17; 33 LJ Ch 549; 10 LT 332; 10 Jur NS 794; 71 ER 385

1222 Portionist disposing of settled property — Loss of portion

Whenever a son, entitled to an estate in remainder under a settlement of real property which, if it were

an estate in possession, would exclude him from sharing in any portions charged on the property, has exercised, by virtue of his estate in remainder, dominion over and disposed of the settled property, he at once becomes and remains excluded from the portions provision. In observing this principle the court will not measure the benefit to himself or the detriment to others which the son so disentailing the settled property creates.

Re Leeke's Settlement Trusts, Borough v Leeke [1937] Ch 600; [1937] 2 All ER 563; 106 LJ Ch 228; 157 LT 481; 53 TLR 735; 81 Sol Jo 419

ANNOTATION **Consd** Re Gunters Settlement Trusts, Owen v Pritchard-Barrett [1949] 1 All ER 680

1223 Power to charge lands for children living at father's death — Child en ventre sa mere entitled

(1) The eldest daughter, where there is a son, or where the estate by a settlement goes all to a remainderman, is a younger child in equity.

(2) Power to charge lands for portions for younger children living at the father's death. A child *en ventre sa mère* is a child within the power.

(3) Where lands are settled on A for life, remainder to such woman as he should marry for life, remainder over, with power to charge the premises with any sum of money, such power, unless there be a clause inserted to the contrary, will, like a power of leasing, overreach all the estates.

Beale v Beale (1713) 1 P Wms 244; 24 ER 373, LC

1224 Eldest daughter — Where son living — Or estate going to remainderman

Beale v Beale no 1223 ante

1225 On right to take under will

By a will made in the United States "in American form" testator, who was born in Scotland and had become an American citizen, but had spent the last four years of his life in England, directed the trustees thereof, after the death of testator's wife, to pay the capital of the trust estate "to my daughter H if living and if not then in equal shares to her child P and any other child or children of my said daughter her surviving who would be entitled to share in her estate had she died intestate a resident of the state of New York and possessed of personal property." By a subsequent English will he gave his residuary estate to plaintiff bank on trust subject, as therein mentioned for H "absolutely if she be living at my death but if she be then dead . . . for all and every the children or child of my said daughter living at my death who being sons or a son have attained or shall attain the age of 21 years or being daughters or a daughter have attained or shall attain that age or previously marry and if more than one in equal shares . . ." By the latter will testator provided that it should be read in conjunction with and not in any way as overriding or revoking (except and in so far as might be necessary for the purpose of giving effect to the directions concerning the disposition of his English estate therein contained) his will already executed to deal with his American estate. H was domiciled in New York and married, but could not have children—as her husband and testator knew. A year before the making of the American will she and her husband had adopted the boy, P. In the year when the English will was made they adopted a girl, I. Testator habitually referred to P as H's child, to I as P's sister and to himself as the grandfather of both P and I. He died in 1943, and was predeceased by his wife and by H, who was alive at the date of the English will. On a summons to determine whether the residuary gift in the English will took effect in favour of P and I or whether testator's residuary estate in England was undisposed of: *Held* construing the English will on the footing that testator was domiciled in England (1) Adoption of Children Act 1926 (c 29) s 5(2) (repealed) did not exclude, in the case of a child adopted under the Act, any evidence which would have been admissible in the case of an illegitimate child, inasmuch as Parliament could not have intended to place an adopted child in a worse position than an illegitimate child; and the Act showed no reason for applying to adopted children principles different from those applicable to illegitimate children; (2) as, in the circumstances, which were well known to testator, it was impossible that any legitimate children could take under the bequest, the case fell directly within the principle stated by *Lord Cairns* in *Hill v Crook* (no 1228 post and applied by *Jenkins J*, in *Re Wohlgemuth* (Vol 51 WILLS (reissue) no 8865) and the residuary gift took effect in favour of P and I, the adopted children of H.

Re Fletcher, Barclays Bank Ltd v Ewing [1949] Ch 473; [1949] 1 All ER 732; [1949] LJR 1255; 93 Sol Jo 301

ANNOTATIONS **Apld** Re Gilpin, Hutchinson v Gilpin [1953] 2 All ER 1218 **Consd** Re Marshall, Barclays Bank Ltd v Marshall [1957] 3 All ER 172

1226 On right to take under will — "Children" — Contrary intention — Effect of surrounding circumstances

In 1949 a testator made a will by which he gave his residue to be divided equally amongst his seven named nephews and nieces, including Mrs H in equal shares *per capita* as tenants in common. Testator made a codicil on 1 September 1953, containing substitutionary provision whereby if any nephew or niece died in his lifetime leaving children living at his death, such children were to take by substitution the

deceased parent's share. Mrs H had two children, the first defendant born in 1948 and the second defendant born in 1950. Mrs H died on 17 September 1953. By an order made under Adoption Act 1950 (c 26) (repealed), on 11 November 1958, the first defendant was adopted by a stranger to the family. Testator made a new will on 10 July 1959, which incorporated the residuary provisions of the previous will and codicil. He made another similar will on 22 June 1963, and died on 3 December 1963. The question arose whether the first defendant was entitled to benefit under the residuary disposition. There was evidence that before making his wills in 1959 and 1963, testator was aware that Mrs H had died in 1953 and that the first defendant had been adopted; that some time after the will of 1959, in conversation with the widow of testator's brother, testator had referred to the first defendant as well as the second defendant as being entitled to share in testator's estate, and that, after the adoption, testator continued to be on intimate terms with the first defendant and to give him presents. Under Adoption Act 1958 (c 5) s 16(2)(*b*), testator's will had to be read as though the first defendant were not included in the reference to the children of Mrs H unless "the contrary intention appears": *Held* (1) the contrary intention required to satisfy the words "unless the contrary intention appears" in Adoption Act 1958 (c 5) s 16(2)(*b*) might appear from any surrounding circumstances which carried conviction to the mind of the court, but the effect of surrounding circumstances, if that was relied on to establish a contrary intention, must be really cogent and convincing; (2) the history of testator's testamentary dispositions was admissible in determining whether the relevant contrary intention appeared, and the evidence (*a*) that the scheme of testator's testamentary dispositions had remained unchanged in this respect since the codicil of 1 September 1953, and (*b*) that at some date after his will of 1959 (though not after his will of 1963) he had referred to the first defendant as being entitled to share in his estate, was sufficiently cogent to carry conviction of a contrary intention within s 16(2)(*b*) on the part of testator, *viz*, that the first defendant was entitled to benefit from his gift in favour of the children of Mrs H; accordingly the first defendant was entitled to half of the share of testator's residuary estate bequeathed originally in favour of Mrs H.

Re Jones' Will Trusts, Jones v Squire (or Hawtin Squire) [1965] Ch 1124; [1965] 2 All ER 828; [1965] 3 WLR 506; 109 Sol Jo 476

1227 On right to take under will — Whether child includes adopted child

Testator by his will, made on 7 October 1947, gave his residuary estate on trust, after the death of his daughter, "for such of them the child or children of my . . . daughter . . . as shall be living at the date of my death and shall attain the age of twenty-one years . . ." At the date of his will testator was eighty-six years old and his daughter was forty-seven. She had married in 1934, but the marriage was not consummated and she obtained a decree of nullity in December 1938. Thereafter she went to live with testator and in September 1947, adopted a child, who had been living with her since April 1947. Testator died in 1948, and the daughter died in 1959 without having remarried or adopted a second child. By Adoption of Children Act 1926 (c 29) s 5(2) "child" did not include an adopted child unless a contrary intention appeared. On the question whether the daughter's adopted child was entitled to benefit under the will: *Held* construing testator's residuary bequest in the light of the surrounding circumstances at the date of his will, the natural conclusion was that testator intended his daughter's adopted child to benefit, and the extreme improbability that she would marry again and have a child sufficed to exclude the primary meaning of "child" as being confined to natural and legitimate children; so, too, there appeared a contrary intention sufficient, for the purposes of Adoption Act 1926 (c 29) s 5(2) to justify the words "child or children" being read as referring to the adopted child and any other children which the daughter might adopt.

Re Jebb, Ward-Smith v Jebb [1966] Ch 666; [1965] 3 All ER 358; [1965] 3 WLR 810; 109 Sol 613, CA

1228 Whether gift invalid

No gift, however express, to unborn illegitimate children is allowed by law, nor under a gift good as to illegitimate children as a class will after born illegitimate children be permitted to take (*Lord Chelmsford*).

Hill v Crook (1873) LR 6 HL 265; 42 LJ Ch 702; 22 WR 137, HL; affg SC sub nom

Crook v Hill (1871) 6 Ch App 311, LJJ; subsequent proceedings (1876) 3 Ch D 773

ANNOTATIONS **Consd** Occleston v Fullalove (1874) 9 Ch App 147; Re Bolton, Brown v Bolton (1886) 31 Ch D 542; Re Horner, Eagleton v Horner (1887) 37 Ch D 695 **Apld** Re Lowe, Danily v Platt (1892) 61 LJ Ch 45 **Consd** Re Du Bochet, Mansell v Allen [1901] 2 Ch 441; Re Dicker, Crallan v Tomlinson [1947] Ch 48; Re Makein, Makein v Makein [1955] 1 All ER 57; Sydall v Castings Ltd [1966] 3 All ER 770

1229 Gift to "issue of the marriage" — Child legitimated by subsequent marriage

By a marriage settlement executed in 1893 it was provided that after the death of the wife, who was given a life interest in the settled property, it was to be held in trust for all or any one or more of the issue

of the spouses as the husband should appoint and, subject to any apportionment, for such of the issue of the marriage as being male should attain the age of twenty-one years, or being female should attain that age or marry. The year before the marriage a child had been born of whom the spouses were the parents: *Held* although, the child became legitimate by virtue of the Legitimacy Act 1926 (c 60), he was not a child of the marriage, and accordingly was not an object of the power of appointment.

Re Wicks' Marriage Settlement, Public Trustee v Wicks [1940] Ch 475; 109 LJ Ch 163; 163 LT 31; 56 TLR 535; 84 Sol Jo 304

ANNOTATIONS **Consd** C v C [1947] 2 All ER 50

1230 Legitimated children — Settlement executed before legitimation of child — Entitlement of legitimated child to settled property

In 1934, a settlor settled property on his son for life, over to any child of the son or, in default of such a child, to any nephew or niece of the son. The son subsequently fathered an illegitimate child; he later married the child's mother, thus legitimating the child under Legitimacy Act 1926 s 1. The question arose whether the child was entitled to the settled property by virtue of the 1926 Act s 3(1): *Held* s 3(1) gave a legitimated person the right to take any interest under any disposition coming into operation after the date of legitimation. Under the 1926 Act s 11 "disposition" meant the provision creating the interest, not the interest itself; it thus meant the 1934 settlement. That settlement came into operation when it was executed, *ie* well before the son's child was born or legitimated. Accordingly, the son's child was not entitled to the settled property.

Re Billson's Settlement Trusts (1983) Times, 2 December, CA

B Trusts for children other than eldest child

a In general

LAW See Halsbury's Laws (4th edn) vol 42 para 726 et seq

1231 All children entitled except persons succeeding to estates

Duke v Doidge (1746) 2 Ves Sen 203n; 28 ER 131

ANNOTATIONS **Consd** Wilbraham v Scarisbrick (1847) 1 HL Cas 67; Gray v Limerick (1848) 2 De G&Sm 370; Macoubrey v Jones (1856) 2 K&J 684; Collingwood v Stanhope (1869) LR 4 HL 43; Reid v Hoare (1884) 26 Ch D 363

1232 All children entitled except persons succeeding to estates

When a real estate is so settled that it must on the death of a parent go to his eldest son, and provision is made by that parent or by any person in *loco parentis*, whether by settlement in contemplation of marriage, or by will, for the younger children of such parent, courts of equity have considered the presumption, that it was intended to make provision for all the children, so strong, as to warrant it in holding that by the word "younger" must have been intended all except the one child who succeeds to the estate. But this does not apply to the case of a will in which the primary intention of testator appears to have been to found certain families, or to do something beyond merely making a provision for children. The circumstances that the will is of an executory nature, will make no difference.

Scarisbrick v Skelmersdale (Lord) (1840) 4 Y&C Ex 78; 1 HL Cas 173n; 160 ER 927; affd sub nom *Wilbraham v Scarisbrick* (1847) 1 HL Cas 167, HL

ANNOTATIONS **Consd** Meredith v Treffry (1879) 12 Ch D 170; Shuttleworth v Murray [1901] 1 Ch 819

1233 Eldest child not taking estate — Entitled to portion

Plaintiff is entitled to the £1,000 and £300 and the two freehold houses, under a trust in marriage articles; for an elder daughter, where there is a son, is accounted a younger child.

Heneage v Hunloke (1742) 2 Atk 456; 26 ER 676, LC

ANNOTATION **Consd** Wilbraham v Scarisbrick (1847) 1 HL Cas 167

1234 Eldest child not taking estate — Entitled to portion

Duke v Doidge (1746) 2 Ves Sen 203n; 28 ER 131

ANNOTATIONS **Consd** Wilbraham v Scarisbrick (1847) 1 HL Cas 167; Gray v Limerick (1848) 2 De G&Sm 370; Macoubrey v Jones (1856) 2 K&J 684; Collingwood v Stanhope (1869) LR 4 HL 43; Reid v Hoare (1884) 26 Ch D 363

1235 Younger child considered as eldest — Only as between parents or persons in loco parentis and children

Younger child is never considered as an eldest, but between parent and children, or one in *loco parentis*, not in the case of a provision by a stranger.

Hall v Hewer (1753) Amb 203; 27 ER 135, LC

ANNOTATIONS **Consd** Matthews v Paul (1819) 2 Wils Ch 64 **Apld** Scarisbrick v Skelmersdale (1840) 4 Y&C Ex 78; Sandeman v Mackenzie (1861) 1 John&H 613 **Consd** Shuttleworth v Murray [1901] 1 Ch 819

1236 Younger child considered as eldest — Not as between child and stranger

Hall v Hewer no 1235 ante

1237 Only daughter succeeding to estate — Considered as eldest son

The court will, from the general frame of a settlement, collect the intent contrary to the express words of a particular clause, and therefore, where an estate in N, part of the general estate, was, in default of issue male of that marriage, limited to the first and other daughters, and terms were created of the whole estate, to raise portions for daughters, payable at certain times, and in certain events; and in case there was no issue male of that marriage, such portions were directed to be augmented; with a proviso, that in case any daughter should be entitled to the estate in N before the portion appointed for her should be paid, then her portion should cease, and not be paid; there being an only daughter, and the father having died without issue male after her portion was vested: *Held* she ought to be considered as an eldest son, and she was not entitled to the augmented portion, though the estate vested after it became payable.

Northumberland (Earl) v Egremont (Earl) (1759) 1 Eden 435; 28 ER 753

ANNOTATION **Consd** Rainy v Ellis (1872) 26 LT 602

Scottish, Irish and Commonwealth Cases

1238 Eldest child not taking estate — Entitled to portion

Rooke v Plunkett [1902] 1 IR 299 (IR)

1239 Children of two marriages take as one class

Green v Green (1845) 2 Jo&Lat 529; 8 I Eq R 473 (IR)

1240 Younger child taking estate

Tennison v Moore (1850) 13 I Eq R 424 (IR)

1241 Younger child taking estate — Regarded as elder child

L'Estrange v Winnieth [1911] 1 IR 62 (IR)

1242 Daughter surviving son — Predeceasing father

Simpson v Frew (1855) 4 I Ch R 428; revsd (1856) 5 I Ch R 517; 8 Ir Jur 222 (IR)

1243 Daughter succeeding to estate

Stirum v Richards (1861) 12 I Ch R 323; 14 Ir Jur 69 (IR)

1244 "Younger children"

"Younger children" are those which were such at the death of the institute or heir in possession.

Catton v Mackenzie (1872) LR 2 Sc&Div 202 (SCOT)

b Death of eldest child

LAW See Halsbury's Laws (4th edn) vol 42 para 726 et seq

1245 Whether younger child becoming eldest child excluded

(1) Grandmother under a power, creates, by deed, a term to commence after her death for raising money for younger children; as their father should appoint: If no appointment, equally; if but one, besides the eldest, then to that one; if none except the eldest, then to him; if no eldest son, then to her own executors. At the date of the deed there was one grandson and one granddaughter. The father afterwards had another son, and died without appointment. The eldest son having died under age, held that the whole sum belonged to the daughter, and that the younger son having thus become an eldest son, was excluded. Elder son unprovided for considered as a younger. Vesting not suspended, in general by a power to appoint.

(2) Portions not to be raised for the representatives of a child, who died before it was naturally required.

Teynham (Lord) v Webb (1751) 2 Ves Sen 198; 28 ER 128, LC

ANNOTATIONS As to (1) **Distd** Northumberland v Egremont (1759) 1 Eden 435 **Consd** Cholmondeley v Clinton (1820) 2 Jac&W 1; Windham v Graham (1826) 1 Russ 331; Wilbraham v Scarisbrick (1847) 1 HL Cas 167; Lyddon v Ellison (1854) 19 Beav 565 Sandeman v Mackenzie (1861) 1 John&H 613; Ellison v Thomas (1862) 1 De GJ&Sm 18

1246 Whether younger child becoming eldest child excluded

By voluntary settlement, A settled a sum to be raised out of his real estate among his children as he should appoint, and in default of appointment for his children, other than an eldest or only son, equally. On the marriage of C, one of his daughters, A covenanted that he would not execute any appointment, nor do any act to diminish the share or interest of C, in the division of the trust property below a certain sum: *Held* (1) the covenant entered into by A upon the marriage of C operated as a release of his power *pro tanto*; (2) that in the absence of mention of any given period for vesting, the shares vested at twenty-one, or marriage; (3) The first born son having attained twenty-one but died in A's lifetime, and consequently before succeeding to the real estate, was to be considered as a younger son, and therefore entitled, through his representatives, to a share in the money raisable for portions.

Davies v Huguenin (1863) 1 Hem&M 730; 2 New Rep 101; 32 LJ Ch 417; 8 LT 443; 11 WR 1040; 71 ER 320

ANNOTATION As to (1) **Consd** Re Evered, Molineux v Evered [1910] 2 Ch 147

1247 Whether younger child becoming eldest child excluded

By an indenture of settlement certain real estates stood limited to J for life and after his death as to part thereof to E, the son of J, for life, remainder to H, the eldest son of E, for life, and to his first and other

sons in tail, remainder to D, the second son of E, for life, and to his first and other sons in tail, with remainders over, and as to the remaining part thereof, to trustees upon trusts for sale and conversion, the proceeds to be held as personal estate in trust for the children of E, "other than or not being an eldest or only son for the time being entitled under the limitations hereinbefore contained to the manors" etc, the unsold part of the settled estates, "either in possession or in remainder expectant on the decease of the survivor of J, the grandfather, and E," the shares to vest in such of them as should attain twenty-one, or, if daughters, marry under that age, and to be paid at such age or days of marriage, or immediately after the decease of the survivor of J and E, which should last happen. E, the father, died in the lifetime of J, the grandfather, and D, having attained twenty-one, died in the lifetime of both his father and grandfather. D, the second son of E, attained twenty-one in the lifetime of H, and became entitled as tenant for life in possession to the unsold part of the settled estates on the death of his grandfather: *Held* under these circumstances, and notwithstanding the fact that the settlement contained a separate provision for H by way of rentcharge, his personal representative was, and D, the second son, was not, entitled to share the personal estate with the younger children.

Swinburne v Swinburne (1868) 17 WR 47

1248 Whether younger child becoming eldest child excluded — Estate of no value

Sands v Fleetwood (1691) Nels 186; 21 ER 822

1249 Whether younger child becoming eldest child excluded — Estate of no value — Sale under paramount title

By marriage settlement an estate was settled on the wife and the husband successively for life, with remainder to trustees for a term of 600 years, and subject thereto to the first and other sons in tail. Other estates were settled free from the portions term, but subject to prior charges which entirely absorbed them. The trusts of the term were if there should be any child or children of the husband and wife other than or besides an eldest or only son, who by virtue of the limitations should for the time being be entitled to the hereditaments and premises, to raise for the portions of such child or children other than or besides such eldest or only son, £5,000 to be vested in such of them as the husband and wife, or the survivor, should appoint, and in default of appointment equally. There were three children of the marriage, two sons and a daughter. In 1841 the estate was sold, under a paramount title, and produced a sum of about £2,400. In 1841, the eldest son died an infant. In 1882 the surviving tenant for life died and the portions became payable. There had been no appointment. The younger son who had become the elder and had attained twenty-one claimed to take a share with his sister of the £2,400: *Held* the effect of the settlement was to give £5,000 to the sister as a first charge on the estate, and the rest of the estate to the brother, and whether the value of the residue were more or less than the portion, or as in this case, nothing at all, the brother had no right to claim any share in the prior charge.

Reid v Hoare (1884) 26 Ch D 363; 53 LJ Ch 486; 50 LT 257; 32 WR 609

1250 Whether younger child becoming eldest child excluded — Specific portion appointed to such younger child — Implied condition that status remains unaltered

A by marriage settlement is tenant for life, remainder to trustees, to raise £4,000 for younger children's portions, as A should appoint; remainder to his first, etc, sons in tail. A appoints the £4,000 amongst his younger children, and particularly £2,600 thereof to B his second son. The eldest son dies six years afterwards, whereby B became eldest son, and entitled to the whole estate after his father's death; and thereupon A makes a new appointment of the £2,600 to one of his daughters. Decreed the last appointment to take place; the first being made to B upon a tacit or implied condition, that he should not become the eldest son.

Chadwick v Doleman (1705) 2 Vern 528; 1 Eq Cas Abr 344; 23 ER 941

ANNOTATIONS **Distd** Jermyn v Fellows (1735) Cas temp Talb 93 **Apld** Teynham v Webb (1751) 2 Ves Sen 198 **Consd** Driver v Frank (1814) 3 M&S 25; Windham v Graham (1826) 1 Russ 331; Wilbraham v Scarisbrick (1847) 1 HL Cas 167; Macoubrey v Jones (1856) 2 K&J 684; Sandeman v Mackenzie (1861) 1 John&H 613 **Distd** Sing v Leslie (1864) 2 Hem&M 68 **Consd** Collingwood v Stanhope (1869) LR 4 HL 43; Reid v Hoare (1884) 26 Ch D 363 **Expld** Domvile v Winnington (1884) 26 Ch D 382

1251 Whether younger child becoming eldest child excluded — Specific portion appointed to such younger child

By a family settlement dated 21 July 1888, power was given to B to appoint portions to her younger named children. By deal of poll dated 8 June 1890, B appointed £3,000 to a younger son, G and directed that £1,500 should be paid to him forthwith and the balance on her death. Before the death of B the eldest son died. On B's death G became tenant for life under the settlement: *Held* the fact of G having become tenant for life under the settlement did not prevent his taking the £1,500 payable on B's death.

Re Bankes, Alison v Bankes (1909) 101 LT 778

1252 Whether younger child becoming eldest child excluded — Younger child named in power

Where there is a sum of money provided for younger children; one of the younger becomes eldest, he shall have no part of this money; but where the money was, by a private Act of Parliament, to be appointed among A, B and C, naming them, and A afterwards becomes eldest, he is capable of an appointment in his favour.

Jermyn v Fellows (1735) Cas temp Talb 93; 25 ER 682, LC

1253 Whether younger child becoming eldest child excluded — Younger child named in power

Under a power of appoint a sum of money among younger children, but that the eldest son, or the son possessing the estate, shall have no part of the money, a younger son becoming an eldest is excluded, though mentioned by name in the execution of the power whilst he was a younger son.

Broadmead v Wood (1780) 1 Bro CC 77; 28 ER 996, LC

1254 Whether younger child becoming eldest child excluded — Vesting suspended during father's lifetime

The vesting of portions suspended during the father's lifetime. Power to father to raise for younger children not exceeding £3,000, if no appointment, the estate charged with £3,000 for sons at twenty-one, daughters at twenty-one or marriage. Nothing vested in father's life; and representative of one who attained twenty-one and became elder, but died in father's life, not entitled to a share.

Loder v Loder (1754) 2 Ven Sen 530; 28 ER 339, LC

1255 Whether younger child becoming eldest child excluded — Portion directed to vest at twenty-one — Person younger child when attaining age

A son, who, when he attained twenty-one, was a younger child, but, by the subsequent death of his elder brother, in the lifetime of his parents, becomes an eldest son before the time fixed for the payment of the younger children's portions, is entitled to his share of portions, which are directed to vest in younger sons at twenty-one, though not payable till after the death of the parents; there being enough in the settlements, by which the portion were provided, to show, that the character of younger child was to be ascertained by reference to the time when the portions vested, and not to the time when they became payable.

Windham v Graham (1826) 1 Russ 331; 38 ER 128

ANNOTATIONS **Consd** Gray v Limerick (1848) 2 De G&Sm 370 **Apld** Sing v Leslie (1864) 2 Hem&M 68 **Consd** Stanhope v Collingwood (1867) LR 4 Eq 286 **Distd** Re Bayley's Settlmt (1871) 6 Ch App 590 **Apld** Re Wise's Settlmt, Smith v Waller [1913] 1 Ch 41

1256 Whether younger child becoming eldest child excluded — Portion directed to vest at twenty-one — Person younger child when attaining age

Re Wise's Settlement, Smith v Waller no 1274 post

1257 Whether younger child becoming eldest child excluded — Exclusion by term of trust

Lands were settled to the use of A for life, remainder to his eldest son B for life, remainder to C, eldest son of B, for life, with remainder to C's first and other sons successively in tail, remainder to D, the second son of B, for life, remainder to D's first and other sons in tail, with remainders over; with a power of limiting portions in favour of the children of B "not being and besides an eldest or other son, who, on the decease of B and A, shall be entitled to the settled estate"; the portions to vest, in the case of sons, at twenty-one, but not to be raisable in the lifetime of A and B, or either of them, without consent. B died first; then C, without issue, but having attained twenty-one; then A, whereupon D succeeded to the estates. He had attained twenty-one in C's lifetime. No portion had been limited or raised: *Held* neither D nor C's representatives had any title under the portion trusts.

Gray v Limerick (Earl) (1848) 2 De G&Sm 370; 17 LJ Ch 443; 11 LTOS 533; 12 Jur 817; 64 ER 166

ANNOTATION **Apld** Ellison v Thomas (1862) 2 Drew&Sm 111

1258 Whether younger child becoming eldest child excluded — Younger child not taking under original settlement — Estate disentailed by father and deceased elder child

By a marriage settlement estates were limited in strict settlement, subject to a term for raising £15,000 for the portions of all the children of the marriage, except an eldest or only son; and to be vested and paid at such times as the husband should appoint, and in default of appointment, to vest at twenty-one, but not to be paid till after the husband's death: provided that if any son should become an eldest or only son before the time appointed for payment of his portion, then and in default of any such appointment, his share should go to the other children. There was issue of the marriage two sons and three daughters. The eldest son attained twenty-one, together with his father, suffered a recovery of the estates to the use of the father for life, remainder to himself in fee. After all the younger children had attained twenty-one the eldest son died intestate and without issue,

whereupon the reversion in fee of the estates descended to the other son. Afterwards the father appointed the £15,000 amongst the son and the three daughters, and directed that the shares should vest immediately, but should not be paid till after his death. The second son died before the father: *Held* the share of the £15,000 appointed to him did not go over to his sister, but belonged to his estate.
Spencer v Spencer (1836) 8 Sim 87; 5 LJ Ch 310; 59 ER 35

ANNOTATIONS **Consd** Gray v Limerick (1848) 2 De G&Sm 370 **Apld** Macoubrey v Jones (1856) 2 K&J 684 **Consd** Reid v Hoare (1884) 26 Ch D 363 **Apld** Re Wrottesley's Settlmt, Wrottesley v Fowler [1911] 1 Ch 708

1259 Whether younger child becoming eldest child excluded — Younger child not taking under original settlement — Estate disentailed by father and deceased elder child
Construction of a clause of accruer "in case of any younger son becoming an eldest or only son."

An estate was limited to A for life, with remainder to his first and other sons in tail; and a term was created, for raising portions for younger children, to be interests vested in sons at twenty-one, but payable after the death of A; and it was provided, that in case any of the younger sons should become an eldest or only son, his portion should accrue to the other children. A had two sons, B and C, and one daughter; B attained twenty-one, suffered a recovery, whereby he destroyed C's estate in remainder: B died in 1807, leaving C, an infant, to whom he devised the estate for his life. A died in 1833: *Held* C was not entitled to participate in the portion.
Peacocke v Pares (1837) 2 Keen 689; 6 LJ Ch 375; 1 Jur 575; 48 ER 794

ANNOTATIONS **NF** Macoubrey v Jones (1856) 2 K&J 684 **Consd** Reid v Hoare (1884) 26 Ch D 363

1260 Whether younger child becoming eldest child excluded — Younger child not taking under original settlement — Estate disentailed by father and deceased elder child
A second son, becoming the eldest son in the lifetime of his father, who was tenant for life with remainder, subject to trusts for younger children's portions in strict settlement, was prevented from taking an interest in the bulk of the estate by reason of a disentailing deed executed by his father and elder brother: *Held* he was entitled to a share of the portions provided for younger children, notwithstanding a proviso for accruer in the event of a younger son becoming an eldest son; the court being of opinion that, in being excluded by the disentailing deed, he was in effect excluded by the settlement, of which the disentailing deed was necessarily an incident, and the intention was clear to exclude none from the portions who were excluded by the settlement from taking the bulk of the estate.
Macoubrey v Jones (1856) 2 K&J 684; 69 ER 957

ANNOTATIONS **Apld** Collingwood v Stanhope (1869) LR 4 HL 43; Domvile v Winnington (1884) 26 Ch D 382 **Consd** Reid v Hoare (1884) 26 Ch D 363 **Apld** Re Wrottesley's Settlmt, Wrottesley v Fowler [1911] 1 Ch 708

1261 Whether younger child becoming eldest child excluded — Younger child not taking under original settlement — Estate disentailed by father and deceased elder child
A, on his marriage, settled real estates on himself for life, then to trustees for a term to raise portions for his younger children, and subject thereto, to his first and other sons in tail. The portions were to vest in sons at twenty-one, but to be payable after the decease of the husband and wife. G, the second son, attained twenty-one, after which W, the eldest son, having barred the entail, died without issue, and, subsequently, the portions became payable: *Held* G, though the eldest at the period of distribution, was entitled to a share of portions for younger children.
Adams v Beck (1858) 25 Beav 648; 53 ER 784

ANNOTATION **Apld** Re Wrottesley's Settlmt, Wrottesley v Fowler [1911] 1 Ch 708

1262 Whether younger child becoming eldest child excluded — Younger child not taking under original settlement — Estate disentailed by father and deceased elder child
C, who died in 1857, by deed in 1852, appointed a fund to trustees in trust for his daughter W for life, and after her death in trust for the child or all the children, "except an eldest or only son" if more than one, of W, who should attain twenty-one or marry; and failing such trusts then over. W died in 1883, having had four children only *viz*, T, her eldest born son, who attained twenty-one in January 1869, and died in April following, F, who attained twenty-one in 1880, H, who attained twenty-one in 1865, and E, who died in infancy, in 1864; so that the fund vested in H, subject to let in other children, in the lifetime of the eldest born son, and before he attained twenty-one. At the date of the deed certain estates stood limited under a settlement, to which C was a party, to the use of X, the husband of W, for life with remainder to the use of the first and other sons of X and W in tail male. In March 1869, X and his son T disentailed the estates, and limited them to the appointees of both, or of the survivor. The joint power was not exercised; but after the death of T, X by will appointed the estates to F for life, with remainder to his sons in tail male. Upon W's death F claimed half the fund, and H, the whole of it: *Held* (1) if the expression "eldest or only son" was to be read as referring to a son entitled under a settlement

to settled estates, the time for ascertaining the excluded son would be the time for distributing the younger children's portions; but if that expression was to be read according to its natural meaning, the time of vesting would be the time for exclusion; (2) the words an "eldest or only son" *primâ facie* mean an individual, and as there was an eldest son in existence when the provision vested in H the clause of exclusion applied to him, and its operation was exhausted, so that any other son who attained twenty-one was entitled to take; F was entitled to one-half of the fund.

Domvile v Winnington (1884) 26 Ch D 382; 53 LJ Ch 782; 50 LT 519; 32 WR 699

1263 Whether younger child becoming eldest child excluded — Younger child not taking under original settlement — Succession by descent

Sing v Leslie no 1221 ante

1264 Whether younger child becoming eldest child excluded — Settlement by parent or person in loco parentis

(1) The rule, that a limitation in favour of younger children will not operate in favour of a younger child who becomes an eldest son and succeeds to the estates, is confined to cases where the provision is made by a parent or a person *in loco parentis*.

Where, in a marriage settlement, the husband covenanted to pay £10,000 for the children of the marriage; and, for want of such children, for the children of the wife by a former marriage, other than A, her eldest son, as the husband should appoint; and, in default, for all who should attain twenty-one, equally, or, if only one, then for such one younger child: *Held* the wife could not be considered as purchasing the provision in such a sense as to make her the settlor; and the settlement was not by a person in *loco parentis*.

(2) In cases of provisions made by strangers, the time for ascertaining the class of younger children is in general the period of vesting, not the period of distribution as in settlements by parents.

Sandeman v Mackenize (1861) 1 John&H 613; 30 LJ Ch 838; 5 LT 175; 7 Jur NS 1231; 70 ER 889

ANNOTATION As to (1) **Apld** Shuttleworth v Murray [1901] 1 Ch 819

1265 Whether younger child becoming eldest child excluded — Younger child dying before taking possession

Sing v Leslie no 1221 ante

1266 Whether younger child becoming eldest child excluded — Mortgage of portion by younger child — Father joining in mortgage

Testator by his will settled real estates on his daughter for life with remainder to her first and other sons successively in tail male with remainders over, and with power for her on her marriage, by deed to limit a life estate to her husband and to charge £6,000, on the estates as portions for her younger children, to be payable at such times or time and in such manner as she should by deed appoint, and in default of appointment to be divided equally amongst such younger children to become vested interests in sons at twenty-one and in daughters at twenty-one or marriage.

In 1845 the daughter married, and by her marriage settlement a life estate was given to the husband and a term of years was limited upon trusts, in the events which happened, after the death of the survivor of the husband and wife to raise the portions to vest in and be payable to younger sons at twenty-one and daughters at that age or marriage, but payment to be postponed until the death of the survivor of the husband and wife, unless the husband should signify in writing that the same should be sooner paid. There were three children, two sons and a daughter, all of whom attained twenty-one before 1882, when the mother died. In 1897, W the younger son, mortgaged his portion, £3,000, the father joining in the mortgage deed to signify that the sum should be raisable immediately. In 1900 W, on the death of his elder brother without issue, became the eldest son, and in 1905, on the death of the father, succeeded to the estates as tenant in tail, and afterwards died without issue. The question then arose whether W's estate was entitled to have the £3,000, raised and paid: *Held* upon the construction of the will and settlement and in the events which happened the wife's power of appointment among younger children had not been exercised in favour of W and his estate was not entitled to the £3,000.

Re Stawell's Trusts, Poole v Riversdale [1909] 2 Ch 239; 78 LJ Ch 677; 101 LT 49; 53 Sol Jo 542, CA

1267 Right of representatives of deceased eldest son to share — Death before time appointed for raising portions

(1) By a settlement, a sum of money was to be raised after the death of the settlor and another person for all the children of the settlor's son, other than an eldest or only son, for the time being entitled to certain other property. The eldest grandson died before the period when the amount could be raised or he became entitled to the other property: *Held* his representative was entitled to share in the fund to be raised for the younger children.

(2) "Eldest son for the time being" denotes not the person who was actually the eldest son at the date of the deed, but that individual who at a particular future period, that is, when the money is directed to be raised, might be the eldest son.

Ellison v Thomas (1862) 1 De GJ&Sm 18; 1 New Rep 37; 32 LJ Ch 32; 7 LT 342; 8 Jur NS 1139; 11 WR 56; 46 ER 7, LC

ANNOTATIONS As to (1) **Apld** Davies v Huguenin (1863) 1 Hem&M 730 **Folld** Swinburne v Swinburne (1868) 17 WR 47 **Consd** Collingwood v Stanhope (1869) LR 4 HL 43 **Apld** Re Cavendish's Settlmt, Grosvenor v Butler (1912) 106 LT 510. As to (2) **Consd** Collingwood v Stanhope (1869) LR 4 HL 43 **Apld** Re Stawell's Trusts, Poole v Riversdale [1909] 1 Ch 534

1268 Right of representatives of deceased eldest son to share — Effect of prior mortgage by eldest son — To full extent of possible portion

A person who is to be excluded from sharing in a portions fund by reason of his being, at a particular time, the eldest son entitled to a settled estate, is ordinarily entitled, if he dies before that time, to share as if he were a younger child; but he is not so entitled when he has concurred, as remainderman in tail, in disentailing the estate and in raising by mortgage thereof money out of which he received a sum equal in value to a younger child's aliquot share of the fund, as he then would, in effect, be taking a double portion. *Quaere*: whether it is material that such eldest son should receive a substantial amount of the sum raised, in order to exclude him.

Re Fitzgerald's Settled Estates, Saunders v Boyd [1891] 3 Ch 394; [1891–4] All ER 380; 60 LJ Ch 624; 65 LT 242; 40 WR 29

ANNOTATION **Consd** Re Leeke's Settlement Trusts, Borough v Leeke [1937] 2 All ER 563

c Period for ascertaining eldest or youngest child

LAW See Halsbury's Laws (4th edn) vol 42 para 726 et seq

1269 Whether period fixed for distribution

Ellison v Thomas no 1267 ante

1270 Whether period fixed for distribution

In a settlement where there is a clause excluding the eldest son from the benefit of a fund provided for children other than an eldest son, the time for ascertaining who fills the character of eldest son is the period fixed by the settlement for the distribution of the fund. In such a case "eldest" is not solely senior in age. A was, under a will, tenant for life of an estate, remainder to his first and other sons in tail. On A's marriage a settlement was executed by which a fund was created and vested in trustees for the husband and wife for life, and after the decease of the survivor for the benefit of the children of the marriage, "other than and except an eldest son entitled under the will to an estate in tail male in possession or remainder immediately expectant on the death of A." There was a power of appointment in this husband and wife, and in the survivor of them. There were three children of the marriage—a son and two daughters. No joint appointment was made. The wife died. The son, on attaining twenty-one, joined with his father in barring the entail and resettling the estate, which was settled on the father for life, on the son for life, and on the sons of the son in tail. The father appointed one moiety of the trust fund to a daughter on her marriage. No appointment was made of the other moiety. On the death of the father the son claimed a share of the trust fund: *Held* though the character of eldest son was to be ascertained at the time of distribution of the fund, the son here was to be treated as the "eldest son entitled under the will," and consequently was not entitled to a share of the trust fund, for that his resettlement of the estate, and his taking under such resettlement an estate different from that given by the will, had in no way affected the character of "eldest son entitled under the will" which belonged to him when he came of age.

Although it should be, in terms, said in the settlement that the elder child is not to have a portion, yet if under such a settlement the one who is really the elder child, the first born, does not take the family estate, it has been held that, the family estate going to a younger son, which I also ought, indeed, to have mentioned as a leading part of that same system of exposition, the Court of Chancery does not regard the elder born as the elder son, but regards the younger brother who is in possession of the family estate, as the elder, and the actually elder brother as the younger, in order to introduce him as a younger brother into the benefits of the portions provided for the younger children (*Lord Hatherley C*).

Collingwood v Stanhope (1869) LR 4 HL 43; 38 LJ Ch 421; 17 WR 537, HL; varying SC sub nom *Stanhope v Collingwood* (1867) LR 4 Eq 286

ANNOTATIONS **Consd** Reid v Hoare (1884) 26 Ch D 363; Re Prytherch, Prytherch v Williams (1889) 42 Ch D 590; Shuttleworth v Murray [1901] 1 Ch 819; Law Union & Crown Insce v Hill [1902] AC 263; Re Leeke's Settlement Trusts, Borough v Leeke [1937] 2 All ER 563; Re Gunter's Settlement Trusts, Owen v Pritchard-Barrett [1949] 1 All ER 680

1271 Whether period fixed for distribution — Or time of vesting

Windham v Graham no 1255 ante

1272 Whether period fixed for distribution — Or time of vesting

Sandeman v Mackenzie no 1264 ante

1273 Whether period fixed for distribution — Or time of vesting

Domvile v Winnington no 1262 ante

1274 Whether period fixed for distribution — Or time of vesting

By a marriage settlement made in 1828 real estate was limited to trustees upon trust to raise portions for the younger children of the marriage, such portions to vest at twenty-one in the case of sons, or, in the case of daughters, at twenty-one or marriage under that age. The settlement further provided that if any of the children for whom portions were intended, being a son or sons, should die under twenty-one "or should, before attaining such age, become an eldest or only son," then the share in the portions fund of the child so dying, or of the son so becoming an eldest or only son, was to go to the survivors or survivor who should live to attain a vested interest therein. G, a younger son of the marriage, in whom a share in the portions fund became vested by his attaining twenty-one in his father's lifetime, subsequently became the eldest son by the death of his elder brother in the lifetime of his father: *Held* according to the true construction of the settlement, G was a younger son for the purpose of participating in the portions fund, the position of the son in the family having to be determined at the moment when his share vested.

Re Wise's Settlement, Smith v Waller [1913] 1 Ch 41; 82 LJ Ch 25; 107 LT 613; 57 Sol Jo 28

3 Amount of portions

LAW See Halsbury's Laws (4th edn) vol 42 para 732

1275 Amounts ranging according to number of younger children — Death of one or more of children entitled — Whether amount paid to survivors dependent on number

Greaves v Mattison (1682) T Jo 201; 84 ER 1216; sub nom

Graves v Maddison (1682) Skin 38

ANNOTATIONS **Distd** Reresby v Newland (1722) 2 P Wms 93 **Consd** Brome v Berkley (1728) 2 P Wms 484; Stanley v Stanley (1737) West temp Hard 135 **Dbtd** Adams v Danvers (1755) 9 Mod Rep 486 **Consd** Codrington v Foley (1801) 6 Ves 364

1276 Amounts ranging according to number of younger children — Death of one or more of children entitled — Whether amount paid to survivors dependent on number

Trusts for raising portions in marriage articles were as follows: If there should be but one child of the marriage other than an eldest or only child, then to levy and raise the sum of £8,000 for the portion of such child; if there should be two such children, then to levy and raise the sum of £12,000 for the portions of such children; and if there should be three or more such children, then the sum of £15,000 for the portion or portions of such children; the sum of £8,000 to be paid to such one child and the other sums to such children as the husband and wife should jointly appoint; in default, as the survivor should appoint; in default, to become a vested interest in such child or children, being a son or sons, at twenty-one, or being a daughter or daughters at twenty-one, or marriage. If the husband should survive the wife, the portion not to be payable until after his decease. Powers were also contained in the articles for raising any part of the portion or portions for advancement; and during the suspense of vesting, of raising interest on the portions for maintenance and education.

There were three younger children of the marriage, two of whom died in infancy. The husband survived the wife, and the present petitioner, a daughter, now the sole surviving younger child, was a married woman: *Held* as there were three younger children born, the only part of the trust which could come into operation was that which related to the sum of £15,000; and, petitioner was entitled to a portion of £15,000.

Hemming v Griffith, Griffith v Hemming (1860) 2 Giff 403; 2 LT 592; 6 Jur NS 745; 8 WR 687; 66 ER 168

1277 Amounts ranging according to number of younger children — Death of one or more of children entitled — Whether amount paid to survivors dependent on number

Tenant for life of real estates, being empowered by the settlement to charge by deed or will for portions for younger children of his, by any woman he might marry, any sum not exceeding, if there should be but one such child or two such children, and no more £3,000; if three and no more, £4,000 and if four or more, £5,000, "to vest in, be paid to, or divided amongst the child or children respectively for whom the same respectively shall and may be charged, or to or among him, her, them and his, her or their respective issue," at such ages or times, "with such maintenance meanwhile," as he should appoint by his marriage settlement, dated in 1829, in exercise of the power, charged the estates with the payment for younger children of the marriage, if there should be but one such child, or two children, and no more of £3,000; if three, and no more, of £4,000 and if

four or more of £5,000, "to vest in and be paid to such children respectively, or in and to any one or more of them" exclusively, at such ages or times, in such shares and proportions, and with such yearly sums for maintenance "until their respective portions shall become payable" as he should by deed or will appoint and in default of appointment, the sum so charged to be equally divided between and amongst such younger children, "to become a vested interest in such of them, as" being sons, should attain twenty-one, or, being daughters, should attain twenty-one or marry, which should first happen. If any younger child should die under twenty-one or being a daughter, without being married, then the portion of such child, original and accruing, was to accrue and belong to the survivors or survivor, others or other of the younger children. There were issue of the marriage three daughters and two sons. One daughter died under twenty-one, and unmarried; and a second died leaving issue. After the death of both, the husband, having survived the wife, appointed £5,000, as to £2,500 for the surviving daughter, as to £2,000 for one of the sons, and as to £500 for the two infant children, of whom one had since died, of the deceased daughter: *Held* in the events that had happened, the whole sum of £5,000 had become appointable under the power, and the interest of the £500 was applicable for the benefit of the grandchild during her minority.

Knapp v Knapp (1871) LR 12 Eq 238; 24 LT 540

1278 Amounts ranging according to number of younger children — One child of marriage — Appointment of larger sum — Along with additional sum

Phipps v Mulgrave (Lord) no 1411 post

1279 Deficiency in value of portions — Direction to pay according to seniority — Payment in equal shares

AB, a widower, settles land to raise £100 a year for his eldest son, and £100 a piece for his younger children, and afterwards he marries again, and has children by his second wife.

Decreed the children by the second wife were equally entitled with the other younger children.

Though the portions of the younger children were by the settlement to be paid according to their seniority, yet in case of a deficiency they shall be paid in average.

The portions of the younger children who died in the life of their father, not to be raised in favour of the administrators. Otherwise if any of the daughters had married in the life of their father, and afterwards died.

Brathwaite v Brathwaite (1685) 1 Vern 334; 23 ER 503, LC

1280 Deficiency in value of portions — Liability of tenant for life to pay — Rights against settlor's estate

A on the marriage of his son, settles lands, which he covenants to be £800 per annum, reserving to himself a power of charging the same with £1,200 for the portions of his younger children. A charged the estate with only £600, but because the value of the lands was defective, the son refused to pay these portions: *Held* the portions were well charged, as they only amounted to a moiety of what the father had power to charge, and, if there was a deficiency in the value of the lands, the son ought to sue upon the covenant for satisfaction, out of his father's assets.

Ormsby v Dodwell (1702) 6 Bro Parl Cas 41; 2 ER 919, HL

1281 Different amounts payable by settlement — Subsequent devise of lands to portionists equally

Teviot (Viscount) v Spencer (Lady) (1689) 2 Eq Cas Abr 350; Prec Ch 5; 22 ER 298

1282 Trust to raise sum for portions — Subsequent trust to raise similar sum on failure of issue male — Daughter becoming heir-at-law — One sum payable

On marriage, lands are settled on A for life, remainder to the first, etc, son of the marriage in tail male, remainder to trustees for five hundred years, to raise £5,000 portions for daughters, payable at eighteen or marriage, remainder to A in fee. After the marriage A settles other lands, and a term is created for raising the like sum of £5,000 for daughters on failure of issue male, payable at sixteen, or marriage. A dies leaving a daughter his heir at law, who attains eighteen and dies unmarried. The trust of the term is not merged in the fee, but the portion shall go to the daughter's executors, and is disclosable by her will; but there shall be but one £5,000 raised.

Thomas v Kemeys (1696) 2 Vern 348; Freem Ch 207; 23 ER 821, LC; affd (1701) Colies 112, HL

ANNOTATIONS **Consd** Saville v Saville (1719) 11 Mod Rep 327; Compton v Oxenden (1793) 4 Bro CC 397

1283 Trust for certain sum if only one daughter — Smaller sums to each of other younger daughters

In a marriage settlement it was agreed, that if there should be but one daughter, she should have £500 for her portions, and that £200 a piece should be paid to every of the other younger daughters. There were three daughters of the marriages, and the eldest claimed to be entitled to a portion of £500, but held, that she was only entitled to a portion of £200.

Chamberlain v White (1720) 6 Bro Parl Cas 60; 2 ER 933, HL

1284 Power to appoint to children living at death of appointor — Appointment of equal sums — Death of child in lifetime of appointor — Survivor entitled to whole
Garnier v Cowper, Leheups v Garnier (1732) 2 Eq Cas Abr 649; 22 ER 544

1285 Power to appoint sum not exceeding certain amount — Provision for larger aggregate sums in default of appointment — Shares of children dying to go to survivors — Larger sum payable
A settles his estate to his sister B for life, remainder to her second and other sons in tail, etc, and gives her a power with the consent of C her husband and, for C surviving B, to charge it with a sum not exceeding £12,000 for their children; and if they or the survivor of them do not appoint the provision, then £2,000 each to be raised for younger sons, and £3,000 each for daughters, at their ages of twenty-one, with interest at £5 per cent for their maintenance to commence from the time of the appointment; and if no appointment, then from the death of the survivor of B and C, and if any of the younger children die before their shares become payable, the same to go to the survivors. A dies, C dies, leaving four younger sons and two daughters: one of which died an infant soon after her father; then B dies without making any appointment, the whole £14,000 shall be raised, and carry interest only from the death of B.
Rolt v Rolt (1735) Cas temp Talb 189; 25 ER 731, LC

1286 Power to appoint shares — Release by child for whom provision made — Exercise of power excluding child provided for — Other children entitled to whole fund
A father being tenant for life under his marriage settlement, with power to appoint the shares in which his younger children were to take a sum to be raised for their portions, having exercised the power by his will, afterwards made a provision for one of his daughters, took a release from her of her portion, and by a codicil revoked the appointment in his will, so far as it respected her: *Held* her share did not sink into the freehold, or belong to his residuary legatee, but the other younger children were entitled to the whole fund.
Noel v Walsingham (Lord) (1824) 2 Sim&St 99; 3 LJOS Ch 12; 57 ER 283

ANNOTATIONS **Consd** Lee v Head (1855) 1 K&J 620; Re Merton's Settlement, Public Trustee v Wilson [1953] 2 All ER 707

1287 Trust to raise certain sums — Partial appointment in favour of one portionist — Right of appointee to share in unappointed fund
Walmsley v Vaughan no 2764 post

Scottish, Irish and Commonwealth Cases

1288 Amounts ranging according to number of younger children — Death of one or more children entitled — Whether amount paid to survivors dependent on number
Vane v Dungannon (Lord) (1804) 2 Sch&Lef 118 (IR)

1289 Amounts ranging according to number of younger children — Death of one or more children entitled — Whether amount paid to survivors dependent on number
Clarke v Jessop (1844) Drury temp Sug 301 (IR)

1290 Amounts ranging according to number of younger children — Death of one or more children entitled — Whether amount paid to survivors dependent on number
Stuart v Castlestuart (Lord) (1858) 8 I Ch R 408 (IR)

1291 Amounts ranging according to number of younger children — Death of one or more children entitled — Whether amount paid to survivors dependent on number
Rye v Rye (1878) 1 LR Ir 413 (IR)

1292 Amounts ranging according to number of younger children — Death of one or more children entitled — Whether amount paid to survivors dependent on number
Duncombe v Leinster (Duke) (1907) 42 ILT 33 (IR)

4 Time for raising portions

A Generally

LAW See Halsbury's Laws (4th edn) vol 42 paras 733, 734

1293 Question of construction — Intention of parties
Codrington v Foley (Lord) no 1311 post

1294 Question of construction — Intention of parties
Smyth v Foley no 1308 post

1295 Question of construction — Intention of parties
(1) Where portions for younger children are created, if their interests are vested, and the contingencies have happened on which the portions are to be paid, interest on them is payable, and the portions must be raised, although the only means of raising them may be the sale or mortgage of a reversionary term. The intention of the parties creating the portions is to govern.

(2) But if the principal is not raisable till the death of the survivor of father or mother, though the title to the portion may be vested, interest on it will not be payable till that time, except on express words.

(3) The question as to the time when portions become payable is one of construction, and when according to that construction the period has arrived when the portion is directed to be raised and paid, this must be done although it can only be done by a waste of property, and sale or mortgage of a reversionary term.

(4) A portion is not properly said to be payable by trustees until two things have occurred, namely, when the time appointed for raising has arrived, and when the person entitled is able to give a discharge; but a portion is often said to be payable to a child so soon as the event has happened which gives the child a vested interest in it.

Massy v Lloyd (1863) 10 HL Cas 248; 8 LT 122; 9 Jur NS 391; 11 WR 484; 11 ER 1021, HL

ANNOTATION As to (1) **Consd** Re Gisborough's SE [1921] 2 Ch 39

1296 On arrival of time appointed — Though waste of property involved

Massy v Lloyd no 1295 ante

1297 When portionist capable of giving discharge

Massy v Lloyd no 1295 ante

1298 Portion charged in reversionary term — Whether term must first come into possession

The portions charged on a reversionary fund shall not, in general, be raised till the term comes into possession; yet when it is expressly directed, under a power, that they shall be raised as soon as conveniently may be, they shall bear interest from the death of testator.

Conway v Conway (1791) 3 Bro CC 267; 29 ER 529, LC

ANNOTATION **Dbtd** Codrington v Foley (1801) 6 Ves 364

1299 Delay in raising portions — Whether portionists barred by lapse of time

Young v Waterpark (Lord) no 1430 post

1300 Interest of owner of estate to be considered — As well as portionist

Trustees of a term for raising portions by sale or mortgage or by "any other reasonable means," with power in their discretion to postpone the raising of the same, are bound to take into account the interests of the persons entitled to the estate as well as the interests of the portioners.

Testator, in exercise of a power contained in a settlement to appoint portions to the amount of £25,000, appointed the estate to trustees for a term of one thousand years on trust upon the death of a tenant for life, who died in 1915, to raise the portions by mortgage or sale of the hereditaments, or by receipt of the income thereof, or by sale of timber or minerals, or by any other reasonable means, with power in their discretion to postpone the raising of the same. The trustees of the term found that the only practicable way of raising the portions immediately was by mortgage at the rate of 6 per cent. The total value of the estate and capital moneys was estimated at some £174,000. The present tenant for life objected to the immediate raising of the portions and offered to increase the rate of interest on the portions from 4 to 5 per cent as a condition of postponing the raising of the portions. On a summons for directions taken out by the trustees of the term: *Held* the trustees of the term ought to have regard to the interests of the persons entitled to the estate as well as to the interests of the portioners, and under the circumstances the court gave liberty to the trustees to postpone the raising of the portions for the period of one year if and so long as the tenant for life paid the increased rate of interest, with liberty to apply at the end of the year.

Re Sandys, Union of London & Smiths Bank v Litchfield [1916] 1 Ch 511; 85 LJ Ch 418; 114 LT 690; 32 TLR 355

B Where period fixed

LAW See Halsbury's Laws (4th edn) vol 42 paras 733, 734

1301 Whether raisable in lifetime of parent — Where term limited in remainder after parent's death

Greaves v Mattison (1682) T Jo 201; 84 ER 1216; sub nom

Graves v Maddison (1682) Skin 38

ANNOTATIONS **Distd** Corbett v Maidwell (1710) 3 Rep Ch 190; Butler v Duncomb (1718) 1 P Wms 448; Reresby v Newland (1722) 2 P Wms 93; Hebblethwaite v Cartwright (1734) Cas temp Talb 31; Stanley v Stanley (1737) West temp Hard 135 **Consd** Stevens v Dethick (1743) 3 Atk 39 **Dbtd** Adams v Danvers (1755) 9 Mod Rep 486 **Consd** Clinton v Seymour (1799) 4 Ves 440; Codrington v Foley (1801) 6 Ves 364

1302 Whether raisable in lifetime of parent — Where term limited in remainder after parent's death

Hellier v Jones (1689) 1 Eq Cas Abr 337; 21 ER 1085

1303 Whether raisable in lifetime of parent — Where term limited in remainder after parent's death

By marriage settlement a term is limited to raise £5,000 if but one daughter to be paid at twenty-one

or marriage, which should first happen after the death of the father and mother, or within six months after either of those days or times. There being one daughter only, and she having attained twenty-one, and her father being dead her portion was decreed to be raised in the lifetime of her mother.
Gerrard v Gerrard (1703) 2 Vern 458; 1 Eq Cas Abr 337; 23 ER 894; sub nom
Gerard v Gerard (1703) Freem Ch 271

ANNOTATIONS **Consd** Corbett v Maidwell (1710) 3 Rep Ch 190 **Distd** Buder v Duncomb (1718) 1 P Wms 448 **Dbtd** Adams v Danvers (1755) 9 Mod Rep 486

1304 Whether raisable in lifetime of parent — Where term limited in remainder after parent's death
A term limited in remainder after the father's death, in trust for raising daughters' portions at such an age or marriage, when either happens the portions may be raised in the father's lifetime. So if on contingency and the contingency happens in the life of the father; but not before the contingency happened.

The daughter must be a daughter unmarried or unprovided for at the time of the father's death, which is a contingency not yet happened (*Lord Cowper C*).
Corbett v Maidwell (1710) 1 Salk 158; 3 Rep Ch 190; 1 Eq Cas Abr 337; 2 Vern 640, 655; 91 ER 147, LC

ANNOTATIONS **Distd** Butler v Duncomb (1718) 1 P Wms 448 **Consd** Reresby v Newland (1722) 2 P Wms 93; Hall v Carter (1724) 2 Atk 354 **Distd** Brome v Berkley (1728) 2 P Wms 484; Hebblethwaite v Cartwright (1734) Cas temp Talb 31 **Consd** Stanley v Stanley (1737) West temp Hard 135; Stevens v Dethick (1743) 2 Atk 39; Adams v Danvers (1755) y Mod Rep 486 **Distd** Churchman v Harvey (1757) Amb 335 **Consd** Smith v Evans (1766) Amb 834; Clinton v Seymour (1799) 4 Ves 440; Codrington v Foley (1801) 6 Ves 364

1305 Whether raisable in lifetime of parent — Where term limited in remainder after parent's death
A term is limited in remainder after the death of a man and his wife, to raise daughters' portions at eighteen or marriage. One of the daughters attains that age after the death of her father. Decreed that the portion should be raised in the mother's lifetime.
Cotton v Cotton (1738) 3 Y&C Ex 149n; 7 LJ Ex Eq 41; 160 ER 651

ANNOTATION **Consd** Smyth v Foley (1838) 3 Y&C Ex 142

1306 Whether raisable in lifetime of parent — Where term limited in remainder after parent's death
On a settlement previous to a marriage, the trust of a term was, in case the husband should have no issue male, and there should be issue daughters, etc, to raise, if two daughters, £25,000 to be paid to them when they attain twenty-one or are married, but not to be raised till after the death of their grandfather. The father died and left issue two daughters, only, the grandfather since is dead; the bill is brought by plaintiff in the right of his wife, one of the daughters, for £12,500, with interest for same from the time of the marriage: *Held* the portion vested on the marriage upon the words of the settlement, and interest was due from the time of the marriage.
Lyon v Chandos (Duke) (1746) 3 Atk 416; 26 ER 1040, LC

ANNOTATION **Expld** Clinton v Seymour (1799) 4 Ves 440

1307 Whether raisable in lifetime of parent — Where term limited in remainder after parent's death
Estate settled on husband and wife for life, and then to trustees for term to raise portions for daughters, by leasing, assigning, or mortgaging. The husband dies, leaving daughters at his death, and no issue male. The portions shall be raised in the life of the mother, out of the reversion.
Smith v Evans (1766) Amb 633 App M 834; 27 ER 410, 523, LC

ANNOTATION **Consd** Codrington v Foley (1801) 6 Ves 364

1308 Whether raisable in lifetime of parent — Where term limited in remainder after parent's death
Under a marriage settlement lands were limited to the use of the intended husband for life, with remainder to trustees to preserve the contingent remainders, with remainder to the intended wife for life, with remainder to trustees for the term of 500 years, with remainder to the first and other sons of the marriage successively in tail, with remainder to the daughters in tail, and the trusts of the term were declared to be for raising portions for the younger children at twenty-one, by sale or mortgage of the term.

The marriage took effect, and the wife died, leaving her husband and several children of the marriage, both sons and daughters, surviving her, who all attained the age of twenty-one: *Held* the younger children were entitled to have their portions raised by sale or mortgage of the term in the lifetime of their father, the tenant for life.

In the construction of marriage settlement, courts of equity will decline to act upon any views of the expediency or inexpediency of the provisions in such settlements.

I take the rule . . . to be this, that where a term is limited in remainder to commence in possession after the death of the father, yet if the trust is to raise a portion payable at a fixed period, the child shall not

wait for the death of the father before the portion is raised, but at the fixed period may compel a sale of the term; and secondly, where the period is not fixed by the original settlement, but depends on a contingency, the rule applies as soon as the contingency happens; and, thirdly, where not only the period, but the class of children in favour of whom the portions are to be raised, depends on a contingency, as when it is limited to take effect, in case the father dies without issue male by his wife, there, also, on the contingency happening by the death of the wife without issue male, the portions are raisable immediately, and the term is saleable in the lifetime of the father.

Lord Eldon . . . has, I think, laid down the rule on its true and sound foundation—that the court holding an equal mind ought to look at all the circumstances, and to see what, on a sound construction of the instrument, was the actual intention of the party. I entirely adopt this principle (*Alderson B*).

Smyth v Foley (1838) 3 Y&C Ex 142; 7 LJ Ex Eq 34; 160 ER 684

1309 Whether raisable in lifetime of parent — Where term limited in remainder after parent's death

(1) Portions for children: *Held* raisable during the life of a tenant for life, out of a reversionary term.

(2) The costs of raising portions are payable out of the estate, and not out of the portions.

Michell v Michell (1842) 4 Beav 549; 7 Jur 887; 49 ER 452

1310 Whether raisable in lifetime of parent — Where term limited in remainder after parent's death — Whether court will postpone time

Where there is a term for years for raising daughters' portions, payable at a certain time and a vested interest, they shall not stay till the death of father and mother; but the court will lay hold of the slightest circumstance in a settlement, that shows an intention to postpone the raising them in the life of the father and mother.

Stanley v Stanley (1737) 1 Atk 549; West temp Hard 135; 26 ER 345, LC

ANNOTATIONS **Consd** Clinton v Seymour (1799) 4 Ves 440 **Consd** & **Distd** Codrington v Foley (1801) 6 Ves 364

1311 Whether raisable in lifetime of parent — Where term limited in remainder after parent's death — Whether court will postpone time

Portion raised out of a reversionary term. The rule is, that it depends upon the particular penning of the trust and a fair construction of the whole instrument as to the intention. Upon a limitation to the parent for life with a term to raise portions at twenty-one or marriage, if there is nothing more, and the interests are vested, and the contingencies have happened, at which the portions are to be paid, upon the general rule the interest is payable, and the portions must be raised by sale or mortgage of the term.

Codrington v Foley (Lord) (1801) 6 Ves 364; 31 ER 1095, LC

ANNOTATIONS **Consd** Lygon v Coventry (1845) 14 Sim 41; Massy v Lloyd (1863) 9 Jur NS 391

1312 Whether raisable in lifetime of parent — Where term limited in remainder after parent's death — Expression of contrary intention

(1) Land settled upon husband and wife for their lives, and the longest liver of them, then to trustees for a term of years, which term was in trust for raising, after the commencement of a term, a portion of £3,000 payable at twenty-one, or marriage; husband dies, leaving issue a daughter, who marries, living the mother. Decreed, that the portion should not be raised by sale or mortgage of the term, living the mother, by reason of those words "after the commencement, etc."

(2) The portion in this case, though vested, was not to carry interest until the term should commence, for all interest is in default of payment (*Lord Parker C*).

Butler v Duncomb (1718) 10 Mod Rep 433; 1 P Wms 448; 2 Vern 760; 1 Eq Cas Abr 339; 88 ER 797, LC

ANNOTATIONS As to (1) **Consd** Brome v Berkley (1728) 2 P Wms 484; Bradley v Powell (1736) Cas temp Talb 193 **Distd** Hall v Carter (1742) 9 Mod Rep 347 **Consd** Stevens v Dethick (1743) 3 Atk 39 **Distd** Teynham v Webb (1751) 2 Ves Sen 198 **Consd** Clinton v Seymour (1799) 4 Ves 440 **Expld** Codrington v Foley (1801) 6 Ves 364. As to (2) **Consd** Churchman v Harvey (1757) Amb 824 **Distd** Re Greaves' SE, Jones v Greaves [1900] 2 Ch 683

1313 Whether raisable in lifetime of parent — Where term limited in remainder after parent's death — Expression of contrary intention

The rule is, that if a reversionary term or estate be limited to trustees to raise portions at a certain time, when that time comes the portion must be raised, unless on a declaration of the trust of the term the intention of the parties appears to the contrary (*Lord Hardwicke C*).

Adams v Danvers (1755) 9 Mod Rep 486; 88 ER 592

1314 Whether raisable in lifetime of parent — Where term limited in remainder after parent's death — Expression of contrary intention

An estate was limited to trustees for a term, with remainders to A, and afterwards to his sons in tail, with similar limitations, successively, to B and C,

and their sons in tail. The trusts of the term were, on the death of A, and of B and of C, respectively, to raise portions for their respective younger children: *Held* on the death of C in the life of B, the portions for the younger children of C could not be raised during the life of B.

Everything points to the death of the tenant for life in possession as the period at which the money is to be raised (*Romilly MR*).

Lawton v Swetenham (1852) 18 Beav 98; 52 ER 39; affd 18 Beav 100n, LJJ

1315 Whether raisable in lifetime of parent — Where term limited in remainder after parent's death — Expression of contrary intention — Provision for maintenance

In a marriage settlement, lands are limited to the husband and wife for their lives, remainder to the first and other sons in tail; and in default of issue male, to trustees to raise £2,500 for daughters, payable at twenty-one or marriage, which should first happen, and out of the profits to pay £100 per annum for maintenance; the first payment of the maintenance to commence after the estate of the trustees shall have come into possession. The husband dies without issue male, leaving the wife and a daughter: *Held* the portion shall not be raised in the mother's lifetime, because the maintenance, which is naturally to precede the portion, is not to be paid till the trustees are in possession.

Brome v Berkley (1728) 6 Bro Parl Cas 108; 2 P Wms 484; 1 Eq Cas Abr 340; 2 ER 965, HL

ANNOTATIONS **Consd** Hebblethwaite v Cartwright (1734) Cas temp Talb 31 **Distd** Bradley v Powell (1736) Cas temp Talb 193 **Consd** Stanley v Stanley (1737) 1 Atk 549 **Distd** Hall v Carter' (1742) 2 Atk 354 **Apld** Stevens v Dethick (1743) 3 Atk 39 **Distd** Lyon v Chandos (1746) 3 Atk 416 **Apld** Adams v Danvers (1755) 9 Mod Rep 486 **Consd** Clinton v Seymour (1799) 4 Ves 440; Smyth v Foley (1838) 3 Y&C Ex 142

1316 Whether raisable in lifetime of parent — Where term limited in remainder after parent's death — Expression of contrary intention — Provision for maintenance

Evelyn v Evelyn no 1399 post

1317 Whether raisable in lifetime of parent — Where term limited in remainder after parent's death — Expression of contrary intention — Provision for maintenance

Hall v Carter no 1571 post

1318 Whether raisable in lifetime of parent — Where term limited in remainder after parent's death — Expression of contrary intention — Provision for maintenance

Term to raise daughters' portion, to daughters of son, on failure of issue male of grandson, with power for grandson to jointure: *Held* the portions not raisable, nor interest payable, till after the death of the jointress.

Churchman v Harvey (1757) Amb 335 App I 824; 27 ER 225, 519

1319 Whether raisable in lifetime of parent — Where term limited in remainder after parent's death — Expression of contrary intention — Direction to raise "after death of survivor of father or mother"

Where portions were provided for daughters on failure of issue male, to be paid at twenty-one, or marriage after the death of the survivor of the father or mother; the father having died, and there being an only daughter, who had attained twenty-one: *Held* from the clear indication of the intention, to postpone the raising till after the death of the survivor, the portion should not be raised during the lifetime of the mother.

Verney v Verney (Earl) (1761) 2 Eden 26; 28 ER 805

1320 Whether raisable in lifetime of parent — Where term limited in remainder after parent's death — Expression of contrary intention — Parent with power of appointment

Where a parent, who is tenant for life of a settled estate, with remainder to a trustee for a term of 500 years, upon trust to raise portions for younger children, has power to appoint the portions by deed or will, they cannot be raised in the parent's lifetime; and the whole sum cannot be raised until they have all attained twenty-one.

Wynter v Bold (1823) 1 Sim&St 507; 57 ER 201

1321 Whether raisable in lifetime of parent — Where term limited in remainder after parent's death — Expression of contrary intention — Insertion of negative words

Hall v Carter no 1571 post

1322 Whether court will enlarge power of trustees — To raise portions within time fixed

Okeden v Okeden no 1378 post

C Where period contingent

LAW See Halsbury's Laws (4th edn) vol 42 paras 733, 734

1323 On happening of contingency

Corbett v Maidwell no 1304 ante

1324 On happening of contingency

A the father, and B the eldest son, resettle an estate, to the use of A for life as to part, then to trustees for 200 years, to raise £1,100 to be paid to the second son within six years after A's death, or as soon after

as the same could be raised, and in the meantime interest from A's death, for and towards his maintenance, remainder to B the eldest, etc. C died indebted, and two years after him A died; from whom a good estate came to B. The creditors cannot have this portion raised, the contingency upon which it was payable never happening.

Bradley v Powell (1736) Cas temp Talb 193; 25 ER 733

ANNOTATIONS **Dbtd** Tunstall v Brachen (1753) Amb 167 **Consd** Remnant v Hood (1860) 2 De GF&J 396

1325 On happening of contingency — Contingent period and class of children

Smyth v Foley no 1308 ante

1326 On happening of contingency — Marriage with consent — Subsequent condonation of secret marriage by parent

Farmer v Compton (1625) 1 Rep Ch 1; 21 ER 490

ANNOTATIONS **Consd** Hervey v Aston (1738) West temp Hard 350; Dashwood v Bulkeley (1804) 10 Ves 230

1327 On happening of contingency — Marriage with consent — Subsequent consent of trustees

A mother by her will says that if her daughters marry with the consent of trustees, or the major part of them, and signified in writing, before such marriage had, then I give to her, and not otherwise, £800 and directed M to pay her £30 yearly while she continued sole, by £15 each May Day, and All Saints' Day, and charged all her real estate with debts of all kinds and legacies. The daughter after the death of the mother married plaintiff without the consent of the trustees, and died soon after, but before her death the trustees declared their consent and approbation in writing: *Held* plaintiff should be paid the arrears of the £30 *pro rata* till the marriage; and in case the personal estate should be exhausted by payment of debts, so much of the real estate to be sold as will pay the £800 and arrears of the annuity.

Reynish v Martin (1746) 3 Atk 330; 26 ER 991; sub nom

Rhenish v Martin (1746) 1 Wils 130, LC

ANNOTATION **Distd** Re Nourse, Hampton v Nourse [1899] 1 Ch 63

1328 On happening of contingency — Default of issue male

The trust of the term was, on failure of issue male, out of the rents, etc, or by sale, etc, to raise portions for daughters, payable at twenty-one or marriage, and maintenance till their portions grew due, to be paid by half-yearly payment, *viz*, Christmas and St John Baptist, the first payment to be made at the first of those feasts next coming or happening after the estate so limited to the trustees should take effect in possession. The father died without issue male, leaving a daughter who attained her age of twenty-one, it was adjudged that her portion could not be raised in the lifetime of the mother, because the maintenance was to precede the portion, and that was not to be raised till after the death of the father and mother, when the term came into possession.

Goodal v Rivers (1730) Mos 395; Kel W 2; 2 Eq Cas Abr 647; 25 ER 459, LC

1329 On happening of contingency — Default of issue male — Of marriage

The trust of a term here was for raising portions for a daughter in default of issue male, payable at twenty-one or marriage; the mother died, leaving no son, and only one daughter, plaintiff's wife, who with her husband brought their bill against the father and the trustees to raise the portion immediately; the court was of opinion she was not entitled to have it raised in the father's lifetime.

Stevens v Dethick (1743) 3 Atk 39; 26 ER 826

1330 On happening of contingency — Default of issue male — Of marriage

Dominick v Langley (1684) 1 Vern 299; 23 ER 402

1331 On happening of contingency — Default of issue male — Of marriage

By marriage settlement, lands were limited to husband and wife for their lives, remainder to the heirs male of their bodies; and if there should be no issue male of their bodies, and one or more daughters, then to trustees for 500 years from the decease of the survivor, in trust by sale or mortgage, to raise £1,000 for daughters' portions, but there is no time appointed for the payment of them. The father died leaving a daughter only. The portion vesting in the daughter in the lifetime of the mother, it was decreed to be raised by a sale, with reasonable maintenance in the meantime, though no maintenance was provided by the settlement.

Staniforth & Clerkson v Staniforth (1703) 2 Vern 460; 23 ER 895; sub nom

Stainforth v Stainforth (1703) 1 Eq Cas Abr 337

ANNOTATIONS **Distd** Corbett v Maidwell (1709) 2 Vern 640 **NF** Adams v Danvers (1755) 9 Mod Rep 486

1332 On happening of contingency — Default of issue male — Of marriage

Gerrard v Gerrard no 1303 ante

1333 On happening of contingency — Default of issue male — Of marriage

Champney v Champney (1715) 10 Mod Rep 314; 88 ER 743

1334 On happening of contingency — Default of issue male — Of marriage

A upon his marriage with B settled his estate to the use of himself for life, remainder to first and other sons in tail male, remainder to trustees for 1,000 years, remainder to his brother C for life, remainder to the heirs male of his body hereafter to be begotten; and then declared the trust of the term, that if there should be no issue male of the bodies of A and B begotten, that should live to the age of twenty-one years, or be married and have issue, and that there should be a daughter or daughters of the bodies of A and B such daughter should have £4,000 for her portion; and if two or more, they to have £5,000, equally to be divided at their ages of twenty-one, or days of marriage, which should first happen; and if only one daughter, she to have the yearly sum £100 to be paid her half-yearly for her maintenance; if two or more, the like sum to be paid them half-yearly in equal shares, until their respective portions paid; if the portions not paid, the trustees to raise them out of the rents, or by sale or mortgage of the premises, or of part. Provided that if the father should in his lifetime prefer them in marriage with portions equivalent, or the remainderman should, after the father's death, or that there should be no daughter who should attain the age of twenty-one, or be married, then the term to cease. B died in the life of A leaving no son, but three daughters, who were all unmarried, C took an estate tail under this settlement: and the portions might be raised for the daughters in the lifetime of A their father.

Where a certain day is appointed for portions becoming due, nothing is more certain, than that reversionary terms may be sold before they fall into possession, and that though there is no express clause or sale to warrant it (*Lord Talbot C*).

Heblethwaite v Cartwright (1734) Cas temp Talb 31; 2 Barn KB 438; 25 ER 643, LC

ANNOTATIONS **Consd** Verney v Verney (1761) 2 Eden 26; Doe d James v Hallett (1813) 1 M&S 124

1335 On happening of contingency — Default of issue male — Of marriage

Smyth v Foley no 1308 ante

1336 On happening of contingency — Default of issue male — Of marriage — Son born after father's death

Lands by marriage settlement were limited to the sons in tail male, remainder to A the husband in fee. Provided if A and his wife, or either of them, die without issue male living at the time of his or her death, leaving only one daughter unmarried, the trustees to stand seised till they have raised £1,500 for such daughter; and if more daughters unmarried at the death of A and his wife, or either of them, and no issue male living begotten between them, then £3,000 for such daughters. A died leaving daughters, and his wife enceinte of a son, which is afterwards born. Whether the daughters are entitled to the £3,000.

Palmer v Cracroft (1706) 2 Vern 578; 23 ER 976

1337 On happening of contingency — Default of issue male — Of issue male of marriage

A conveyed lands to the use of himself and his wife for life, remainder to their first and other sons in tail, and for default of such issue, and in case A should die, or be dead without issue male of his body born, or *en ventre sa mère* at the time of his death, and should leave one or more daughters, then to JS for 500 years, to raise portions for such daughters. A died, leaving both sons and daughters. The sons having afterwards all died without issue male, living the daughters: *Held* upon the death of the surviving son, the term arose and took place, and it was not a condition precedent, but a remainder upon the determination of an estate tail.

Strode v Andrews (1706) 6 Bro Parl Cas 46; 2 ER 923; sub nom

Andrews v Stroud (1706) Holt KB 623; Mod Rep 88; 90 ER 1245, HL

1338 On happening of contingency — Default of issue male — Of issue male of marriage

Where by marriage settlement it is declared that trustees shall stand possessed of certain terms upon trust, that in case there shall be no issue male of the marriage at the time of the decease of the husband or wife, which shall first happen, or *en ventre sa mère* born after his death, or in case the issue male between them shall die without issue male, and there shall be a failure of issue male between them, and at the time of such failure there shall be issue female living at the time of the husband's or wife's decease, which of them shall first happen, or born in due time after the death of the husband, that then the trustees shall by rents and profits raise the portions of such daughter, to be paid at their ages of twenty-one years, with interest for forbearance if not paid at that time, and for maintenance and education, to be paid them at the end of the first half-year after the decease of either the husband or wife: *Held* there being issue male at the death of the wife who survived her husband, the contingency had not happened upon which the portions of the daughters were to be raised.

Malden v Meynell (1737) West temp Hard 74; 25 ER 827; sub nom

Malden v Menill (1737) 2 Atk 8, LC

D Postponement

1339 Restraint by particular proviso
Fane v Devonshire (Duke) no 1420 post

1340 Grounds for postponement — Payment of debts of tenant for life
Under what circumstances the payment of a portion from under a will shall be postponed, until all the father's debts are satisfied.
Daly v French (1715) 6 Bro Parl Cas 55; 2 ER 929, HL

1341 Grounds for postponement — Convenience of estate
Lowther v Condon (1740) 2 Atk 127; Barn Ch 327; 26 ER 480, LC

ANNOTATIONS **Consd** Sherman v Collins (1745) 3 Atk 319; Tolner v Marriott (1830) 9 LJOS Ch 14

1342 Grounds for postponement — Alternative methods of raising — Election by trustees
Hall v Carter no 1571 post

1343 Grounds for postponement — Discretion of trustees — Interest of parties entitled to estate
Re Sandys, Union of London & Smiths Bank v Litchfield no 1300 ante

1344 Power enabling parent to revoke trust — Suspension during parent's life
Reresby v Newland no 1404 post

E Anticipation in favour of portioners

1345 Whether raising of portions anticipated — In favour of heir
Lands of an heir are charged with portions to infants at twenty-one or marriage; the portions shall not be admitted to be paid in before they grow due, in ease of the land.
Oldfield v Oldfield (1685) 1 Vern 336; 23 ER 505, LC

1346 Whether raising of portions anticipated — In favour of heir
The heir may discharge his estate when the portion becomes payable, though it belongs to an infant.
Anon (1728) Mos 56; 25 ER 268

1347 Whether raising of portions anticipated — In favour of heir
The trusts of a term of years were to raise as portions for younger children £5,000, if there should be one; £8,000, if two; and £10,000, if three or more, to be divided among them equally, the shares of the sons at twenty-one, and the shares of the daughters at twenty-one or marriage. There were three younger children: *Held* the heir-at-law, on attaining twenty-one, was not entitled to have the portions raised, and his estate discharged, before the portions became payable; and the court would not order a larger sum to be raised for portions than had actually become vested and payable to the children who had attained twenty-one or married.
Sheppard v Wilson (1845) 4 Hare 392; 9 Jur 920; 67 ER 701

ANNOTATION **Consd** Marsh v Keith (1861) 29 Beav 625

1348 Whether raising of portions anticipated — In favour of other portionists — Survivorship and accruer clause
One has several daughters and being seised in fee charges his lands with £1,000 a-piece to his daughters payable at twenty-two or marriage; and if any die, then to the survivors, but no time limited when the additional portion should be paid to the surviving daughters. If one dies unmarried before twenty-two, the additional portion shall not be paid to the surviving daughters until the deceased daughter should have come to twenty-two.
Feltham v Feltham (1725) 2 P Wms 271; Cas temp King 15; 24 ER 726

1349 Whether raising of portions anticipated — Only some portionists entitled — Whether whole sum raised
Where, under a settlement, a sum of money is to be raised out of real estates for the portions of younger children, and some of the portions have become payable, the court will raise the whole sum at once, although some of the children have not acquired vested interests.
Gillibrand v Goold (1833) 5 Sim 149; 3 LJ Ch 100; 58 ER 294

1350 Whether raising of portions anticipated — Only some portionists entitled — Whether whole sum raised
Sheppard v Wilson no 1347 ante

1351 Whether raising of portions anticipated — Only some portionists entitled — Whether whole sum raised — Investment of sum not immediately acquired
Lands were limited to trustees for a term of years in trust to raise a sum for portions for younger children, to be vested at twenty-one or marriage, with a proviso that no sale or disposition should be made until some one of the portions should be actually payable. The eldest of the younger children had attained twenty-one: *Held* the whole sum was raisable at once; and after paying the adult child her share, the remaining portions ought to be provided for by carrying over a sum of stock sufficient, at the present price, to provide for them, with a margin for depreciation.
Peareth v Greenwood (1880) 28 WR 417

5 Method of raising portions

A Generally

LAW See Halsbury's Laws (4th edn) vol 42 para 735

1352 Direction for particular method — Whether other methods excluded
Ivy v Gilbert no 1376 post

1353 Direction for particular method — Whether other methods excluded
The trust of a term is, to raise daughters' portions by rents, issues, and profits; or by making leases for three lives at the ancient rent; or by granting copyholds on fines; the money to be paid to the daughters at their age of eighteen or marriage, or as soon after as the same can be raised out of the premises as aforesaid; the portions, as it seems, may not be raised by sale or mortgage.
Mills v Banks (1724) 3 P Wms 1; 24 ER 943, LC

ANNOTATIONS **Consd** Haldenby v Spofforth (1839) 1 Beav 390; Stroughill v Anstey (1852) 1 De GM&G 635

1354 Direction for particular method — Sale of lands charged to pay debts — Charge on other lands of settlor
Legh v Legh (1846) 15 Sim 135; 60 ER 568

1355 Sale or mortgage
A portion charged on lands by virtue of a power shall be raised by a sale or mortgage, and not by the rents and profits of the lands charged; because it could not thereby be received in any reasonable time, and the party entitled might be abridged of half the value of the portion by that manner of raising it.
Kelly v Bellew (Lord) (1707) 4 Bro Parl Cas 495; 2 ER 338, HL

1356 Sale or mortgage — Sale — Where no directions as to mode of raising — Portions to be raised "as soon as they conveniently could"
Lands are settled on marriage upon condition, if there should be a daughter, the persons in remainder should pay her £2,000 at sixteen with power for the daughter, in case of non-payment, to distrain for the £2,000 and damages. Though no power to sell, yet a sale decreed for raising the portion.
Meynell v Massey (1686) 2 Vern 1; 23 ER 614, LC

1357 Sale or mortgage — Sale — Where no directions as to mode of raising — Portions to be raised "as soon as they conveniently could"
Trust of a term to raise portions out of rents and profits, to be paid as soon as conveniently may be. By virtue of the word profits trustees may sell or mortgage; *secus*, if said annual profits.
Trafford v Ashton (1718) 1 P Wms 415; 24 ER 451; sub nom
Ashton v — (1718) 10 Mod Rep 401, LC

ANNOTATION **Consd** Metcalfe v Hutchinson (1875) 1 Ch D 591

1358 Sale or mortgage — Sale — Joinder of heir — On application for sale
Land settled on trustees for raising portions for daughters, on bill for a sale, court will decree the heir to join in the sale, though he has no legal interest.
Roll v Roll (1689) 2 Vern 99; 23 ER 673

1359 Sale or mortgage — Mortgage — Of different parts of estate
Charges upon an estate more than sufficient to answer them directed to be raised by mortgages of different parts.
Mosley v Mosley (1800) 5 Ves 248; 31 ER 570

1360 Sale or mortgage — Mortgage — Inclusion of costs of effecting security
Power to raise a sum of money by mortgage includes power to raise also by mortgage the costs of effecting the security.

Trustees of a marriage settlement made in 1802 were empowered to raise and levy the sum of £6,000 for portions on the security of a term of 300 years in certain freeholds. Part of the £6,000 was raised. In 1872 it became necessary to raise the residue, which then amounted to the sum of £3,290 8*s* 4*d*. By an order then made in this suit which was instituted for the execution of the trusts of certain indentures of settlement, certain trustees were authorised to advance this amount out of their trust funds upon the security of the term. Considerable costs had to be incurred in effecting the security, and it was now asked that the lastly named trustees might be at liberty to advance a further sum out of their trust funds upon the same security to cover the costs so incurred: *Held* the term of 300 years might properly be taken as a security, not only for the whole amount of £6,000, but also for the costs.
Armstrong v Armstrong (1874) LR 18 Eq 541; 43 LJ Ch 719

ANNOTATION **Consd** Nightingale v Reynolds [1902] 2 Ch 117

1361 Leasing
Edwards v Sleater (1665) Hard 410; 145 ER 522

1362 Leasing
Ivy v Gilbert no 1376 post

1363 Leasing
Mills v Banks no 1353 ante

1364 Where portioners become entitled to estate charged

Where four portioners entitled each to a fifth of a portions fund, became entitled in undivided shares to the estate upon which the portions fund was charged, the entire estate being also subject to a mortgage: *Held* no one of the portioners could claim the right of having the whole fund divided, and thrown in fourths upon the respective shares, in order that, by payment of the difference between what was chargeable on her share of the estate, and what was due to her in respect of the portion, her share of the estate might be cleared; but such a proposal was a proper subject for arrangement in chambers; and upon bill filed by a portioner under the above circumstances to have her share in the estate discharged, and to have the trusts of the portions term administered by the court, leave was given to plaintiff to bring into chambers a scheme for the purpose.

Otway-Cave v Otway (1866) LR 2 Eq 725; sub nom *Otway-Cave v Cave* (1866) 15 WR 6

1365 Out of capital moneys

By a settlement dated 2 October 1906, lands and other hereditaments in Yorkshire were settled in the events which happened to the use of trustees for a term of ninety-nine years if G should so long live upon the trusts therein mentioned, and subject thereto to the use of G for life, and after his death to the use that his wife should receive during the remainder of her life a yearly rentcharge of £800, and subject and charged as aforesaid to the use of trustees for the term of a thousand years from the death of G upon the trusts thereinafter declared with divers remainders over. The trusts of the thousand years' term were, in the event which happened of G leaving five younger children, that the trustees "shall," after the death of G or in his lifetime, at his request in writing raise the sum of £25,000 for portions to go to or amongst all or any the younger children of G and their issue as G should by deed or will appoint. In a deed dated 4 November 1920, appointing this sum amongst these younger children and their issue, G requested the trustees to raise this sum by any means authorised by the settlement or by law or preferably, if the law permitted, out of capital moneys; and on 13 January 1921, G in writing requested and directed his trustees to raise the sum out of capital moneys. This summons raised the question whether the trustees could and ought to comply with G's direction. There was evidence that it was desirable to do so if it was lawfully possible: *Held* although Settled Land Act 1882 (c 38) s 21 (repealed), did not sanction the application of capital moneys in the manner directed, the court would sanction such application subject to the consent being obtained of incumbrancers or persons whose interests had priority to the thousand years' term, because if, as the trustees were bound to do at the direction of G, they raised the sum of £25,000 by mortgage of the reversionary term of a thousand years, such mortgage would be an incumbrance "affecting the inheritance" within Settled Land Act 1882 (c 38) s 21(ii) (repealed), so that it could at once be discharged out of capital moneys. It was not the practice of the court to leave trustees to do indirectly what it would involve less expense to do directly.

Re Gisborough's (Lord) Settled Estates [1921] 2 Ch 39; 90 LJ Ch 400; 125 LT 701; 65 Sol Jo 553

B Out of personalty

LAW See Halsbury's Laws (4th edn) vol 42 para 735

1366 Where portions charged on land

Middleton v Middleton (1685) 2 Rep Ch 377; 21 ER 692

1367 Where portions charged on land

Strode v Ellis (1692) Nels 203; 21 ER 826

1368 Where portions charged on land

A by several deeds, charges different parts of his real estates with portions for his younger children, and afterwards by his will confirms the charges so made; and then gives the residue of his personal estate, after payment of his debts and legacies, to trustees, in trust to lay out the same in the purchase of land, to be settled to particular uses. The eldest son brings his bill controverting the validity of the deeds, and insisting that the personal estate was liable to make good the several charges so far as it would extend: *Held* the personal estate should go according to the will, and each particular estate should bear the specific charge made upon it.

Ferrers (Earl) v Ferrers (Countess) (1725) 6 Bro Parl Cas 97; 2 ER 958, HL

1369 Where portions charged on land

Portions secured by settlement out of lands or articled so to be, are not to be paid out of the personal estate

Edwards v Freeman (1727) 2 P Wms 435; 1 Eq Cas Abr 249; 24 ER 803, LC

ANNOTATION **Consd** Evelyn v Evelyn (1731) 2 P Wms 659

1370 Where portions charged on land

The £10,000 charged by B, on the term of a thousand years, shall not be paid out of his personal estate, but the land on which it was originally charged must bear the burden of it.

Burgoigne v Fox (1738) 1 Atk 575; 26 ER 362, LC

1371 Where portions charged on land

Lanoy v Athol (Duke and Duchess) (1742) 2 Atk 444; 9 Mod Rep 398; 26 ER 668, LC

ANNOTATIONS **Follld** Lechmere v Charlton (1808) 15 Ves 193 **Apld** Graves v Hicks (1833) 6 Sim 391 **Follld** Loosemore v Knapman (1853) Kay 123

1372 Where portions charged on land

Portions, to be raised by a trust term in a marriage settlement: the real estate held the primary fund; and a covenant by the settlor to pay them auxiliary only.

Lechmere v Charlton (1808) 15 Ves 193; 33 ER 727

ANNOTATION **Consd** Loosemore v Knapman (1853) Kay 123

1373 Where portions charged on land

By a settlement in contemplation of marriage, reciting, that, the intended husband being entitled to certain real estate, it was agreed on the treaty for the marriage, that he should secure to the intended wife, in case she should survive him, a certain annuity by way of jointure, "in manner thereinafter expressed," the husband demised certain real estate to trustees for a long term of years, upon the trusts thereinafter declared, and then covenanted that his heirs, executors, administrators, or assigns, should pay the jointure to his wife surviving him, upon certain specified days; and the covenant was followed by a declaration that the demised lands were to be held upon trust for the settlor until some default in making any of the payments of the jointure; and, in case of non-payment of any part for forty days next after any day of payment, then, upon trust to secure the same: *Held* as between the real and personal representatives of the settlor, the land was the primary fund for payment of the jointure, because the jointure was not in satisfaction of any debt due from the settlor at the time of executing the settlement, nor had his personal estate been augmented by any consideration given for it; and therefore the presumption was, that a primary charge upon the land was intended; and that presumption was not rebutted by anything in the recitals, or in the form of the deed of settlement.

Loosemore v Knapman (1853) Kay 123; 2 Eq Rep 710; 23 LJ Ch 174; 24 LTOS 21; 2 WR 664; 69 ER 52

ANNOTATION **Distd** Field v Moore, Field v Brown (1855) 7 De GM&G 691

1374 Where portions charged on land

Under a covenant that if the covenantor's wife survived him, he, his heirs, executors or administrators would pay her a specified annuity for life, and that for better securing it, he or his heirs would grant and secure the same out of a sufficient part of the real estates devised to him by a particular will: *Held* the real estates were only secondarily liable, and the personal estate of the covenantor was the primary fund.

Field v Moore, Field v Brown (1855) 7 De GM&G 691; 25 LJ Ch 66; 26 LTOS 207; 2 Jur NS 145; 4 WR 187; 44 ER 269, LJJ

ANNOTATIONS **Apld** Campbell v Ingilby (1856) 21 Beav 567 **Distd** Barrow v Barrow (1858) 4 K&J 409 **Consd** Buckmaster v Buckmaster (1887) 35 Ch D 21

Scottish, Irish and Commonwealth Cases

1375 Where portions charged on land

A portion charged on lands by virtue of a power shall be raised by sale or mortgage and not by the rents and profits of the lands charged; because it could not thereby be received in any reasonable time, and the party entitled might be abridged of half the value of the portion by that manner of raising it.

Kelly v Bellew (1715) 4 Bro Parl Cas 501 (IR)

C Out of rents and profits

LAW See Halsbury's Laws (4th edn) vol 42 para 735

CROSS REFERENCES See PERPETUITIES vol 37(1) (reissue) no 544 et seq (violation of rule against perpetuities in case of term prior to estate tail), no 1007 et seq (whether right to accumulate infringement of rule against perpetuities)

1376 General rule

(1) A trust term for raising daughters' portions if it direct a particular method of raising the portions, it implies a negative, that they shall not be raised any other way.

A trust term to raise portions out of rents issues, and profits, as well by leasing for three lives or twenty-one years, at the old rent; this extends only to raise the portions by annual profits or by leasing, and not by mortgage or sale; and if the trustee in such trust term, mortgages for the portion, the mortgage is void, when the portion might have been raised by the profits.

(2) The natural meaning of the word "profits" is annual profits, though for necessity, in some cases, it has been construed to extend to any profits that can be made by sale or mortgage.

(3) Where a portion is to be raised by annual profits or fines, if no time be appointed, the portion is not due, till such time as it might be so raised.

Ivy v Gilbert (1722) Prec Ch 583; 2 P Wms 13; 24 ER 261, LC; affd sub nom

Ivie v Gylberte (1723) 6 Bro Parl Cas 68, HL

ANNOTATIONS As to (1) **Distd** Mills v Banks (1724) 3 P Wms 1 **Apld** Evelyn v Evelyn (1731) 2 P Wms 659 **Expld** Green v Belchier (1737) West temp Hard 217 **Apld** Conyngham v Conyngham (1750) 1 Ves Sen 522

1377 General rule
Okeden v Okeden no 1378 post

1378 Right to accumulate
Directing a gross sum to be raised does not imply that it shall be raised at once, for it may be raised out of the rents and profits, and so laid up till it amounts to that sum.

This court lays great stress upon a particular time being appointed for the payment of a portion, and has enlarged the power of trustees to raise it within the time.

If the surplus profits will not be sufficient to answer the purpose, then I shall be strongly inclined that the estate shall be sold to make up the deficiency (*Lord Hardwicke C*).
Okeden v Okeden (1738) 1 Atk 550; 26 ER 345; sub nom
Okeden v Walter (1738) West temp Hard 514, LC

1379 Tenant for life permitted to take rents and profits — Right of trustees of term to enter subsequently
Where a limitation was in a settlement made before marriage of A to the use of trustees and their heirs until they should raise certain portionary sums of money, if not paid at a fixed time by A; and the portions were not then paid; and the trustees permitted the assignees of A to enter and take profits of the lands beyond the amount of the portions; still the trustees may afterwards enter and hold over to raise the portions.
Thomason v Mackworth (1666) O Bridg 502; Cart 75; 124 ER 713

1380 Tenant for life permitted to take rents and profits — Right of portionists — Against tenant for life and remainderman
Sanders v Sanders (1739) West temp Hard 686; 25 ER 1150, LC

1381 Deficiency of ordinary profits — Right to sell timber
Where the ordinary profits of a term are not sufficient to raise a portion, timber may be felled, or a mine worked for it against the heir.
Offley v Offley (1691) Prec Ch 26; 24 ER 14

1382 Deficiency of ordinary profits — Right to work mines
Offley v Offley no 1381 ante

1383 Appointment of receiver of rents and profits — Tenant for life obstructing decree of raising portions
Limitation of a term for 500 years to raise portions for younger children, and afterwards estate limited to T for life, with remainders over, and a decree made to sell the term for raising the portions. T, the tenant for life refusing to produce the title deeds before the master, and obstructing the decree, an order was made on motion for a receiver of the rents and profits of the estate.
Brigstocke v Mansel (1818) 3 Madd 47; 56 ER 427

1384 Application in discharge of capital sum and interest — Pending mortgage
Balfour v Cooper no 1601 post

1385 Whether sale or mortgage allowed
A trust to pay portions out of rents and profits, at prefixt days gives the trustees power to sell.
Backhouse v Middleton (1670) as reported in 1 Cas in Ch 173; 22 ER 748

ANNOTATION **Folld** Metcalfe v Hutchinson (1875) 1 Ch D 591

1386 Whether sale or mortgage allowed
Cary v Appleton (1674) 1 Cas in Ch 240; 22 ER 780

1387 Whether sale or mortgage allowed
Where there is a trust in a settlement for raising portions out of rents and profits, the lands may be sold.
Sheldon v Dormer (1693) 2 Vern 310; 23 ER 802

1388 Whether sale or mortgage allowed
Where a term is limited to raise portions for younger children by rents and profits, the heir may have the portions raised by a sale, though the younger children oppose it; as well as he may insist on a sale if he thinks fit.
Warburton v Warburton (1701) 2 Vern 420; 23 ER 869; on appeal (1702) 4 Bro Parl Cas 1, HL

1389 Whether sale or mortgage allowed
The words "rents and profits" extended beyond their natural meaning, annual profits, to mortgage or sale, when necessary to effect the object, raising a gross sum, for fines on renewal therefore as well as portions, and not controlled by the apparent general intention to preserve the estate entire.
Allan v Backhouse (1813) 2 Ves&B 65; 35 ER 243; affd (1821) Jac 631, LC

ANNOTATIONS **Consd** Shaftesbury v Marlborough (1833) 2 My&K 111 **Distd** Haldenby v Spofforth (1839) 1 Beav 390 **Apld** Jones v Jones (1846) 5 Hare 440 **Distd** Solley v Wood (1861) 29 Beav 482 **Apld** Wragg v Morley (1866) 14 WR 949

1390 Whether sale or mortgage allowed
Where a term is created for the purpose of raising money out of the rents and profits, if the trusts of the will require that a gross sum should be raised, the expression "rents and profits" will not confine the power to the mere annual rents, but the trustees are to raise it out of the estate itself by sale or mortgage (*Lord Eldon C*).
Bootle v Blundell (1815) 1 Mer 193; 19 Ves 494; 35 ER 646, LC

ANNOTATION **Apld** Metcalfe v Hutchinson (1875) 1 Ch D 591

1391 Whether sale or mortgage allowed
Smyth v Foley no 1308 ante

1392 Where raisable out of "annual profits"
Trust of a term to raise portions out of rents and profits, to be paid as soon as conveniently may be.

By virtue of the word profits trustees may sell or mortgage; *secus* if said annual profits.
Trafford v Ashton (1718) 1 P Wms 415; 24 ER 451; sub nom
Ashton v — (1718) 10 Mod Rep 401, LC

ANNOTATIONS **Consd** Allan v Backhouse (1813) 2 Ves&B 65; Metcalfe v Hutchinson (1875) 1 Ch D 591

1393 Where raisable out of "annual profits"
Ivy v Gilbert no 1376 ante

1394 Where raisable out of "annual profits"
On settlement before marriage, a proviso, that if a husband and wife die, leaving issue unprovided for, that then the trustees might enter upon an estate, and take the rents thereof, till they had received £200 for the benefit of such unprovided children, in such manner and proportion as the survivor of the husband and wife should appoint. The wife survived, and appointed the £200 for a daughter, plaintiff's wife, being an unprovided child, bill brought to have the £200 raised. Decreed the £200 and interest by way of maintenance, from the death of the mother defendant appealed from that part which allowed interest, and decree affirmed.

Wherever the words to be raised by rents and profits are used in a deed, unless there are other words to make it annual, the court has always made a liberal construction, in order to obtain the end which the party intended by raising the money, has allowed a mortgage and a sale.

The appointment of the £200 being in such manner, and proportions, as the survivor of father and mother shall think fit, the father or mother might have made it payable at any time.
Green v Belchier (1737) 1 Atk 505; West temp Hard 217; 26 ER 319, LC

ANNOTATIONS **Apld** Allan v Backhouse (1813) 2 Ves&B 65 **Consd** Metcalfe v Hutchinson (1875) 1 Ch D 591

1395 On deficiency of rent and profits
Okeden v Okeden no 1378 ante

1396 On deficiency of rent and profits
Where real estates were devised in strict settlement, subject to a trust for raising portions for younger children during the minority of the tenant for life, out of the rents and profits, or by sale or mortgage: *Held* certain funds which had arisen from the rents during the minority of the tenant for life were applicable to the payment of the portions, and the deficiency only could be raised by sale or mortgage.
Warter v Hutchinson (1823) 1 Sim&St 276; 57 ER 112

1397 Effect of concurrent provision for leasing
Ivy v Gilbert no 1376 ante

1398 No time limited for payment
Ivy v Gilbert no 1376 ante

1399 No time limited for payment
(1) A term of 500 years created to raise portions for daughters in failure of issue male, as soon as conveniently may be after the father's death, but no maintenance nor any express time mentioned when the portions are payable; there are three daughters, and the eldest but eight years old, the father is dead, but the mother who has a jointure on the estate is living; the court will not raise the portions for daughters so young, out of the reversionary term.

(2) Portions secured by a trust term out of land payable to daughters, to be raised by rents and profits, and no time limited for payment, shall carry no interest, and be raised only by perception of profits, not by sale or mortgage.

Where a particular certain time is limited for the payment of the portion, there it carries interest from that time (*Jekyll MR*).
Evelyn v Evelyn (1731) 2 P Wms 659; 2 Barn KB 118; 24 ER 904; on appeal (1733) 6 Bro Parl Cas 114, HL

ANNOTATIONS As to (2) **Apld** Cowper v Scott (1731) 3 P Wms 119; Okeden v Okeden (1738) 1 Atk 550

1400 Contrary intention — Rents and profits distinctly appropriated
Ivy v Gilbert no 1376 ante

D Sale or mortgage of reversionary term

LAW See Halsbury's Laws (4th edn) vol 42 para 735

1401 Right to raise portions out of reversionary term
Cotton v Cotton (1738) 3 Y&C Ex 149n; 7 LJ Ex Eq 41; 160 ER 651

1402 Right to raise portions out of reversionary term
The court leans against the construction for raising portions or maintenance out of a reversionary term. Appointment, by father and son under a power, of money charged on an estate, that in case the son should survive, it should be applied by him in and towards payment of the debts of the father; and subject thereto the residue, if any, should go and be considered as part of the personal estate of the father,

and in case the father should survive, it should go and be paid by him, his executors, etc, in and towards satisfaction of his debts, with a similar provision as to the residue; the father surviving appointed in favour of another son, for valuable consideration as to part: as to that, the decree directed payment under the appointment: the residue to be paid into court, with liberty to apply; in case of no application within twelve months to be paid according to the appointment.
Clinton v Seymour (1799) 4 Ves 440; 31 ER 226

ANNOTATIONS **Consd** Codrington v Foley (1801) 6 Ves 364

1403 Right to raise portions out of reversionary term — By sale
A reversionary term sold for the raising of a daughter's portion.
Sandys v Sandys (1721) 1 P Wms 707; 24 ER 580, LC

ANNOTATION **Consd** Brome v Berkley (1778) 2 P Wms 484

1404 Right to raise portions out of reversionary term — By sale
Where there is a power, in a trust term to raise portions, that the father, with consent of the trustees, may revoke all the uses; this suspends the portion, and it cannot be raised until after the father's death.

The trust of a term was for raising a portion for a daughter, in default of issue male, payable at eighteen or marriage, or as soon after as the same might conveniently be raised. The mother died, leaving no son, and only one daughter: *Held* this portion could not conveniently be raised, by sale of the reversion of the term, in the father's lifetime.
Reresby v Newland (1723) 6 Bro Parl Cas 75; 2 ER 942, HL

1405 Right to raise portions out of reversionary term — By mortgage
A reversionary term raised for securing maintenance and portions for daughters, shall, in cases of necessity, be mortgaged to pay either, and when fallen into possession, shall pay all the arrears of maintenance incurred before it came into possession.
Ravenhill v Dansey (1723) 2 P Wms 179; 2 Eq Cas Abr 645; 24 ER 690, LC

1406 Right to raise portions out of reversionary term — By mortgage — Discretion of trustees — Application of capital moneys
Re Gisborough's (Lord) Settled Estates no 1365 ante

E Power to charge portions

a In general

1407 Power overreaches all estates
Beale v Beale no 1223 ante

1408 Eldest son joining with father to alter settlement — Right to raise portions provided by original settlement
When a son joins with his father in altering a settlement of an estate, where he may claim the benefit of charges under the former settlement, contrary to the subsequent one.
Edmonds v Edmonds (1740) Barn Ch 362; 27 ER 679, LC

1409 Power given to executrix — Not extending to real estate — Of which executrix trustee only
A power given to an executrix to raise a portion for a younger child does not extend to real estates, of which she was also trustee. A power to raise portions may be executed at several times, provided the first execution be not meant as a complete execution, and that the party, in the whole execution, does not transgress the limits of the power.
Doe d Milborne v Milborne (1788) 2 Term Rep 721; 100 ER 388

1410 Exercise of power — At several times
Doe d Milborne v Milborne no 1409 ante

1411 Exercise of power — Mistake as to amount of portion
£10,000 provided by settlement for one daughter or younger son, £15,000 if more: there being but one daughter, the father by will under a power reserved to him appoints the time of payment and the application of the interest of the £15,000 provided for her by settlement, and gives her the further sum of £5,000, she was held entitled to £20,000. Charge upon land payable at a future day not vested till the time of payment.
Phipps v Mulgrave (Lord) (1798) 3 Ves 613; 30 ER 1182, LC

1412 Exercise of power — Reservation of right to revoke — Effect of reappointment
A tenant in tail under a will with power to charge portions and for the purpose of raising them to demise the devised hereditaments to trustees for a term, charged the estate with the payment of £4,000 for the benefit of his younger children as he should appoint, and subject to appointment equally, and he appointed the hereditaments to trustees for a term with a proviso for cesser, and reserved to himself a power of revoking any of the trusts of the money, and to declare any new trusts thereof. He executed a subsequent deed, not noticing the former, purporting to charge part of the hereditaments with £2,000 in favour of a younger child, and to create a term to secure it: *Held* the trusts of the money were

well revoked and reappointed, but the reappointment of the term was void, so that the trustee of it could not give a good receipt to mortgagees for the money raised.

Vyvyan v Vyvyan (1861) 4 De GF&J 183; 31 LJ Ch 158; 5 LT 511; 8 Jur NS 3; 10 WR 179; 45 ER 1153, LC

1413 Omission of power — Ground for rectification of settlement

Welman v Welman no 215 ante

1414 Extinguishment or release of power — Disentailing estate

A having a power to charge lands with portions for younger children, suffers a recovery, and after by will reciting his powers, he charges the estate with £1,000 for the portion of his daughter, and devises her £1,000, the recovery having extinguished his power, the £1,000 charged on the lands was decreed to be paid out of his personal estate.

Tankerville (Earl) v Coke (1729) Mos 146; 25 ER 319, LC

1415 Extinguishment or release of power — Disentailing estate

Semble: where a tenant for life, having a power to charge the estate after his death for the benefit of his children, levies a fine, the power will be extinguished.

By a marriage settlement, lands were limited to the use of the husband for life, remainder to the wife for life, remainder to trustees for a term of 400 years, to commence from the decease of the survivor of the husband and wife, remainder to the heirs of the body of the wife begotten by the husband, remainder to the heirs of the husband. The trust of the term was, in case there should be issue of the marriage a son and one or more younger child or children, who should live to attain his, her, or their age or ages of twenty-one years, to raise such sum, not exceeding £200 in the whole, as the husband and wife should by any deed or writing appoint, or in default thereof, as the survivor should by deed or writing, or his or her last will or testament, appoint; and in default of such appointment, or subject thereto, after the moneys so appointed should have been raised, and the costs of the trustees paid, the term was to cease or be assigned in trust to attend the inheritance. There were younger children of the marriage who attained twenty-one. The wife died without having joined in any appointment, and afterwards the husband levied a fine of the premises: *Held* the power was extinguished by the fine.

Bickley v Guest (1831) 1 Russ&M 440; 39 ER 170

1416 Extinguishment or release of power — By excess instrument

A tenant for life, having a power to charge the estate with portions for younger children, mortgaged his life estate, and covenanted not to exercise the power: *Held* he could not, afterwards, charge the estate with portions, to the prejudice of his mortgagees.

Hurst v Hurst (1852) 16 Beav 372; 22 LJ Ch 538; 1 WR 105; 51 ER 822

1417 Extinguishment or release of power — By excess instrument

A power given to a tenant for life to charge the inheritance with portions for younger children may be released not only by an instrument expressly releasing it, but by dealings manifestly inconsistent with its exercise. The donee of the power cannot be allowed to derogate from his own grant. Ordinary covenants for title do not suffice to release the power, if the property is in terms assured or appointed subject to the power, the presumption being strong that such covenants are only ancillary to the assurance and are not intended to enlarge its operations.

By a marriage settlement in 1822 certain real estates were settled to the use of the husband for life, with remainder, subject to a long term of years for securing portions for younger children, to the use of his first and other sons successively in tail male, and he was thereby empowered by deed or will to charge a further sum for portions for younger children. By a disentailing deed in 1854 his eldest son, with his consent as protector of the settlement, assured the settled estates in fee simple, subject to the uses, estates, and terms limited in the settlement anterior to the limitations in tail male and all powers to such precedent estates belonging or annexed, to such uses as the father and son should by deed jointly appoint. They thereupon in exercise of the joint power created three mortgages upon the estates. Each mortgage deed contained (*inter alia*) a joint and several covenant by them for quiet enjoyment "free and clear and freely and clearly . . . released . . . and indemnified of from and against all and all manner of . . . portions, and especially" certain specified charges, but the power to appoint further portions was not specially mentioned. The father survived his son and died in 1896, having by his will charged the estates with the further sum for portions for younger children: *Held* upon the construction of the mortgages the power to appoint further portions had not been released, and, therefore, the portions charged had priority over the mortgages.

Nottidge v Dering, Raban v Dering [1910] 1 Ch 297; 79 LJ Ch 439; 102 LT 145, CA

1418 Extinguishment or release of power — By dealings inconsistent with exercise

Nottidge v Dering, Raban v Dering no 1417 ante

1419 Extinguishment or release of power — By covenants for title

Nottidge v Dering, Raban v Dering no 1417 ante

b Construction

1420 Whether general power cut down — Particular proviso

A general power to raise portions for daughters, may be restrained and qualified by a particular proviso.

Fane v Devonshire (Duke) (1718) 6 Bro Parl Cas 137; 2 ER 984, HL

1421 Question of circumstances of case

Where the intention of a settlement appears from the recitals, to be to secure a provision for children, it is a question of the actual circumstances in each particular case whether a power in the settlement, which is in terms general, must be cut down to a particular power in favour of children only.

Minton v Kinwood (1868) 3 Ch App 614; 37 LJ Ch 606; 18 LT 781; 16 WR 991, LJJ

1422 Power given by reference to another power — Free from contingencies applicable to other power

A, tenant for life in possession, joined with B, the next heir, in the settlement of certain estates. The settlement contained, among other things, a power for B, in case of the death of his first wife and his marrying again, to charge the settled estates with portions for the younger children of his second marriage, the amounts being regulated with reference to the number of children that might be born of the first marriage. The deed contained a proviso that if the brothers of B should respectively come into possession of the settled estates, "either before or after their marriage with any woman or women," they might charge all or any part of the estates with "the like sum or sums of money for the portion or portions of their child or children, other than an eldest or only son, as B is entitled to do before or after his marriage with any woman or women after the decease of his first-taken wife by virtue of the provision hereinbefore contained: *Held* this was an absolute power, which, with reference to a younger brother of B succeeding to the settled estates, was not subject to the restrictions and contingencies which applied to B himself in making a charge for the children of his second marriage.

Harrington (Earl) v Harrington (Countess Dowager) (1868) LR 3 HL 295; 37 LJ Ch 858, HL

1423 Power exercisable if there should be "not more than two children" — No children born

A marriage settlement contained a provision authorising and directing the trustees, on the request of the survivor of the husband and wife, to raise, "if there should be not more than two children of the marriage, the sum of £5,000 and if there should be more than two children, the sum of £3,000." There were no children born of the marriage, and the husband survived his wife. It was, however, contended that the event on which the exercise of the power depended had not occurred, inasmuch as there was no express power to raise any sum in the event of there being no children: *Held* the power was intended to override previous limitations in the settlement; and the only proper and grammatical construction of the words was, that the expression "not more than two children" extended to the case of there being no children. Therefore, the sum of £5,000 was raisable.

Wilkinson v Thornhill (1889) 61 LT 362

c Validity of execution of power

1424 Power to appoint by deed — Instructions in writing for deed — Death before execution

Father by a marriage settlement, had power to charge lands with £500 for portions for his daughters; had prepared notes in writing purporting his will; and declared those notes were the effect of his will, but died before it was drawn up in form, and before it was executed; this was decreed to be a good execution of his power.

Smith v Ashton (1676) Cas temp Finch 273; 1 Cas in Ch 263; Freem Ch 308; Freem KB 308; 3 Keb 551; 1 Eq Cas Abr 345; 23 ER 150

1425 Power to appoint by deed — Exercisable by survivor of trustees

Bushell v Newby & Wakefield (1676) Cas temp Finch 260; 23 ER 143, LC

1426 Defective execution — How far equity will assist — Power of leasing as provision for children

Gooding v Gooding (1698) 1 Eq Cas Abr 342; 21 R 1089; sub nom

Anon (1698) Freem Ch 224

1427 Exclusive or unequal appointment

The father by marriage settlement has a power to make an appointment of a sum not exceeding a sum certain, for portions and maintenance of younger children, in such manner and under such limitations as he shall appoint. He has several younger children, and by his will, taking notice that the rest were provided for by their grandfather, he appoints the

whole sum to one. This is not a good pursuance of his power.
Menzey v Walker (1735) Cas temp Talb 72; 25 ER 669, LC

1428 Exclusive or unequal appointment
By marriage settlement, £1,500 was provided for younger children in such shares as the parents should appoint, in default of appointment to all the children, after the death of the wife. The parents afterwards made an appointment excluding one child; this deed vests the portions in the children born or to be born.
Mayhew v Middleditch (1782) 1 Bro CC 162; 28 ER 1054, LC

1429 Exclusive or unequal appointment
A power to raise such sum as A should direct, to be divided amongst such younger children as A should direct, authorises an exclusive appointment to one.
Tanner v Babbage (1835) 4 LJ Ch 101

1430 Exclusive or unequal appointment
(1) A settlement was made in Ireland of estates, some of which were situate there and the rest in England, by which the estates were limited to trustees for a term of years, for raising at a future time £10,000 for portions; and interest at 5 per cent was to be raised out of the rents for the children's maintenance in the meantime; but the settlement was silent as to the rate of interest on the portions after they had become payable: *Held* the £10,000 must be raised in Irish currency; but not with Irish interest, 6 per cent, but 4 per cent according to the usual course of the court.

(2) Under a marriage settlement the husband and wife, having power to appoint £10,000 amongst all their younger children, but in such shares as they should think fit, appointed the whole, in different sums and at different times, to four of the younger children, to the exclusion of the rest: *Held* the three first appointments were good, and only the last void.

(3) Under a marriage settlement, a term was vested in trustees for raising £10,000 for the younger children of the marriage, and, subject thereto, the estates were limited to the first and other sons in tail male. Much more than six years after the £10,000 ought to have been raised and paid, the younger children filed a bill, to have that sum raised: *Held* the relation of trustees and *cestui que trust* existed between the parties; and, therefore, Statute of Limitations (repealed), which enacted that money to be raised out of land should not be recoverable but within twenty years next after a right to receive the same should have accrued to some person capable of giving a receipt for the same, did not apply.
Young v Waterpark (Lord) (1842) 13 Sim 199; 11 LJ Ch 367; 6 Jur 656; 60 ER 77; on appeal (1845) 15 LJ Ch 63, LC
ANNOTATION As to (1) **Consd** Balfour v Cooper (1883) 23 Ch D 472

1431 Exclusive or unequal appointment
Upon the construction of an instrument creating a power of raising portions: *Held* the donee had a right to distribute the portions unequally.
Cotgreave v Cotgreave (1846) 1 De G&Sm 38; 16 LJ Ch 145; 8 LTOS 233; 11 Jur 51; 63 ER 961

1432 Exclusive or unequal appointment — Existing prior appointment in equal shares
(1) By a marriage settlement of 1791 certain estates at B were charged with a sum of £10,000 for portions for the children of the marriage, in equal shares; and by the same instrument power was given to substitute for those estates other estates of equal value, as a fund for raising those portions. By a deed of 1811 the settlor covenanted that, as soon as estates at H were disincumbered, he would charge them in substitution for the other estates with the payment of £10,000 for portions under the same limitations as had been expressed in the settlement, and would also further charge the same estates at H with the sum of £30,000 for the younger children of the marriage, to be paid to them in such shares and proportions as he, the settlor, should by deed or will appoint. By a deed of 1816, which was a general conveyance of all the settlor's estates in trust for payment of his debts, reciting amongst other things that the settlor had not then performed the covenant contained in the deed of 1811, it was declared that the trustee of that deed should hold the estates at H, or otherwise convey the same to the trustees of the settlement for the purpose of securing the portions, according to the deed of 1811; and by a deed of 1816, reciting the former deeds, the trustees of the deed of trust, by the direction of the settlor, conveyed the estates at H to the trustee of the settlement, upon trust, after the death of the settlor, to raise £10,000 in lieu and satisfaction of the £10,000 under the settlement, in trust for all and every the children of the marriage, under the same limitations as were contained in the settlement, and upon trust to raise the further sum of £30,000 for all and every the children of the marriage except the eldest son J, in the same manner in all respects, excluding J, as by the indenture of settlement was declared concerning the sum of £10,000 thereby directed to be raised: *Held* the deed of 1817 was a complete execution of the power of appointing the £30,000 contained in the deed of 1811; and, consequently, the younger children of the marriage who were living at the time of the execution of the deed of 1817 were entitled to the £30,000 in equal shares.

(2) A father executed a power of appointment under which his four younger children, B, C, D and

E, became entitled, subject to his life interest, to £30,000 in equal shares. The father afterwards, by several instruments of appointment, affected to appoint the whole fund, to B, C and D in the following shares: *viz*, to B £13,000, to C £5,000, and to D £12,000. E, who was a son, died in his father's lifetime intestate and without issue whereupon his share devolved to the father. After E's decease the father, with a view to support the subsequent appointments, executed a deed poll, declaring that the original appointment under which the children took equally was made by mistake: *Held* though the subsequent appointments were invalid so far as related to the shares of B, C, and D, yet as regarded the share of E the father was bound by the statement in the deed poll; and E's share, amounting to £7,500, must be apportioned between B and D in satisfaction *pro tanto* of the losses which, through the invalidity of the subsequent appointments, had been sustained by their respective shares.

Armytage v Armytage (1842) 1 Y&C Ch Cas 461; 6 Jur 790; 62 ER 971

1433 Successive executions

Doe d Milborne v Milborne no 1409 ante

1434 Power to appoint in praesenti — Appointment to take effect after death of appointor

Dawson v Cleveland (Duke) (1737) West temp Hard 106; 25 ER 845

1435 Devise to trustees to pay debts and incumbrances — Portions payable out of residue

Tempest v Saline, Pollexfen v Adelmere (1743) Sugden on Powers 8th ed 915

1436 Right to annex condition to appointment

A father having a power to appoint portions to younger children, to be raised at all events, in such shares as he shall think fit, cannot annex a condition to the appointment of any child's share.

Pawlet v Pawlet (1748) 1 Wils 224; 95 ER 586

1437 Exercise by will

Covenant to settle an estate in strict settlement; subject to a power to the father, tenant for life, in case there should be any younger child or children, to charge such sum or sums for such younger child or children, payable in such proportions, and at such times, as he should appoint. The power was held well executed by a will directing a sale and appointing the money.

Long v Long (1800) 5 Ves 445; 31 ER 674, LC

1438 Exercise by will

By a settlement made on the marriage of plaintiff an estate was settled in trust for plaintiff's father, the settlor, and his wife, for their lives, remainder to plaintiff for life, remainder to his children, and in default of issue to plaintiff and his heirs. A power was reserved to the settlor of charging the estate by deed or instrument in writing to the extent of £500, for portions of his younger children, and of creating a term for that purpose. By his will the settlor devises the settled estate to plaintiff, his heirs and assigns, subject to and charged with legacies to three daughters of the settlor, amounting together to £500. He afterwards bequeathed the legacies, and directed them to be paid by plaintiff, his heirs and assigns. He did not create a term of years, nor in any way refer of the power contained in the settlement: *Held* the sums mentioned in the will were well charged on the property comprised in the settlement.

Davies v Davies (1858) 28 LJ Ch 102; 32 LTOS 156; 4 Jur NS 1291; 7 WR 85

1439 Necessity for reference to power — Execution by subsequent deed — Reciting deed containing power

Armytage v Armytage no 1432 ante

1440 Necessity for reference to power — Execution by will

Davies v Davies no 1438 ante

1441 Necessity for reference to power — Execution by will — Will comprising object of power

Although a will does not state that it is made in execution of a power, yet if it plainly refer to and comprise the subject of the power, it will be deemed a good execution.

Hunlock v Gell (1830) 1 Russ&M 515; 39 ER 198

1442 Necessity for reference to power — Execution by will — Mistake as to settlement creating power

Testator, after reciting that under the settlement in 1819, on his second marriage, he had power to charge £5,000 amongst the children of his second marriage, proceeded to appoint it. The settlement of 1819 contained no such power, but a resettlement of 1839 contained a power to appoint that sum to his younger children: *Held* the will was a valid execution of the power.

Re Wilmot (1861) 29 Beav 644; 54 ER 777

1443 Power contingent on certain events — Events not happening

Sing v Leslie no 1221 ante

1444 Portions not to exceed certain amount — "At any one time" — Exercise by

successive tenants for life — Portions raised exceeding specified amount

By his will, made in 1860 testator who died in 1863 devised his real estate in strict settlement, and empowered each person thereby made tenant for life, whether in possession or not, to charge the property with the payment of any annual sum not exceeding £1,000 by way of jointure, and with any sum not exceeding £20,000, for portions of younger children. The will then provided that the devised property should not by virtue of these powers at any one time be liable to the payment of more than the annual sum of £1,500 for jointures, and more than the principal sum of £30,000 for portions of younger children. Provisions similar to this were to be found in books of precedents published before the date of the will. One tenant for life died in 1872, having charged the property with £20,000 for portions; and another tenant for life died in 1874, having made the same charge. Both these sums of £20,000 were raised and paid. In 1890 a third tenant for life, who never came into possession, died, having also charged the property for £20,000 for portions. On a summons taken out to determine whether this third charge was a good exercise of the power and valid and effectual for the whole amount: *Held* the form of the provisions having been the common form at the date of the will, the words "at any one time" must be construed as applying to the sum chargeable for portions as well as to the sum chargeable for jointures; and the third charge of £20,000 therefore did not transgress the limitations imposed by the will in respect of portions, but as valid and effectual for the whole amount.

Re Beckett, Bethell v Grimthorpe (1905) 93 LT 746; 22 TLR 84

Scottish, Irish and Commonwealth Cases

1445 Exclusive or unequal appointment

A father, having a power of appointment among all his children, by will, purporting to appoint the whole fund, excluded one child, and appointed a portion of the fund to grandchildren, not objects of the power: *Held* the appointment was valid, so far as it related to the portion of the fund appointed to the children.

Ex p Bernard (1857) 6 I Ch R 133; 9 Ir Jur 226 (IR)

1446 Exclusive or unequal appointment

Re Bromhead's Trusts, Public Trustee v Bromhead [1922] 1 IR 75 (IR)

1447 Exercise by will

Fenton v Fenton (1837) 1 Dr&Wal 66 (IR)

1448 Portions not to exceed certain amount

Re Borrowes' Estate (1868) 2 IR Eq 468 (IR)

1449 Execution in favour of children of former marriage

Cooke v Brisoe (1838) 1 Dr&Wal 596 (IR)

1450 Promise to appoint — Whether valid appointment

Re Jennings (1854) 8 I Ch R 421, PC (IR)

6 Vesting of portions

A Generally

LAW See Halsbury's Laws (4th edn) vol 42 para 736

1451 Presumption as to time of vesting — When child most requires it — Twenty-one or marriage

Emperor v Rolfe no 1516 post

1452 Presumption as to time of vesting — When child most requires it — Twenty-one or marriage

Mostyn v Mostyn no 2820 post

1453 Presumption as to time of vesting — When child most requires it — Twenty-one or marriage

By a voluntary settlement, expressed to be made in consideration of natural love and affection for settlor's son G, and daughters M and E, property was settled in trust for settlor for life, with remainder, as to part, in trust for G for life, and after his decease, in trust for all G's children which might be living at the time of his decease, as tenants in common; and if G should have but one such child, then for such only child; the share of every such child to be vested at twenty-one, or, if a daughter, at twenty-one or marriage; with proviso for survivorship if more than one child of G, and any of them being a son should die under twenty-one, or, being a daughter, under twenty-one without having been married; and in case all such of G's children as were sons should die under twenty-one, and all such of them as were daughters under that age without having been married, then over; and as to other parts of the property, in trust for M for life, and, after her decease, for all her children, who, being sons, should attain twenty-one, or, being daughters, should attain that age or be married, in such manner and form, and in such shares and proportions, and subject to such clauses of survivorship, etc, as before declared with respect to G's children; and, as to a third part of the property, upon trusts for E and her children, similar to the trusts for M and her children: *Held* the instrument, though voluntary, and not expressed to be made in consideration of natural love and affection for the settlor's grandchildren, was within the rule in *Emperor v Rolfe* (no 1516 post); and having regard to

the terms of the limitation over, after the trusts for G's children, and notwithstanding the different form in which the trusts for the children of M and E were expressed, two children of G who attained twenty-one, and subsequently died in his lifetime, took vested and transmissible interests equally with those of G's children who survived him: the rule being that, whereas, in ordinary instruments, an express estate thereby limited cannot be enlarged except by necessary inference, yet, upon instruments of this description, there is an implication of law, arising upon the instrument itself, subject to any expression to the contrary, that it is the intention of any person who places himself *in loco parentis* to provide portions for children or grandchildren, as the case may be, at the period when such portions will be wanted, namely, upon their attaining the age of twenty-one, or, in the case of daughters, upon their attaining that age, or marriage; and such portions shall then vest, whether the children do or do not survive their parents.

Swallow v Binns (1855) 1 K&J 417; 26 LTOS 37; 1 Jur NS 843; 69 ER 522

1454 Presumption as to time of vesting — When child most requires it

On marriage articles £9,000 in trust for husband and wife for life, and for eldest son subject to raise and pay £5,000 for younger children as father should appoint; for want of appointment at twenty-one; the interest for maintenance. Mother dies, only one younger son then, who dies two years old. Father cannot claim this £5,000 as his representative; not vesting in the children. There are no words for vesting except those for raising and paying at twenty-one. Portions by will governed by rules from civil law or ecclesiastical court not applicable to a deed. Construction of portion, is when the children want it. Interest evidence of vesting in legatory cases.

Hubert v Parsons (1751) 2 Ves Sen 261; 28 ER 169, LC

1455 Presumption as to time of vesting — When child most requires it — Uncertainty in settlement

Howgrave v Cartier no 1525 post

1456 Presumption as to time of vesting — When child most requires it

Perfect v Curzon (Lord) no 2816 post

1457 Presumption as to time of vesting — When child most requires it — Uncertainty in settlement

Mostyn v Mostyn no 2820 post

1458 Presumption as to time of vesting — When child most requires it — Settlement by person in loco parentis

Swallow v Binns no 1453 ante

1459 Presumption as to time of vesting — When child most requires it — Settlement by person in loco parentis

In construing a will equally with a settlement made by a person *in loco parentis* the court leans to the presumption that the intention is to vest the portions in the children when they most require it, whether they survive the tenant for life or not; and where there is any reasonable ground for supposing such an intention, the benefit of any doubt is to be given in favour of the vesting.

Testatrix, after giving certain property upon trust for S, her adopted daughter, for life, and after her death for the benefit of all her children, in the same manner as thereinafter declared respecting one moiety of the residue, bequeathed the residue upon trust for S for life, and after he decease, as to one moiety, for all the children of S who should be living at the time of her decease, to be paid to them at the age of twenty-one or marriage; but if such times should happen in the lifetime of S, the payment to be postponed till after her decease; but testatrix directed that the same should become a vested interest in each of the children of S at twenty-one or marriage. There was a similar limitation of the other moiety, and a gift over in case of the death of all the children under twenty-one or marriage. One of the children attained twenty-one in the lifetime of testatrix, but predeceased her: *Held* the representative of such child was entitled to his share.

Jackson v Dover (1864) 2 Hem&M 209; 4 New Rep 136; 10 LT 489; 10 Jur NS 631; 12 WR 855; 71 ER 442

ANNOTATIONS **Apld** Re Knowles, Nottage v Buxton (1882) 21 Ch D 806 **Consd** Re Hamlet, Stephen v Cunningham (1888) 39 Ch D 426

1460 Presumption as to time of vesting — When child most requires it — Applicable to wills as well as settlements

Jackson v Dover no 1459 ante

1461 Presumption as to time of vesting — When child most requires it — Presumption rebuttable only on strong grounds

The presumption, that a prenuptial settlement is intended to provide for children of the marriage at the time when they require a prevision, is so strong that the court will not, unless absolutely compelled by the language of the instrument, adopt a construction of such a settlement, which would exclude from

its benefit a child who comes of age but does not survive both parents.

Currie v Larkins (1864) 4 De GJ&Sm 245; 3 New Rep 621; 10 LT 47; 10 Jur NS 349; 12 WR 515; 46 ER 913, LJJ

ANNOTATION **Consd** Re Hamlet, Stephen v Cunningham (1888) 39 Ch D 426

1462 Conditions as to vesting — In will of parent

(1) A by will gives portions to his daughters, but mentions no time when to be paid, but adds a proviso, that his daughters should marry with consent of his wife; and if any married without such consent her portion to go over. On a bill brought by the daughters for their portions, the court decreed the portions to be paid; but on security to refund, if the condition should be broken. (2) Where portions are provided for daughters by a settlement, the father cannot by his will annex any condition to the payment of them, or devise them over, in case of the death of any of the daughters, before their portions become payable.

Aston v Aston (1703) 2 Vern 452; 23 ER 890

ANNOTATIONS As to (1) **Consd** Garbut v Hilton (1739) 9 Mod Rep 210 **Apld** Re Whiting's Settlmt, Whiting v De Ruten [1905] 1 Ch 96

1463 Conditions as to vesting — Portions payable on future day — Not vested until such day

Phipps v Mulgrave (Lord) no 1411 ante

1464 Under power to appoint portions — Whether vesting suspended

Teynham (Lord) v Webb no 1245 ante

1465 Under power to appoint portions — Validity of immediate vesting — Whether fraud on power

W having a power of charging portions for younger children on real estate under a settlement which gave him in the clearest terms power to fix the ages and times at which the portions should vest, and contained no provision for raising portions in default of appointment, and having three daughters aged nine, seven, and one, appointed by deed in 1828 £10,000, being the full amount he was entitled to charge for the portions of the daughters, to be a vested interest in the three daughters respectively immediately on the execution of the deed, the portions to be paid to them at such times and in such proportions as he should by deed or will appoint, and in default of appointment to be paid to them share and share alike, at twenty-one or marriage, if the same age or time should happen after his decease, but if in his lifetime, then the payment to be postponed till after his death, unless he should signify his consent in writing to their being raised and paid in his lifetime; maintenance at 4 per cent to be raised from his death, and the deed contained power of revocation. In 1832 he made by a deed a similar appointment by way of confirmation of the former, the portions to be vested immediately on the execution of the deed. One daughter married and attained twenty-one, and in 1851 W appointed £5,000, part of the £10,000, to her. The other two died infants and spinsters, one in 1836, the other in 1845. W assigned to plaintiff for value in 1875 the £5,000 appointed to the two deceased daughters, and after his death plaintiff brought this action to have it raised: *Held* (1) where a donee of a power of charging portions on real estate has, under the terms of the power, clear authority to fix the times at which portions shall vest, and appoints a portion to vest immediately, there is no rule of law which prohibits its being raised in the event of the child dying under twenty-one and unmarried, and the decision could not be supported on the ground that the appointment, so far as it made the portions vest immediately, was not within the power; (2) the decision could not be supported on the ground that the appointment, so far as it made the portions vest immediately, was a fraud on the power as being made with a view to secure a benefit to the appointor; for that having regard to the fact that if the father had died without making any appointment, the children would have been unprovided for, it was manifestly for the benefit of the children that the father should make an appointment, and as there was nothing to lead to the conclusion that when the appointments were made the children were likely to die young, and as in the event of the early death of the appointor the children might have derived a benefit from the absolute vesting of their portions, there was no ground for attributing to him an intention to benefit himself by making the portions vest immediately, plaintiff was entitled to have the £5,000 raised.

(3) Powers to appoint portions charged on land ought if their language is doubtful to be construed so as not to authorise appointments vesting those portions in the appointees before they want them, that is before they attain twenty-one, or if daughters, marry (*Lindley LJ*).

(4) Where the language of the power is clear and unambiguous effect must be given to it (*Lindley LJ*).

(5) Where upon the true construction of the power and the appointment the portion has not vested in the lifetime of the appointee the portion is not raisable but sinks into the inheritance (*Lindley LJ*).

(6) Where upon the true construction of both instruments the portion has vested in the appointee the portion is raisable even though the appointee dies under twenty-one or (if a daughter) unmarried (*Lindley LJ*).

(7) Appointments vesting portions charged on land in children of tender years who die soon afterwards are looked at with suspicion, and very little additional evidence of improper motive or object will induce the court to set aside the appointment or treat it as invalid, but that without some additional evidence the court cannot do so (*Lindley LJ*).
Henty v Wrey (1882) 21 Ch D 332; 53 LJ Ch 667; 47 231; 30 WR 850, CA

ANNOTATION As to (3), (4) & (7) **Apld** Re De Hoghton, De Hoghton v De Hoghton [1896] 2 Ch 385

1466 Under power to appoint portions — Where language doubtful — Not before twenty-one or marriage
Henty v Wrey no 1465 ante

1467 Under power to appoint portions — Charged on land — Vesting in children of tender years
A power in a settlement to raise a portion for a younger child at such time as the parent should direct; he directs it to be raised when she is fourteen, and she dying, files his bill for it as her administrator; the portion shall not be raised for the father.

The meaning of a charge for children is that it shall take place when it shall be wanted (*Lord Thurlow C*).
Hinchinbroke v Seymour (1784) 1 Bro CC 395; 28 ER 1200; sub nom
Sandwich's (Lord) Case (1784) cited in 11 Ves at p 479, LC

ANNOTATIONS **Consd** M'Queen v Farquhar (1805) 11 Ves 467; Queensberry Leases Case (1819) 1 Bli 339; Domville v Lamb (1853) 1 WR 246; Wellesley v Mornington (1855) 2 K&J 143 **Expld** Henty v Wrey (1882) 21 Ch D 332

1468 Under power to appoint portions — Charged on land — Vesting in children of tender years — When court will set aside
Henty v Wrey no 1465 ante

1469 Period of vesting violating rule against perpetuities
Limitations of a term to trustees, upon trust to raise portions for the children of A surviving A and B, "to vest in and to be paid and payable to" them at their ages of twenty-four years, with maintenance, etc, in meanwhile, out of the expectant or presumptive shares, and a gift over on the death of all before their shares should become vested: *Held* void for remoteness.
Re Blakemore's Settlement (1855) 20 Beav 214; 52 ER 585

B Portion payable out of realty on event personal to portionist

LAW See Halsbury's Laws (4th edn) vol 42 para 736

1470 Effect of death of portionist before happening of event — Whether portion sinks into inheritance
Wentworth v Young (1638) Nels 36; 21 ER 783

1471 Effect of death of portionist before happening of event — Whether portion sinks into inheritance
£1,000 to be raised and divided amongst five children, one dies before distribution, the survivors shall have his share and not the devisee of him that is dead.
Woolstenholm v Swetnam (1677) 2 Rep Ch 129; 21 ER 636

1472 Effect of death of portionist before happening of event — Whether portion sinks into inheritance
Stawell v Austin (1677) 2 Rep Ch 125; 21 ER 635

1473 Effect of death of portionist before happening of event — Whether portion sinks into inheritance
Brathwaite v Brathwaite no 1279 ante

1474 Effect of death of portionist before happening of event — Whether portion sinks into inheritance
Bond v Brown (1685) 2 Cas in Ch 165; 22 ER 896

1475 Effect of death of portionist before happening of event — Whether portion sinks into inheritance
Portion devised out of land, payable at a future day; if the person to whom payable dies before the day of payment, it is sunk; *aliter* out of personal estate.
Yates v Fettiplace (1700) 12 Mod Rep 276; 1 Ld Raym 508; 2 Vern 416; Freem Ch 243; Prec Ch 140; 88 ER 1319

ANNOTATIONS **Consd** Jennings v Looks (1725) 2 P Wms 276; Chandos v Talbot (1731) 2 P Wms 601; Bellasis v Athwatt (1737) West temp Hard 273; Prowse v Abingdon (1738) West temp Hard 312; A-G v Milner (1744) 3 Atk 112 **Distd** Reynish v Martin (1746) 3 Atk 330

1476 Effect of death of portionist before happening of event — Whether portion sinks into inheritance
Term of 1,000 years to secure daughters' portions payable at sixteen; proviso, if no daughter at the time of failure of issue male, the portion to sink. There is a daughter, who attains to sixteen, and marries without consent, and no son by the marriage: but the daughter dies in the lifetime of the father and mother and consequently while there might be a son; the portion sinks.

Portion secured out of land and the daughter dies before the portion becomes payable; it sinks into the land, so if a legacy be given out of land payable to J

at twenty-one, and J dies before twenty-one, the legacy sinks. *Secus* in both cases where the legacy of portion is given out of a personal estate.
Gordon v Raynes (1732) 3 P Wms 134; 24 ER 1001, LC

1477 Effect of death of portionist before happening of event — Whether portion sinks into inheritance

A devised lands to his son B, but if he should die without issue male of his body then living, or which might be afterwards born, that then his daughter M should receive at her age of twenty-one, or day or marriage, which should first happen, £3,500 over and above £2,500 before given her; and in case the contingency of his son's dying without issue male should not happen before his daughter's said age, or day of marriage, that then she should receive the £3,500 whenever such contingency might happen; and testator charged this legacy or portion on his real estate, M having attained twenty-one, married, and died in the lifetime of her brother B who afterwards died without issue male: *Held* the husband and administrator of M was entitled to this legacy, and it was a subsisting charge on testator's real estate.
Wither v King (1735) 3 Bro Parl Cas 135; 1 ER 1226; sub nom
King v Withers (1735) 3 P Wms 414, HL

ANNOTATIONS **Distd** Bradley v Powell (1736) Cas temp Talb 193; Harvey v Aston (1737) 1 Atk 361; Hall v Terry (1738) West temp Hard 500 **Apld** Goodtitle d Gurnall v Wood (1740) Willes 211 **Folld** Emes v Hancock (1742) 2 Atk 507 **Distd** A-G v Milner (1744) 3 Atk 112 **Consd** Sherman v Collins (1745) 3 Atk 319; Reynish v Martin (1746) 3 Atk 330; Hodgson v Rawson (1747) 1 Ves Sen 44; Tunstall v Brachen (1753) Amb 167 **Apld** Godwin v Munday (1783) 1 Bro CC 191 **Consd** Davis v Huguenin (1863) 1 Hem&M 730

1478 Effect of death of portionist before happening of event — Whether portion sinks into inheritance

By indenture of 27 July 1687, T when in possession of a certain estate was empowered to limit any part of the estate not exceeding £500 per annum to a wife, for her jointure, and also to limit any part of the lands not exceeding £500 per annum for raising portions for younger children.

The value of the estate not exceeding £600 per annum, R when in possession by deed in pursuance of his power, charges part of the lands with £500 per annum for the jointure of his wife and by another deed charges the residue of the lands and the reversion of the lands charged with his wife's jointure with the sum of £675 for each of his younger children to be paid to such of them as should attain twenty-one before his death, within one year after his death, and as to such of them as should not have attained that age, to be paid to the sons at twenty-one, and to the daughters at twenty-one or marriage, such respective portions to be paid with interest at 5 per cent from the time of his death to the time of the payment thereof. T died in 1715, one of his sons dies in 1728, having attained the age of twenty-six, and V in 1730, having attained the age of sixteen: *Held* (1) T under the deed of July 1687, was empowered to charge the estate with interest upon his children's portions before the time at which they were payable, and the interest upon the portions ought not to accumulate until the time of payment; but ought to be paid annually until the principal became due; and (2) having died unmarried and under the age of twenty-one, her portion sunk into the estate for the benefit of the heir-at-law.
Boycott v Cotton (1738) West temp Hard 520; 1 Atk 552; [1558–1774] All ER 313; 25 ER 1064, LC

ANNOTATIONS As to (1) **Consd** Balfour v Cooper (1883) 23 Ch D 472. Generally **Consd** Henty v Wrey (1882) 21 Ch D 332

1479 Effect of death of portionist before happening of event — Whether portion sinks into inheritance

T devises to his nephews and his heirs the moiety of an estate subject to his, testator's, wife's life estate so as his nephew should within one year after the estate should come to him, pay amongst other sums £100 to E and charges the estate with payment of the same E dying in the lifetime of the wife: *Held* E's representative was not entitled to the £100.
Hall v Terry (1738) 1 Atk 502; West temp Hard 500; 26 ER 317, LC

ANNOTATIONS **Distd** Hutchins v Foy (1740) 2 Com 716; Hodgson v Rawson (1747) 1 Ves Sen 44; Tunstall v Brachen (1753) Amb 167

1480 Effect of death of portionist before happening of event — Whether portion sinks into inheritance

Whether a charge on land be created by deed or will, whether given by way of portion for a child or merely as a legacy by collateral relations, or others, if the party dies before the day of payment, cannot be raised.
Prowse v Abingdon (1738) 1 Atk 482; West temp Hard 312; 26 ER 306, LC

1481 Effect of death of portionist before happening of event — Whether portion sinks into inheritance

Ever since the case of *Poulet (Lady) v Poulet (Lord)* no 2667 post, it has been the rule that where there is a portion to be raised out of land, if the person dies

before the day of payment comes, it sinks for the benefit of the heir.

Lowther v Condon (1741) 2 Atk 130; 26 ER 482, LC; previous proceedings (1740) Barn Ch 327; 2 Akt 127; 26 ER 480, LC

ANNOTATIONS **Consd** Sherman v Collins (1745) 3 Atk 319; Poole v Terry (1831) 4 Sim 294; Murkin v Phillipson (1834) 3 My&K 257

1482 Effect of death of portionist before happening of event — Whether portion sinks into inheritance

T devises copyhold lands he had surrendered to the use of his will to his wife for life after her decease to his son S till defendant his grandson attained the age of twenty-three, and as soon as he attained that age, gives it to him and his heirs on condition that he pays to E £60 within two years after he attains twenty-three and in default of payment of the £60 testator gave E a power to enter and receive the rents till the £60 was paid. Testator died soon after making his will. E married plaintiff and was alive when defendant attained the age of twenty-three, but died within the two years after he attained that age: Held the £60 to be raised out of the copyhold lands and to be paid to plaintiff.

Emes v Hancock (1743) 2 Atk 507; 26 ER 705, LC

ANNOTATION **Consd** Manning v Herbert (1769) Amb 575

1483 Effect of death of portionist before happening of event — Whether portion sinks into inheritance

Hubert v Parsons no 1454 ante

1484 Effect of death of portionist before happening of event — Whether portion sinks into inheritance

Devise of estate to second son J after the decease or marriage of the wife, charged with £100 to testator's daughter M. M died living the wife: *Held* the legacy vested in M and transmissible to her representative.

Godwin v Munday (1783) 1 Bro CC 191; 2 Dick 551; 28 ER 1076, LC

1485 Effect of death of portionist before happening of event — Whether portion sinks into inheritance

Evans v Scott no 1528 post

1486 Effect of death of portionist before happening of event — Whether portion sinks into inheritance

Remnant v Hood no 1530 post

1487 Effect of death of portionist before happening of event — Whether portion sinks into inheritance

Davies v Huguenin no 1246 ante

1488 Effect of death of portionist before happening of event — Whether portion sinks into inheritance

Henty v Wrey no 1465 ante

1489 Effect of death of portionist before happening of event — Whether portion sinks into inheritance — Age of vesting subsequently altered by settlor

Every v Gold (1668) 2 Rep Ch 1; 21 ER 599

1490 Effect of death of portionist before happening of event — Whether portion sinks into inheritance — Whether portion secured by settlement or will

One devises £1,000 to his daughter for her portion charged upon a real estate, and payable at twenty-one. Daughter dies before twenty-one. The portion shall sink in the land, otherwise, if no time had been limited for the payment of the portion, for in that case it goes to the executors of the daughter. No difference where the portion is secured by a settlement or a will, if secured out of a real estate, and the party dies before it is payable. In either case it sinks in the lands.

Smith v Smith (1688) 2 Vern 92; 23 ER 669

ANNOTATION **Consd** Sanders v Sanders (1739) West temp Hard 686

1491 Effect of death of portionist before happening of event — Whether portion sinks into inheritance — Whether portion secured by settlement or will

If I secure a portion to a child by deed payable at twenty-one out of land, and the child dies before twenty-one, the portion shall sink into the land and not go to the executor. So if I devise a portion to a child out of land payable at twenty-one, and the child dies before twenty-one, the portion shall sink. Also the portion shall sink as well for the benefit of the *heres factus* as of the *heres natus*. So though the money given to the child be not said to be for a portion, if it appears to be so in fact. If by the will the portion be given out of a real and personal estate payable to the child at twenty-one, and the child dies before twenty-one, then so much as will arise out of the personal estate shall go to the executor or administrator, but what would arise out of the land must sink.

Jennings v Looks (1725) 2 P Wms 276; 24 ER 728; sub nom

Anon (1725) 2 Eq Cas Ab 488

ANNOTATIONS **Consd** Chandos v Talbot (1731) 2 P Wms 601; Reynish v Martin (1746) 3 Atk 330

1492 Effect of death of portionist before happening of event — Whether portion sinks into inheritance — Although money declared not

to be portion — Money appearing in fact to be such

Jennings v Looks no 1491 ante

1493 Children deceased after attaining vested interest — Right of representatives

Davies v Huguenin no 1246 ante

Scottish, Irish and Commonwealth Cases

1494 Effect of death of portionist before happening of event — Whether portion sinks into inheritance

The trusts of a term were to raise, at twelve years from a mother's death, £2,500 for younger children; £1,000 of that sum for one of them, and the remainder for the others; the sums to be paid to them respectively, when raised pursuant to the deed. The deed was one in which the mother, tenant for life, joined her eldest son, the remainderman, in opening the estate. The younger child, to whom the £1,000 was to have been paid at twelve years from the mother's death, died during her life: *Held* the £1,000 was not vested, and could not be raised.

Ruby v Foot & Beamish (1817) Beat 581 (IR)

1495 Effect of death of portionist before happening of event — Whether portion sinks into inheritance

Edgeworth v Edgeworth (1829) Beat 328, 334, 335; 2 Ir L Rec 1st Ser 461 (IR)

1496 Effect of death of portionist before happening of event — Whether portion sinks into inheritance

A trust disposition and settlement directed the trustees to reconvey the granter's property to his children in equal shares, to the sons on attaining the age of twenty-five years, and to the daughters on attaining majority. Certain of the children having predeceased the term at which the provisions were payable: *Held* under the settlement, no right to the shares provided thereby to them vested in the predeceasing children.

Stewart's Trustees v Stewart (1851) 13 Dunl (Ct of Seas) 1386; 23 Sc Jur 644 (SCOT)

1497 Effect of death of portionist before happening of event

Arbuthnot v Arbuthnot (1816) Hume 536 (SCOT)

1498 Effect of death of portionist before happening of event

Walker's Trustees (1870) 8 Macph (Ct of Seas) 870; 42 Sc Jur 509 (SCOT)

C Portion payable out of personalty on event personal to portionist

LAW See Halsbury's Laws (4th edn) vol 42 para 736

1499 Portion payable — Notwithstanding prior death of portionist

Wentworth v Young (1638) Nels 36; 21 ER 783

1500 Portion payable — Notwithstanding prior death of portionist

(1) Term limited by a settlement to raise portions for younger children payable at twenty-one or marriage. One of them dies under twenty-one and unmarried. Her portion shall not be raised for the benefit of the administratrix. (2) Otherwise, if the portion was to be raised out of a personal estate.

Poulet (Lady) v Poulet (Lord) (1685) 1 Vern 204; 23 ER 415; sub nom

Pawlett v Pawlett (1685) 1 Vern 321; 2 Rep Ch 286; 1 Eq Cas Abr 267; sub nom

Paulett's (Lord) Case (1685) 2 Vent 366; Freem Ch 93; affd 14 Lords Journals 87, HL

ANNOTATIONS As to (1) **Consd** Rivers v Derby (1688) 2 Vern 72 **Apld** Smith v Smith (1688) 2 Vern 92 **Distd** Harrison v Buckle (1719) 1 Stra 238 **Consd** King v Withers (1735) Cas temp Talb 117 **Distd** Whaley v Cox (1737) 2 Eq Cas Abr 549 **Apld** Prowse v Abingdon (1738) West temp Hard 312 **Consd** Sherman v Collins (1745) 3 Atk 319; Hodgson v Rawson (1747) 1 Ves Sen 44 **Expld** Manning v Herbert (1769) Amb 575 **Consd** Henty v Wrey (1882) 21 Ch D 332

1501 Portion payable — Notwithstanding prior death of portionist

A portion devised to a child with interest, but not to be paid or payable until the child attain twenty-one years or was married: the child dies under twenty-one and unmarried decreed the portion to the administrator.

Collins v Metcalfe (1687) 1 Vern 462; 23 ER 588, LC

1502 Portion payable — Notwithstanding prior death of portionist

A by will gives £500 to his daughter, to be paid by his executors at her age of twenty-one, out of his personal estate, and rents of his real; and if not raised by that time, the executors to stand seised, and take the rents, till the £500 was raised, and after payment gives the land to his son. The daughter marries at eighteen and dies under twenty-one; the husband takes administration. Decreed, the portion to be raised, and that by a sale, though the land by reason of the incumbrances would produce little more than the £500.

Jackson v Farrand (1701) 2 Vern 424; 1 Eq Cas Abr 268; 16 Vin Abr 448; 23 ER 871; subsequent proceedings sub nom

Ferrand v Jackson (1703) 3 Bro Parl Cas 2, HL

ANNOTATIONS **Apld** Wilson v Spencer (1732) 3 P Wms 172 **Expld** King v Withers (1735) Cas temp Talb 117; Boycot v Cotton (1738) 1 Atk 552 **Dbtd** Prowse v Abingdon (1738) Atk 482 **Consd** Godwin v Munday (1779) 1 Bro CC 191

1503 Portion payable — Notwithstanding prior death of portionist

Jennings v Looks no 1491 ante

1504 Portion payable — Notwithstanding prior death of portionist

Gordon v Raynes no 1476 ante

1505 Portion payable — Notwithstanding prior death of portionist

Whaley v Cox (1737) 2 Eq Cas Abr 549; 22 ER 462

ANNOTATIONS **Distd** Van v Clarke (1739) West temp Hard 699

1506 Portion payable — Notwithstanding prior death of portionist

Devise of lands to wife for life and after her death to the son he paying out of such lands £600 to testator's daughters within six months after death of wife with power of entry in case of non-payment. The daughters died in the life of testator's wife: *Held* the legacies vested and on his death to be raised for their representatives.

Manning v Herbert (1769) Amb 575; 27 ER 372, LC

1507 Portion payable — Notwithstanding prior death of portionist

Hutchins v Foy (1740) 2 Com 716; 92 ER 1282

1508 Portion payable — Notwithstanding prior death of portionist

By a marriage settlement trustees were directed, after the death of the husband and wife, to transfer the trust fund to all and every the child and children of the marriage, his, her, or their respective executors, administrators, and assigns, equally to be divided between them, the children, if more than one; and if but one, then to such only child; the shares of such of the children as should be minors at the death of the survivor of the husband and wife to be paid to them at twenty-one; with power for the trustees to apply the income of the respective shares of such minors for their maintenance and education; and in case there should be no child of the marriage, or all of them should die, "before they became entitled to their respective shares," then over. There were six children of the marriage; two of them died infants in the lifetime of their parents, the others survived both parents, and attained twenty-one: *Held* all six children took vested and transmissible interests at their births, and the shares of those who died under twenty-one in the lifetime of their parents were not divested thereby.

Jopp v Wood, Smith v Jopp (1865) 2 De GJ&Sm 323; 6 New Rep 359; 34 LJ Ch 625; 12 LT 689; 11 Jur NS 833; 13 WR 954; 46 ER 400, LC

1509 Portion payable — Notwithstanding prior death of portionist — Unless express or implied direction to contrary

Mostyn v Mostyn no 2820 post

1510 Portion payable — Notwithstanding prior death of portionist — Unless express or implied direction to contrary

A limitation by settlement of a fund vested in trustees, upon trust, to pay the income to M for life, and at her death "to pay or transfer the capital to all her children, except her eldest or only son, in equal shares at their respective ages of twenty-one years," confers a vested interest on all the children of M who attain twenty-one, although they may die before the period of division.

A younger son attained twenty-one, and then became the eldest by the death of his elder brother before the period of division: *Held* as there was no reason shown by the settlement for excluding the eldest son, such as his accession to another estate, the share that was vested in the younger son was not divested by his becoming the eldest.

If the direction had been at the death of the tenant for life to pay and divide the fund to and among the other *cestui que trusts* simply, their interests would have vested on the execution of the settlement or on their respective births of both afterwards . . . but the super-added words that the division is to be on the children attaining twenty-one have no reference to anything excepting their personal qualification by arriving at that age (*Page-Wood V-C*).

Re Theed's Settlement (1857) 3 K&J 375; 26 LJ Ch 514; 69 ER 1154

ANNOTATION **Consd** Domvile v Winnington (1884) 20 Ch D 382

1511 Portion payable — Notwithstanding prior death of portionist — Unless express or implied direction to contrary

Currie v Larkins no 1461 ante

1512 Portion payable — Notwithstanding prior death of portionist — Unless express or implied direction to contrary

By a marriage settlement funds were settled upon the wife for life, with remainder to the children of the marriage in equal shares, "to be a vested interest at their ages of twenty-one years," with a gift over to the husband in the event of all the children dying under twenty-one, and a reversion to the settlor in the event of there being no child born, but no clause of survivorship and accruer as to shares of children dying under twenty-one. There were five children, of whom four attained twenty-one, and the fifth died an infant: *Held* the

whole fund vested in the four children who attained twenty-one.

Re Colley's Trusts (1866) LR 1 Eq 496; 14 WR 528

1513 Portion payable — Land directed to be sold for payment of portions

Lands devised to be sold for payment of portions, one of the children dies after the portion becomes due, and before the land sold, the administrator is entitled to the money.

Bartholomew v Meredith (alias Moorehead) (1687) 1 Vern 276; 23 ER 468

1514 Portion payable

Salisbury (Earl) v Bennet (1691) 2 Vern 223; Nels 170; 23 ER 744; affd sub nom

Bennett v Salisbury (Lord) (1691) Freem Ch 118, HL

ANNOTATIONS **Consd** Bertie v Faulkland (1698) 3 Cas in Ch 129; Hervey v Aston (1738) West temp Hard 350

D Portion payable out of realty on event not personal to portionist

LAW See Halsbury's Laws (4th edn) vol 42 para 736

1515 General rule — Portion raisable on happening of event — Though portionist dead

By a marriage settlement a term for years is created to raise £5,000 portion for daughters, payable at their age of twenty-one or marriage; proviso if any of the daughters attain the age of twenty-one or marry in the father's lifetime, then the portion to be paid within a year after the father's death. Also if any of the daughters die before her portion payable or before her age of twenty-one or marriage, her share to go to the survivor; there was issue a son and three daughters, the first of whom married and received her portion; the second attained twenty-one, married and died without issue, and her husband administered; the third daughter survived both her sisters; resolved the husband as administrator of the second daughter is entitled to her share of the £5,000, she having lived to twenty-one, so that the right vested in her, and the payment was only suspended till her father's death.

Pitfield's Case (1728) 2 P Wms 513; 24 ER 841, LC

1516 General rule — Portion raisable on happening of event — Though portionist dead

Portions in a settlement by a term after mother's death for defendants, to grow due and payable at twenty-one or marriage, etc, one daughter having, after twenty-one and marriage, died in life of mother, her portion shall go to her representatives, and not to her sister.

On the construction of the words due and payable, as well as on the nature and reason of the thing, and also from their use in other parts of the clause, they must be relative to the times before fixed, twenty-one or marriage (*Lord Hardwicke C*).

Emperor v Rolfe (1748–9) 1 Ves Sen 208; 27 ER 986, LC

ANNOTATIONS **Folld** Cholmondeley v Meyrick (1758) 1 Eden 77 **Apld** Willis v Willis (1796) 3 Ves 51 **Distd** Hope v Clifden (1801) 6 Ves 499 **Consd** Fry v Sherborne (1829) 3 Sim 243 **Apld** Evans v Scott (1847) 1 HL Cas 43; Swallow v Binns (1855) 1 K&J 417; Jackson v Dover (1864) 4 New Rep 134 **Distd** Re Wilmott's Trusts (1869) LR 7 EQ 532 **Expld** Chell v Chell (1875) 23 WR 252 **Apld** Wakefield v Maffet (1885) 10 App Cas 422

1517 General rule — Portion raisable on happening of event — Though portionist dead

One having a daughter thirty years old, settled his estate on himself and wife for their lives, remainder for 500 years, remainder over, and declared the trust of the term to raise after the death of him and his wife, £850 for his daughter, her executors and administrators. The daughter died in the lifetime of her father: *Held* her representatives were entitled.

Smith v Partridge (1755) Amb 266; 27 ER 177

1518 General rule — Portion raisable on happening of event — Though portionist dead

Term to commence after the father's death, to raise portions for younger children, in such shares and proportions as he should appoint, for want of appointment, equally, to sons at twenty-one, to daughters at twenty-one or marriage, to be paid immediately after the decease of the father, with survivorship in case of the death of a child before its portion should become due and payable. The father died without making any appointment: *Held* the portions vested at twenty-one or marriage during his life.

Cholmondeley v Meyrick (1758) 1 Eden 77; 3 Bro CC 254n; 28 ER 613

ANNOTATIONS **Distd** Lawrence v Maggs (1759) 1 Eden 453 **Consd** Verney v Verney (1761) 2 Eden 26 **Folld** Willis v Willis (1796) 3 Ves 51 **Consd** Hope v Clifden (1801) 6 Ves 499 **Apld** Evans v Scott (1847) 1 HL Cas 43

1519 General rule — Portion raisable on happening of event — Though portionist dead

Covenant in marriage articles, that in case the father should happen to die leaving issue male, and one or more younger son or daughter, to raise portions; if but one then living £1,000, if two £1,200, if three £1,500, to be paid at their respective ages of twenty-one, or marriage, in such proportions as the survivors of the father and mother should direct, in default of such direction, equally: *Held* the share of a son who attained twenty-one was vested though he died in the father's lifetime.

Rooke v Rooke (1761) 2 Eden 8; 28 ER 797

1520 General rule — Portion raisable on happening of event — Though portionist dead
Woodcock v Dorset (Duke) (1792) 3 Bro CC 569; 3 Ves&B 82n; 29 ER 704, LC

ANNOTATIONS **Folld** Hope v Clifden (1801) 6 Ves 499 **Distd** Schenck v Legh (1804) 9 Ves 300 **Consd** Powis v Burdett (1804) 9 Ves 428; Howgrave v Cartier (1814) Coop G 66 **Apld** Maitland v Chalie (1822) 6 Madd 243 **Consd** Fry v Sherborne (1829) 3 Sim 243 **Apld** Bulmer v Jay (1830) 4 Sim 48 **Consd** Whatford v Moore (1837) 3 My&Cr 270; Jeffery v Jeffery (1849) 17 Sim 26 **Distd** Bythesea v Bythesea (1854) 23 LJ Ch 1004 **Apld** Jackson v Dover (1864) 4 New Rep 136 **Expld** Jeyes v Savage (1875) 10 Ch App 555

1521 General rule — Portion raisable on happening of event — Though portionist dead
Settlement on marriage to the use of the husband for life; remainder to trustees for 500 years in trust after the death of the husband, and not before unless with his consent as therein mentioned, to raise portions for younger children, to be paid in such shares, and at such times, as the husband and wife should appoint; in default of appointment to be paid, if but one besides an eldest or only son, £5,000, if two, £6,000, if three, £8,000, and if four or more £10,000 equally; to be paid respectively at twenty-one, or marriage of daughters if after the age of sixteen, if such times of payment happen after the death of the husband; if in his life, then within twelve months after his decease, and not before, unless with such consent: provided, that if any of such younger children should die before his, her or their portions should become payable, so that the number should be reduced to less than four no more should be raised than what would make the whole sum for the portion of the survivor or survivors of such younger children equal to the sum originally limited for the portion or portions of such child or children, if one, two, or three. Three younger children only survived their father; but more than four had attained twenty-one. The sum to be raised is £10,000.

If but one had remained, attaining the age of twenty-one, but dying in the lifetime of the parent, it is clear that must have been a vested interest; for there are no words to make it sink for the benefit of the inheritance (*Lord Loughborough C*).
Willis v Willis (1796) 3 Ves 51; 30 ER 888, LC

ANNOTATIONS **Distd** Hope v Clifden (1801) 6 Ves 499 **Consd** Fry v Sherborne (1829) 3 Sim 243

1522 General rule — Portion raisable on happening of event — Though portionist dead
Portion vested in the case of parent and child by implication from the whole settlement, against express words: and a clause of survivorship upon the death of a child, before the portion should become payable, was upon the authorities construed, before it should be vested.
Hope v Clifden (Lord) (1801) 6 Ves 499; 31 ER 1164, LC

ANNOTATIONS **Consd** Schenck v Legh (1804) 9 Ves 300 **Apld** Poulett v Poulett (1821) 6 Madd 167 **Consd** Fry v Sherborne (1829) 3 Sim 243

1523 General rule — Portion raisable on happening of event — Though portionist dead
Trust, in case husband and wife shall at the death of the survivor leave any child or children, and such child or children attain twenty-one, to convey to such child, if but one and if there shall be more than one child, who shall live to attain twenty-one, to convey to such children, who shall attain twenty-one, according to the appointment of the father, or the mother, surviving; in default of appointment, equally, at twenty-one, with survivorship; and if both parents die without leaving any child, etc, remainder to the father, vested in children, having attained twenty-one, who died in the life of one parent, with those, who survived both.
King v Hake (1804) 9 Ves 438; 32 ER 671

ANNOTATIONS **Distd** Swallow v Binns (1855) 1 K&J 417 **Consd** Dalton v Hill (1862) 6 LT 446

1524 General rule — Portion raisable on happening of event — Though portionist dead
Term in trust, after the decease of the father, in case he shall leave a younger child, etc, to raise portions; to be paid according to appointment, and in default, etc at twenty-one or marriage; with a provision for advancement in the life of the father by his direction, and survivorship upon the death of any child, before the portion shall be payable; and, if there shall be no such child, or all die before the portions become payable, not to be raised. Vested in an only younger child; who, having attained twenty-one, died in the life of the father; no appointment having been made.
Powis v Burdett (1804) 9 Ves 428; 32 ER 667

ANNOTATIONS **Consd** King v Hake (1804) 9 Ves 438 **Apld** Maitland v Chalie (1822) 6 Madd 243; Fry v Sherborne (1829) 3 Sim 243; Walker v Simpson (1855) 1 K&J 713 **Distd** Whitman v Aitken (1866) LR 2 Eq 414

1525 General rule — Portion raisable on happening of event — Though portionist dead
Power of appointment in a marriage settlement held to comprehend, as its objects, all the children of the marriage, and not to be confined to such of the children only as should be living at the death of the survivor of the parents.

If the settlement clearly and unequivocally makes the right of the child to a provision depend upon its surviving both or either of the parents, a court of equity has no authority to control that disposition.

If the settlement is incorrectly or ambiguously expressed, if it contains conflicting and contradictory clauses, so as to leave in a degree uncertain the period, at which, or the contingency upon which, the shares are to vest, the court leans strongly towards the construction, which gives a vested interest to the child, when that child stands in need of a provision (*Grant MR*).

Howgrave v Cartier (1814) Coop G 66; 3 Ves&B 79; 35 ER 479

ANNOTATIONS **Apld** Hotchkin v Humfrey (1817) 2 Madd 65; Perfect v Curzon (1820) 5 Madd 442 **Consd** Fitzgerald v Field (1826) 1 Russ 416 **Apld** Torres v Franco (1830) 1 Russ&M 649 **Consd** Clutterbuck v Edwards (1832) 2 Russ&M 577 **Apld** Whatford v Moore (1837) 3 My&r 270 **Distd** Woodhouse v Woodhouse (1841) 5 Jur 404 **Consd** Bouverie v Bouverie (1847) 2 Ph 349; Bythesea v Bythesea (1854) 23 LJ Ch 1004 **Distd** Re Morse's Settlmt (1855) 21 Beav 174 **Consd** Remnant v Hood (1860) 1 LT 423 **Distd** Re Wollaston's Settlmt (1860) 27 Beav 642 **Consd** Dalton v Hill (1862) 6 LT 446 **Apld** Dixon v Barkshire (1865) 34 Beav 537 **Consd** Re Hamlet, Stephen v Cunningham (1888) 39 Ch D 426

1526 General rule — Portion raisable on happening of event — Though portionist dead

By a marriage settlement a term was created for raising portions for daughters in case the father should die without issue male, such portions to be paid at twenty-one or marriage, but if the daughters should attain that age or be married in the lifetime of the father, then within six months after his decease. But if all the daughters died before their portions became payable, then the fund was not to be raised. There was issue of the marriage a daughter and only child; she attained twenty-one and married, and afterwards died in her father's lifetime; the father died without issue male: *Held* the daughter's representatives were entitled to her portion.

Fry v Sherborne (Lord) (1829) 3 Sim 243; 8 LJOS Ch 25; 57 ER 990

1527 General rule — Portion raisable on happening of event — Though portionist dead

A portion was made payable to children at twenty-one, or marriage, whichever should first happen after the death of the parent; but if in his lifetime, then within three calendar months after his death; and it was afterwards provided, that if any child should die before his portion should become payable, his share should go to the surviving children: one of the children married, and died in the lifetime of the parent: *Held* her portion did not go over, but belonged to her administrator.

Wakefield v De Burgh (1835) 4 LJ Ch 215

1528 General rule — Portion raisable on happening of event — Though portionist dead

By an indenture of February 1794, being the settlement made on the marriage of C and M, a term of 500 years was limited to trustees upon trust, after the decease of the husband and wife to raise the sum of £1,000 for the portion of each and every of the younger children of the marriage, the portions of the sons to be paid at twenty-one, the portions of daughters at twenty-one or marriage, if such events should happen after the decease of the survivor of the husband and wife; and in case any of the younger sons should die or become an eldest or only son before twenty-one or any of the daughters should die before twenty-one or marriage, or before their respective portions should become vested, then and in each such case the portion or portions of the child or children so dying, etc, was, or were to go, survive and accrue to the surviving younger children, to be paid at the same time as their original portions: *Held* looking at all the clauses of the settlement, such survivorship was intended to include the shares of children dying in the lifetime of the tenant for life, under twenty-one and unmarried, and therefore three surviving children, appellants, were entitled to call upon the trustees of the term to raise the sum of £7,000, being the portions under the settlement of seven children, four or whom, however, had died during the lifetime of their parents, under twenty-one and unmarried.

The rule is well established that if portions or legacies are made payable on an event personal to the party to be benefited, and such party die before the event happen, the portion or legacy is not to be raised out of the land; but if the payment is postponed until the happening of an event not referable to the person of the party to be benefited, but to the circumstances of the estate out of which the portion or legacy is to be paid, as on the death of a tenant for life, then it is raisable after the event, although the term out of which it is to be raised has not arisen, in consequence of the party to be benefited not being *in esse* which the event happens (*Lord Cottenham C*).

Evans v Scott (1847) 1 HL Cas 43; 9 LTOS 509; 11 Jur 291; 9 ER 666, HL

1529 General rule — Portion raisable on happening of event — Though portionist dead

Swallow v Binns no 1453 ante

1530 General rule — Portion raisable on happening of event — Though portionist dead

(1) An estate was charged with portions for younger children "to be raised and levied" after the decease of the tenant for life, "and to be forthwith paid and payable": *Held* a younger child, who attained

twenty-one, but died in the lifetime of the tenant for life, took a vested interest.

(2) Legacies or portions charged on real estate, and payable at a future time, do not vest until the time appointed for payment. Upon the death of the legatee or portioner before the time appointed for payment, they lapse, or sink into the inheritance. If, however, the payment of the legacy or portion is postponed, not from any consideration personal to the legatee or portioner, but for the convenience of the estate, the legacy or portion will, notwithstanding, vest in the legatee or portioner before the time of payment.

Remnant v Hood (1860) 2 De GF&J 396; 30 LJ Ch 71; 3 LT 485; 6 Jur NS 1173; 45 ER 674, LJJ

ANNOTATION As to **Consd** Henty v Wrey (1882) 21 Ch D 332

1531 General rule — Portion raisable on happening of event — Though portionist dead

The rule that the court leans to a construction that gives a portion to each child that lives to require it applies to wills as well as settlements.

Testatrix after giving a life interest in real estate to her three daughters, directed the share of each daughter to applied in the maintenance of the children of such daughter who survived her till they attained twenty-one, then the share to be theirs. In case of the death of all the children of a daughter under twenty-one, testatrix gave the share to the other daughters: *Held* a child of a daughter who attained twenty-one, and died in his mother's lifetime, took a vested interest.

Re Knowles, Nottage v Buxton (188) 21 Ch D 806; 51 LJ Ch 851; 47 LT 161; 31 WR 182

1532 General rule — Portion raisable on happening of event — Though portionist dead

By a marriage settlement lands were conveyed upon trust for husband and wife successively for life, and after the death of the survivor, "to levy out of the said lands and premises . . . the sum of £3,000 . . . to be divided to and among all the children of the said intended marriage, save and except such child and children as under the limitations aforesaid shall succeed to the enjoyment of the lands and premises hereby conveyed . . . in equal shares and proportions as tenants in common and not as joint tenants, the share of such child or children as shall be a son or sons to be paid to him or them upon his or their respectively arriving at the full age of twenty-one years, and the share or shares of such of them as shall be daughters to be paid upon their respectively arriving at their full age of twenty-one years, or day or days of marriage, whichever shall first happen. Provided always that such marriage during minority shall be had by and with the consent and approbation of" the parents "or the survivor of them: with interest for the same by way of maintenance at the rate of £6 by the hundred, to be computed from the day of the death of the survivor of" the parents, "with benefit of survivorship to the survivors or survivor of such children if any of such children shall die before his, her, or their share or shares shall become payable unmarried and without leaving issue as aforesaid, it being the true intent and meaning of these presents that none of the children of the said intended marriage, who under the limitations herein contained shall become entitled to an estate in possession in any part of the lands and premises hereby conveyed . . . shall be entitled to any part of" the said sum. A son attained twenty-one and died in the lifetime of his father: *Held* there being no words indicating a clear intention to make the vesting of children's shares contingent on their surviving both parents, the son took a vested interest in his share on attaining twenty-one.

Wakefield v Maffet (1885) 10 App Cas 422; 55 LJ Ch 4; 53 LT 169, HL

1533 Exclusion of rule — Construction of settlement — Vesting conditional on survival of portions

By marriage settlement, a term is created for raising £400 a piece for younger children, to be paid them within a year after the father's death, and with interest from his death; one of the children dies after the father, but within a year after his death, the portion not being raised: *Held* it should sink in the inheritance, and not be raised for the benefit of its representative.

Tournay v Tournay (1709) Prec Ch 290; 2 Eq Cas Abr 654 pl 6; 24 ER 139, LC

1534 Exclusion of rule — Construction of settlement — Vesting conditional on survival of portions

Term raised to secure daughters' portions. Trust thereof declared, that if the husband should leave no heir male by the marriage, and should leave a daughter or daughters, then the trustees to raise portions payable to daughters at twenty-one or marriage; proviso, that if the husband should die without leaving a daughter living at his death, then the term to cease. There is no issue male by the marriage; but there is a daughter who attains twenty-one and marries. Mother died, and daughter died in father's lifetime leaving issue; her husband administered to her, he shall have no portion.

Wingrave v Palgrave (1717) 1 P Wms 401; 24 ER 444, LC

ANNOTATION **Consd** Fry v Sherborne (1829) 3 Sim 243

1535 Exclusion of rule — Construction of settlement — Vesting conditional on survival of portions

Power to husband and wife to charge a term of years in lands with such sum or sums of money, not exceeding £200 for their two daughters, A and B, as the husband and wife should appoint, and in failure of their joint appointment, as the survivors should appoint, was interest from such time as the term of years should commence in possession, and not before. The term was not to commence in possession until after the death of the survivor husband and wife, in execution of the power, directed the £200 to be equally divided between the two daughters six months after the decease of the father and mother, and if either of them died before payment, or the money became due, then the share of her so dying to be laid out for the benefit of her executors. One of the daughters died after the appointment, and before the time of payment. This was a good appointment to the daughters themselves, and the appointment to executors was void; but as one of the appointees died before time of payment, her share sank into the estate. The joint appointment having appointed the whole, the share of the daughter who died was not the subject of any further appointment.

Brown v Nisbett (1750) Cox Eq Cas 13; 29 ER 1040, LC

ANNOTATION **Consd** Webster v Boddington (1848) 16 Sim 177

1536 Exclusion of rule — Construction of settlement — Vesting conditional on survival of portions

Marriage settlement on husband and wife for life, and trust term if no issue male, or if all should die without issue male before twenty-one years, to raise portions for daughters, etc. A son attained twenty-one, but died in father's lifetime without issue male. The portions not raisable.

Worsley v Granville (Earl) (1751) 2 Ves Sen 331; 28 ER 214, LC

1537 Exclusion of rule — Construction of settlement — Vesting conditional on survival of portions

Loder v Loder no 1254 ante

1538 Exclusion of rule — Construction of settlement — Vesting conditional on survival of portions

Howgrave v Cartier no 1525 ante

1539 Exclusion of rule — Construction of settlement — Vesting conditional on survival of portions

By a settlement before marriage, whereby lands given to trustees for 500 years, in trust that, if the intended husband and wife should leave one or more daughter or daughters, younger son or sons, that should be living at the time of the decease of the survivors of them, the trustees should raise, etc, £2,000 for the portion or portions of such daughter or daughters, younger son or sons, the same to be paid to such daughter, if but one, and no younger son, at eighteen or marriage; and to such younger son, if but one, and no daughter, at twenty-one, with allowance for maintenance in the meantime, etc; and if there shall be more than one daughter or younger son, then to be paid to such daughter or daughters at eighteen or marriage; and to such younger son or sons at twenty-one years, etc: *Held* the settlement did not vest anything in children who died before the decease of the surviving parent.

Hotchkin v Humfrey (1817) 2 Madd 65; 56 ER 259

1540 Exclusion of rule — Construction of settlement — Vesting conditional on survival of portions

(1) In a marriage settlement, the father of the wife, after making a provision for her during her life, covenants, that, in case there shall be a child or children of the marriage living at her decease, he will pay £3,000 to such child or children on their attaining twenty-one, or, if they shall have attained that age in their mother's lifetime, at her death; in the directions that are afterwards given for the distribution of the sums in different events among the children of the marriage, and their issue, no reference is made to the contingency of their surviving the mother; and though there is an express enumeration of the cases in which the money is not to be payable, the death of a child in the mother's lifetime, after having attained twenty-one, is not specified as one of those cases: *Held* the interest, which a child who has attained twenty-one takes in these sums, remains contingent during the life of the mother; there not being enough in the subsequent clauses to control the plain words of the covenant.

(2) In the same settlement, the father covenants to pay upon the death of the husband £2,000 to the eldest or only son of the marriage: *Held* this covenant is controlled by subsequent clauses, so as not to give a vested interest upon the death of the father to an only son who was then under age.

Fitzgerald v Field (1826) 1 Russ 416; 4 LJOS Ch 170; 38 ER 162

ANNOTATION **Consd** Swallow v Binns (1855) 1 K&J 417

1541 Exclusion of rule — Construction of settlement — Vesting conditional on survival of portions

A term was created by a marriage settlement, upon the trust, in case the intended husband should die, leaving issue by the intended wife an eldest or only

son, who should attain twenty-one, or die before that, if leaving issue and one or more younger child or children then, after the several deaths of the husband and wife, and the commencement of the term, but not sooner, unless with the consent of the husband, to raise portions for the younger children, there being an elder or only son, or the heirs of the body of such son, then living, such portions to be paid to daughters at eighteen or days of marriage, which should first happen after the several deaths of husband and wife, otherwise within three months after the death of the survivor of them: *Held* the representatives of a daughter who attained eighteen married, and died in the lifetime of her parents, were not entitled to her portion.

Whatford v Moore (1837) 3 My&Cr 270; 6 LJ Ch 378; 40 ER 928, LC

ANNOTATIONS **Consd** Jackson v Dover (1864) 2 Hem&M 209 **Apld** Jeyes v Savage (1875) 10 Ch App 555 **Consd** Day v Radcliffe (1876) 3 Ch D 654

1542 Exclusion of rule — Construction of settlement — Vesting conditional on survival of portions

A clause in a will provided for the date at which the interest should vest in the case of sons, namely, twenty-one. It then provided for the date of the vesting in the case of daughters, namely, twenty-one or marriage. These two provisions were in a continuous sentence, and at the end of the words dealing with the case of daughters came the following passage, "if the same respectively shall happen after the death of H, the father, but if the same should happen in his lifetime, then immediately after his death." Respondent, as mortgagee of B's one-third share of a portion of £6,000, claimed to have a sum of £2,000 raised, notwithstanding that B had died in the lifetime of his father, H: *Held* according to the canon of construction it had been the practice to construe a deed providing portions as vesting the portions at twenty-one, or, in the case of daughters' marriage, unless the deed throughout all its provisions clearly treated the vesting as contingent on the portioner surviving the parent, and therefore the one-third share of the portions sum became vested in B on his attaining the age of twenty-one, and was not contingent on his surviving his father.

Waller v Stevenson (1912) 56 Sol Jo 666, HL

E Portion payable out of personalty on event not personal to portionist

LAW See Halsbury's Laws (4th edn) vol 42 para 736

1543 General rule — Portion payable on happening of event — Though portionist dead

By a settlement made previous to the marriage of A and B certain exchequer annuities were vested in trustees, in trust for the husband for life, then to the wife for life, and after both their deaths, for the children of the marriage equally, if more than one; and if but one, for such only child; to be assigned over to such child or children respectively, at their ages of twenty-one, happening after the death of the survivor of the father and mother; but if either of the children should attain twenty-one during the joint lives of the father and mother, or the life of the survivor, then his or her share was to be paid within three months after the death of such survivor. But if there should be no children of the marriage, or being such, all of them should die before their shares should become transferable as aforesaid, then the annuities were to go to the survivor of the husband and wife. There was issue only one son, who attained twenty-one, but died in the lifetime of his mother who survived her husband. Upon a question between her and the son's executor, who was entitled to these exchequer annuities it was held, that they became vested in the son on his attaining twenty-one, and were transmissible and devisable by him, notwithstanding he died in his mother's lifetime.

Jeffreys v Reynous (1767) 6 Bro Parl Cas 398; 2 ER 1158, HL; affg SC sub nom

Reynous v Jeffreys (1766) 2 Eden 365, LC

ANNOTATIONS **Consd** Schenck v Legh (1804) 9 Ves 300; Fry v Sherborne (1829) 3 Sim 243

1544 General rule — Portion payable on happening of event — Though portionist dead

Portions to be paid or transferred at twenty-one or marriage; if in the lives of the parents, entitled for life, not to be paid, assigned, or transferred, till their decease; with survivorship in case of the death of any before his, her or their, shares should be payable, etc, vested at twenty-one or marriage in the life of the parents. *Quaere*: upon a further proviso for a limitation over in the event of no child living at the death of the survivor of the parents, or the death of all, before the fund should be so, as aforesaid, payable, etc, whether contingent.

Schenck v Legh (1803) 9 Ves 300; 32 ER 618

ANNOTATIONS **Apld** Bayard v Smith (1808) 14 Ves 470 **Consd** Walker v Main (1819) 1 Jac&W 1; Clutterbuck v Edwards (1832) 2 Russ&M 577; Rammell v Gillow (1845) 15 LJ Ch 35

1545 General rule — Portion payable on happening of event — Though portionist dead

Perfect v Curzon (Lord) no 2816 post

1546 General rule — Portion payable on happening of event — Though portionist dead

By a marriage settlement, stock was settled, subject to life interest in the husband and wife, in trust for their children, share and share alike, the shares to be paid to them at twenty-one or marriage, and the shares of children dying leaving issue before their shares had become payable, were to be in trust for their issue, but in case any of the children should die before their shares should become payable, without leaving any issue, then their shares were to be in trust for the surviving children. There were six children of the marriage, who all attained twenty-one, two of them died in the lifetime of their surviving parent: *Held* the word "payable" must be held to mean "vested," and, consequently, the representatives of deceased children were entitled to shares of the stock.

Mocatta v Lindo (1837) 9 Sim 56; 59 ER 278

ANNOTATIONS **Consd** Rammell v Gillow (1845) 15 LJ Ch 35 **Distd** Re Wilmott's Trusts (1869) LR 7 Eq 532

1547 General rule — Portion payable on happening of event — Though portionist dead

By settlement, personal estate was limited, after the death of the husband and wife, in trust for all the children as tenants in common, and the several issue of the body of such children; and failing issue of any such children, their shares to the use of the surviving children, as tenants in common, and the issue of their bodies. There was a gift over, in case there should be no issue of the marriage, or any issue of such issue, or being such, all should die before their shares should become payable: *Held* the children of the marriage took absolute interests, and the representatives of a child who died an infant, without issue, in the life of his parents, were entitled to a share.

Mount v Mount (1851) 13 Beav 333; 51 ER 128

1548 General rule — Portion payable on happening of event — Though portionist dead

Swallow v Binns no 1453 ante

1549 Exclusion of rule — Construction of settlement — Vesting conditional on survival of portionist

By a marriage settlement trustees were directed to hold a sum of stock, and the income, after the death of the survivor of husband and wife, unto and amongst a child, J, of the husband by a former marriage, and all the children of the then intended marriage, in equal shares, and in case any or either of them should happen to be dead, leaving issue, unto the issue of such one or more which should be then dead, equally to be divided amongst them or their issue respectively, to each being a son at twenty-one, and to each being a daughter at twenty-one or marriage; and until their respective shares should become "payable as aforesaid," upon trusts as to income for maintenance and education. In case J or either or any of such children of the marriage should die without issue before his, her, or their share should become "due and payable," the share was to be paid and divided unto and amongst the survivors and survivor, and the issue of any one or more of them who might happen to be dead, leaving issue, in equal shares, in manner aforesaid, and when and as his, her, or their original or proper share or shares should become "due and payable." In case at the time of the decease of the survivor of husband and wife there should be neither J, nor any child or children of the marriage, nor any issue of J, or of such child or children, living, or if there should be any then living, if all of them should die before his, her, or their share or shares were "payable, then" there was a gift over. In case the trustees should see it necessary or requisite for a child or the issue of a child to have his, her, or their share or shares paid, assigned, or transferred to him, her, or them before the expiration of "the respective times hereinbefore limited for the payment and division thereof respectively," they were empowered to pay or assign and transfer the same accordingly. J died without leaving issue in the lifetime of the tenant for life: *Held* the provision for the issue of a deceased child relieved the court from the necessity of applying the rule in *Emperor v Rolfe* (no 1516 ante), and upon the construction of the whole settlement, the share of J was divested, and went over to the survivors.

The case of *Emperor v Rolfe* (no 1516 ante) originally established the strong and unrebuttable presumption, that in marriage settlements the shares of children are intended to become vested when they are wanted: that is to say, in the case of sons at twenty-one and of daughters at twenty-one or marriage (*James V-C*).

Re Wilmott's Trusts (1869) LR 7 Eq 532; 38 LJ Ch 275

ANNOTATIONS **Apld** Chell v Chell (1875) 23 WR 252 **Distd** Wakefield v Maffet (1885) 10 App Cas 422

1550 Exclusion of rule — Construction of settlement — Vesting conditional on survival of portionist

By a marriage settlement, reciting an intention to provide for the husband and wife and their issue, a fund was settled in trust for the husband for life, then for the wife for life, and after the death of the survivor, if they should leave any issue who being daughters should marry or attain twenty-one, or being sons attain twenty-one, to transfer the fund unto and equally among all such issue when they should attain twenty-one, or be married if a daughter or daughters with consent; and in the meantime and

until the said issue should attain twenty-one or be married as aforesaid, to pay the income for their maintenance: Provided always, that if any such issue as aforesaid should happen to die before they should respectively become entitled to and actually receive their portions, leaving issue of their respective bodies them surviving, then such lastmentioned issue should take and be entitled to his, her, or their father's or mother's share or shares equally among them, to be paid and transferred at the same time or times as was declared concerning the whole original trust-moneys and the immediate issue of the marriage. There was a gift over if the husband and wife should die without leaving any issue of their two bodies begotten, or being such, they should all die before they should respectively become entitled to receive their portions, and without leaving issue. Two of the four children of the marriage died infants and unmarried in the lifetime of their parents. Another attained twenty-one and died a bachelor in the lifetime of the father, and the fourth attained twenty-one and survived both parents: *Held* the representative of the child who attained twenty-one and died in the lifetime of the father took nothing; but the whole fund went to the survivor.

Jeyes v Savage (1875) 10 Ch App 555; 44 LJ Ch 706; 33 LT 139; 23 WR 764, LJJ

ANNOTATION **Apld** Re Hamlet, Stephen v Cunningham (1888) 38 Ch D 183

F Where no time specified

LAW See Halsbury's Laws (4th edn) vol 42 para 736

1551 Portion vests on attainment of full age

Where no time is appointed for the payment of children's portions, they shall be paid at the age of twenty-one or day of marriage.

Dormer v Dormer (1679) Cas temp Finch 432; 23 ER 235

ANNOTATION **Consd** Doe d Oxenden v Chichester (1816) 4 Dow 65

1552 Portion vests on attainment of full age

Portions provided by marriage settlement for younger children, to be paid at such time as the trustees shall think proper. One of the children dying at seventeen before any appointment, his portion shall sink in the inheritance; but maintenance, and a sum paid in placing him out apprentice, to be allowed out of the trust estate.

Warr v Warr (1702) Prec Ch 213; 1 Eq Cas Abr 267 Pl 3; 24 ER 104

1553 Portion vests on attainment of full age

Aston v Aston no 1462 ante

1554 Portion vests on attainment of full age — Or on marriage

A term is created by marriage settlement to raise £3,000 for daughters' portions, within twelve months after the death of the survivor of the husband and wife. There being one daughter; the father devises the trust lands to make good his wife's jointure, and to raise £3,000 for his daughter's portion. The daughter shall not have two portions of £3,000, and she dying at the age of five years, and the portion to be raised out of land, it shall not be raised for her administrator, but the interest or maintenance the child was entitled to shall.

Brewin v Brewin (1702) Prec Ch 195; Freem C 254; 24 ER 94; sub nom

Bruen v Bruen (1702) 2 Vern 439

ANNOTATIONS **Apprvd** Boycot v Cotton (1738) 1 Atk 552 **Consd** Hutchins v Foy (1740) 2 Com 716; Lowther v Condon (1741) 2 Atk 130; Teynham v Webb (1751) 2 Ves Sen 198; Remnant v Hood (1860) 2 De GF&J 396; Davies v Huguenin (1863) 1 Hem&M 730

1555 Portion vests on attainment of full age — Or on marriage

Remnant v Hood no 1530 ante

1556 Portion vests on attainment of full age — Or on marriage

Davies v Huguenin no 1246 ante

1557 Portion vests immediately

On a marriage, lands are limited to the husband for life, remainder to the wife for life, remainder to the first and other sons of the marriage in tail male, remainder to J in fee. Provided, if there be no issue male of the marriage, and there be one or more daughters living at the husband's death, then the trustees to stand seised subject to the jointure to the intent such daughter or daughters should receive out of the rents £10,000 and £100 per annum for maintenance; but not time limited for payment of the portions. The husband dies leaving only one daughter, who lives to seventeen, and by her will disposes of the £10,000. Decreed this is a vested interest in the daughter, and well disposed of by her will.

Rivers (Earl) v Derby (Earl) (1688) 2 Vern 72; 23 ER 656, LC; affd (1689) 14 Lords Journals 195, HL

ANNOTATIONS **Distd** Smith v Smith (1688) 2 Vem 92 **Folld** Cowper v Scott (1731) 3 P Wms 119 **Consd** Evelyn v Evelyn (1731) 2 P Wms 659; Hutchins v Foy (1739) 2 Com 716; Henty v Wrey (1882) 21 Ch D 332

1558 Portion vests immediately

Smith v Smith no 1490 ante

1559 Portion vests immediately

Devise of lands to trustees in fee, in trust within six years after testator's death, to raise and pay £1,500

to his daughter A. A dies within the six years; the £1,500 shall go to her administrator, here being no certain time limited when, but only the ultimate time within which, it shall be raised.

Where lands are charged with portions [payable out of rents and profits], and not time appointed for payment, the right to the portion vests immediately.
Cowper v Scott (1731) 3 P Wms 119; 24 ER 993

1560 Portion vests immediately
Evelyn v Evelyn no 1399 ante

Scottish, Irish and Commonwealth Cases

1561 Portion vests on attainment of full age — Or on marriage
Haverty v Curtis [1895] 1 IR 23 (IR)

1562 Death of settlor
Re Charleville (1862) 13 1 Ch 6 (IR)

1563 At birth
Beattie's Trustee v Cooper's Trustees (1862) 24 Dunl (Ct of Sess) 519; 34 Sc Jur 259 (SCOT)

7 *Interest on portions*

LAW See Halsbury's Laws (4th edn) vol 42 para 737

1564 When payable — Infant portionists — Portions in hands of trustees
Portions left in trustees' hands for children, though no mention of interest, yet the trustees decreed to pay interest.
Glide v Wright (1666) 1 Rep Ch 265; 21 ER 568

1565 When payable — Charge substituted for portions
Odell v Graydon no 1207 ante

1566 When payable — No time limited for payment — Portion to be raised from rents and profits
Evelyn v Evelyn no 1399 ante

1567 When payment into court ordered — Portion contingent on death or marriage
Portion and interest devised upon a contingency of dying or marriage decreed to be paid into court for the benefit of the heir according to the will, in case of the devisee's death.
Bourne v Tynt (1678) 2 Rep Ch 148; 21 ER 642

ANNOTATION **Consd** Heath v Perry (1744) 3 Atk 101

1568 What moneys first applicable for payment — Money available to raise portion
What is expressly paid towards a portion shall be first applied to discharge the interest of such portion.
Kingsland (Lord) v Tyrconnel (Lady) (1724) 2 Eq Cas Abr 658; 22 ER 553

1569 What moneys first applicable for payment — Money available to raise portion
Balfour v Cooper no 1601 post

1570 General rule — Power to charge interest implied
If a man has power to charge land with any sum not exceeding the sum of £3,000 he may charge it with £3,000 and the interest besides; for the intention is to charge the premises with £3,000 principal money, and that of course carries interest, and none would lend such sum security, if the law were otherwise.
Kilmurry (Lord) v Geery (1713) 2 Salk 538; 1 Eq Cas Abr 341; 91 ER 456

ANNOTATIONS **Expld** Evelyn v Evelyn (1731) 2 P Wms 659 **Apld** Boycot v Cotton (1738) West temp Hard 520; Hall v Carter (1742) 2 Atk 354 **Expld** Hearle v Greenbank (1749) 3 Atk 695 **Consd** Pomfret v Windsor (1752) 2 Ves Sen 472

1571 General rule — Power to charge interest implied
(1) The court, in late cases, have thought it hard to raise daughters' portions in the father's lifetime, and therefore refused to do it.

(2) The portions cannot be raised in the lifetime of the jointress, so as to affect her, for when T executed the power, the estate rose out of the will of T and is precedent to the 200 years' term.

(3) Conveyancers now insert negative words, to prevent portions being raised in a father and mother's lifetime.

(4) A power in trustees of raising portions by rents or by mortgage, is no reason for postponing the raising, in order that they may make their election.

(5) Where there is a power of charging land with a gross sum, it imports interest of course.
Hall v Carter (1742) 2 Atk 354; 9 Mod Rep 347; 26 ER 615

ANNOTATIONS As to (1) **Distd** Steven v Dethick (1743) 3 Atk 39 **Consd** Clinton v Seymour (1799) 4 Ves 440. As to (5) **Consd** Lyddon v Lyddon (1808) 14 Ves 558

1572 General rule — Power to charge interest implied
A power to charge a sum in gross implies a power to give any rate of legal interest; and the rule of the court to give 4 per cent applies only where no rate is specified by the party having power to fix it.

The reason of the rule in Chancery to give interest at 4 per cent only is, that money is generally to be had at the rate; but the rule is not invariable.

Where there is a power to raise portions for children charged upon an estate, that power necessarily imports, that from the time the portion is to be raised, is payable or vested, it is also in the discretion of the party as a necessary consequence of it to prescribe what interest shall be given, provided it does not

exceed legal interest. This court has, according to my view of it, not upon an arbitrary rule laid down by itself, but upon a consideration of plain and evident convenience, at a particular period fixed, that where there is a charge upon land, afterwards it was extended, and wisely, to personal property, the interest shall not exceed 4 per cent.

If the party entitled to charge, or to give interest from the time the fund is to be productive, fixes the rate, the court cannot control it, or diminish it, if he gives more than 4 per cent or increase it, if he gives less than legal interest. Therefore the course of the court obtains only, where no rate is specified by him, who has a right to fix the sum, and any rate of interest he thinks proper, not exceeding legal interest (*Lord Loughborough C*).

Lewis v Freke (1794) 2 Ves 507; 30 ER 748, LC

ANNOTATIONS **Folld** Roe v Pogson (1816) 2 Madd 457
Distd Balfour v Cooper (1883) 23 Ch D 472

1573 General rule — Power to charge interest implied

Power to charge a sum in gross implies a power to give interest.

Roe v Pogson (1816) 2 Madd 457; 56 ER 403

1574 General rule — From time when portion payable

A term of forty years is limited for raising £2,000, either by profits or sale; the trustee takes possession, but make no interest of the profits: *Held* the portion should carry interest, from the time it was payable; as the estate was sufficient, and the trustees might have raised it immediately.

Roseberry (Lord) v Taylor (1702) 6 Bro Parl Cas 43; 2 ER 921, HL

1575 General rule — From time when portion payable

Beal (or Beale) v Beal (or Beale) (1715) Prec Ch 405; Gilb Ch 93; 24 ER 182; previous proceedings (1713) 1 P Wms 244

1576 General rule — From time when portion payable

Butler v Duncomb no 1312 ante

1577 General rule — From time when portion payable

Hall v Carter no 1571 ante

1578 General rule — From time when portion payable

Churchman v Harvey (1757) Amb 335 App I 824; 27 ER 225, 519

1579 General rule — From time when portion payable

Devise to A for life, with remainder to his first and other sons, remainder to his daughters; and, in default of such issue, the premises to stand charged with two sums, to be paid after the death of A without issue, and subject to such charge over, with a power to A of jointuring the whole estate, which he executed, A dying without issue: *Held* the sum only carried interest from the death of the jointress, who survived him.

The early cases in this court went so far as to raise portions on reversionary terms in the life of parents, the time of payment being come, and gave them interest from that time as for the detention of a debt. By that equity they exhausted family estates, encouraged disobedience and set up an unnatural independency. Those considerations have of late introduced a different, and, I think, a more reasonable construction to settlements, by taking the design of the whole settlement into consideration, and has not extorted fruit from a barren reversion, except where the owners have expressly directed it (*Lord Northington Keeper*).

Reynolds v Meyrick (1758) 1 Eden 48; 28 ER 602

1580 General rule — From time when portion payable

A, by a deed, dated in 1826, settled property on himself for life, with remainder for such of his children as he should by deed or will appoint, with remainder in default of appointment to all of his children equally. The deed contained a power enabling A to give a jointure to any wife whom he might afterwards marry, and a direction that, unless the contrary should be directed by any appointment, it should be lawful for the trustees to apply the income of the share of any child for his maintenance. A married soon after the date of this deed, and his wife died in 1836, and there were two children of this marriage. In 1836 A married B, and, by a deed dated in that year, he gave a jointure to B, and directed that, if there should be two children of the marriage, the trustees should raise £4,000 for the portions of such children, to be paid to them at their ages of twenty-one years, after the death of the survivor of A and B, with power for the trustees to give interest on the portions between the death of the survivor of A and B and the time of payment. A afterwards appointed portions for the children of the first marriage, with interest from his death. There were two children of the second marriage. A died in 1849: *Held* the children of the second marriage were not entitled to interest on their portions between the death of A and the death of his widow.

Gardner v Perry (1851) 20 LJ Ch 429

1581 General rule — From time when portion payable

Massy v Lloyd no 1295 ante

1582 General rule — From time when portion payable

Re Drax, Savile v Drax no 1603 post

1583 Interest by way of maintenance for children — Whether payable before portions payable

Glide v Wright no 1564 ante

1584 Interest by way of maintenance for children — Whether payable before portions payable

Greenhill v Waldoe (1713) Prec Ch 367; Gilb Ch 31; 2 Eq Cas Abr 640; 24 ER 166, LC

1585 Interest by way of maintenance for children — Whether payable before portions payable — Where no other provision

Boycot v Cotton no 1478 ante

1586 Interest by way of maintenance for children — Whether payable before portions payable — Where no other provision

Where portions are given to younger children under a settlement made by a father, or other person standing *in loco parentis*, and the settlement contains no provision for the maintenance of the children, interest by way of maintenance for the children during minority will be allowed on their portions although their interests are contingent.

Re Greaves' Settled Estates, Jones v Greaves [1900] 2 Ch 683; 69 LJ Ch 596; 82 LT 799; 49 WR 236; 44 Sol Jo 610

1587 Interest by way of maintenance for children — Whether payable before portions payable

Green v Belchier no 1394 ante

1588 Interest by way of maintenance for children — Whether payable before portions payable — Where special power to trustees

Trust term, by marrage settlement, without impeachment of waste, immediately expectant upon the father's death, subject to a jointure to the mother, by sale or mortgage, rents and profits, or by any other ways and means to raise portions for younger children, at twenty-one, if after the death of both parents, and by such ways and means as the trustees think fit to raise interest for maintenance, until the portions shall respectively become payable: if the remainderman should pay the portions and the interest, or if there should be no younger child, the term or so much as should remain unsold, to attend the inheritance; which was limited in the usual way. Interest due from the death of the father, in the minority of all the children; and the wife surviving.

Lyddon v Lyddon (1808) 14 Ves 558; 33 ER 635

ANNOTATIONS **Apld** Milltown v Trench (1837) 11 Bli NS **Distd** Massy v Lloyd (1863) 10 HL Cas 248

1589 Interest by way of maintenance for children — Whether payable before portions payable — Where provision for maintenance

Portions held to be raisable before the time of payment, under the particular construction of the will by which they were given.

Where testator made special provision for the maintenance of his younger children until receipt of their protions, and stated the sum appointed for the maintenance of the sons to be "in lieu of interest": *Held* the daughters were not entitled to interest on their portions, although there was a general clause in the will that the trustees should stand possessed of the trust funds, and the interest, dividends, and annual produce thereof, for the benefit of the daughters, upon their attaining twenty-one.

Selby v Gillum (1836) 2 Y&C Ex 379; 160 ER 444

1590 Interest by way of maintenance for children — Whether payable before portions payable — Where provision for maintenance

Testator directed his trustees to raise a sum of £12,000 for portions of the children of his son J and his daughter E, towards whom he stood *in loco parentis*, and also to levy and raise for their maintenance and education in the meantime, until the respective portions should become payable, such yearly sum, not exceeding what the interest of the expectant portion would amount to after the rate of 4 per cent per annum, as to the trustees should seem sufficient. The trustees raised for maintenance less than the 4 per cent: *Held* upon a petition by the legatees, they were not entitled to interest, but to maintenance only.

Rudge v Winnall (1849) 12 Beav 357; 18 LJ Ch 469; 14 LTOS 325; 13 Jur 737; 50 ER 1098

ANNOTATION **Distd** Re Rouse's Estate (1852) 9 Hare 649

1591 Where portion to be raised from rents and profits

A term is created for the purpose of raising out the yearly profits, several sums for the maintenance and education of younger children, until their portions become due; and then, upon trust, for raising such sums of money out of the estate, not exceeding £2,000, as the father and mother, or the survivor of them, should appoint: *Held* this £2,000 should carry interest from the time that it might have been raised out of the yearly rents and profits of lands; and an inquiry was directed in order to ascertain that time.

Bagenal v Bagenal (1725) 6 Bro Parl Cas 81; 2 ER 947, HL

1592 Where portion to be raised from rents and profits

Green v Belchier no 1394 ante

1593 Where time fixed for payment

Evelyn v Evelyn no 1399 ante

1594 Annual payment

Boycot v Cotton no 1478 ante

1595 Portion to be raised out of reversionary term

Lyon v Chandos (Duke) no 1306 ante

1596 Portion to be raised out of reversionary term — Depends on construction of trust

Codrington v Foley (Lord) no 1311 ante

1597 Proviso for reduction of portion — If money advanced in lifetime of settlor

By settlement on the marriage of GE and EM a term of 600 years was created to raise portions for daughters; by which it was provided that in case there should be one daughter, the sum of £5,000 should be raised for such only daughter, to be paid at eighteen or day of marriage, with maintenance in the meanwhile. There was a proviso in the settlement, that in case the daughters should be advanced with portions in money or lands, equal in value to the portions thereby provided, in the lifetime of GE or he should give or leave them money or lands not equal in value, the trustees should raise only so much as should make the money or value of the lands so given, equal to the portions provided. Appellant E, being the only daughter of the marriage, attained her age in her father's lifetime; who many years afterwards, being possessed of £5,000 East India annuities, which he had saved from the income of the estate, transferred them to appellant E then a widow. A bill was filed, and the cause was heard before *Lord Bathurst*; in which there was a decree in favour of appellant for her portion of £5,000, with interest from her father's death; the question of satisfaction not being then before the court. Respondents afterwards exhibited their bill of review, stating, that since the former decree they had discovered that GE had transferred to appellant these East India annuities, in part of her portion. On the hearing of that cause it was declared by the Chancellor, that the annuities were to be considered as having been so transferred in part satisfaction of the portion, and he therefore varied the former decree so far.

Pughe v Leeds (Duke) (1780) 6 Bro Parl Cas 125; 2 ER 976, HL

1598 Portions to be raised under power in will — "As soon as conveniently may be"

Conway v Conway no 1298 ante

1599 Settlement varied by private Act

Hansard v Kemeys (1819) 2 Wils Ch 106; 37 ER 248

1600 Right of donee of power to fix rate of interest — Legal rate not to be exceeded — Whether court will interfere

Lewis v Freke no 1572 ante

1601 Right of donee of power to fix rate of interest — Power of distribution only

By a settlement made in England on the marriage of D certain real estates in Ireland were limited to trustees for 1,000 years, upon trust by mortgaging the estates, or out of the rents and profits thereof, to raise £15,000, to be divided among the younger children of the marriage as D should appoint. D appointed the whole of the portions among his children, appointing £4,000 to his daughter, to be raised at certain specified times, with interest in the meantime at 5 per cent. The trustees being unable to raise the portions by mortgage, an action was brought to carry the trusts into effect: *Held* (1) D having only a power of distributing the portions and not of charging them, had no power to fix the rate of interest; but the land being in Ireland 5 per cent was the proper rate to be fixed by the courts; (2) under the terms of the settlement the trustees of the term had right to apply the rents and profits first in payment of the interest, and secondly in reduction of the capital.

Balfour v Cooper (1883) 23 Ch D 472; 52 LJ Ch 495; 48 LT 323; 31 WR 569, CA

ANNOTATION As to (1) **Apld** Re Drax, Savile v Drax [1903] 1 Ch 781

1602 Rate not fixed by parties — Practice of court

Lewis v Freke no 1572 ante

1603 Rate not fixed by parties — Practice of court

Where any settlement or contract contains a provision that a certain fixed sum of money is to be charged on land and to be paid at a fixed time, then, as between the owner of the land and the person entitled to the money, the money, in the eye of a court of equity, bears interest from the date fixed for payment of the money, although nothing is said as to interest in the settlement or contract—unless there are circumstances negativing the presumption that interest is payable.

In 1823 an order was made in a lunacy giving the lunatic's committees power to purchase on his behalf a freehold estate, and to pay the purchase-money out of the rents and profits of his real estate; and the order

went on to declare that the rents and profits so to be applied "shall form a lien on the purchased estate in trust for the lunatic, his executors and administrators"; but the order was silent as to interest. The committees accordingly paid the purchase-money out of the rents and profits of the lunatic's real estate, and in 1824, in consideration of the purchase-money, a conveyance contained a declaration of lien corresponding to the terms of the order, but again without mentioning interest. In 1828 the lunatic died intestate, leaving a married sister his heiress-at-law and sole next of kin, who thereupon took out administration to his estate. In 1853 she died, when her husband, D, became tenant by the curtesy of the purchased property, and continued in enjoyment as such until his death in 1887. After his wife's death he had taken out administration to her estate, and also to the estate of the lunatic. No steps had ever been taken for raising the amount of the lien or charge, and no interest had ever been paid upon it. In an action by D's legal personal representatives against the persons who had become entitled to the purchased estate to enforce the lien: *Held* (1) there had been no merger of the lien either at law or in equity, and nothing to justify a presumption of satisfaction through lapse of time; (2) although interest was not mentioned either in the Order in Lunacy or in the conveyance, the court would in accordance with its well settled practice in other cases of equitable charges on land where interest is not mentioned, such as loans on deposit of title deeds, portions and legacies charged on land, and having regard to the circumstances of the case, treat the lien as an interest-bearing debt—that is to say, as bearing interest at 4 per cent as from the death of the lunatic; and inasmuch as, in the events which had happened, such interest must be regarded as having been virtually paid down to D's death in 1887, the lien was not statute barred at that date. As by the arrangement between the parties the statute was treated as not running from D's death, interest was allowed as from that date.

Re Drax, Savile v Drax [1903] 1 Ch 781; 72 LJ Ch 505; 88 LT 510; 51 WR 612; 47 Sol Jo 405, CA

ANNOTATION **Apld** Stoker v Elwell [1942] Ch 243

1604 Rate not fixed by parties — Practice of court — Property partly situate abroad — Partly situated in England

Young v Waterpark (Lord) no 1430 ante

1605 Rate not fixed by parties — Practice of court — Property partly situate abroad

By a deed of settlement B was empowered to charge certain lands in Ireland with any sum, not to exceed £400 a year, as a jointure for his wife, and with any sum not to exceed £2,000 sterling for his younger children.

In exercise of the power B charged the lands with £2,000 late Irish currency, to be vented in and paid to his younger children in equal shares on their attaining twenty-one or marriage; and he directed, in the event of his dying before the share became vested, that his children should be entitled to interest on their presumption portions at 5 per cent by way of maintenance from the time of his death until such portion should be payable: *Held* the £2,000 carried interest at 5 per cent Irish currency, from the death of B until the shares of the younger children became payable.

Denny v Denny (1866) 14 LT 854

1606 Rate not fixed by parties — Practice of court — Property partly situate abroad

Balfour v Cooper no 1601 ante

Scottish, Irish and Commonwealth Cases

1607 When payable — Effect of delay

Interest will not be given on a portion beyond the filing of the bill, when plaintiff being under no disability, and where no compromise had taken place, had slept upon his rights, of which defendant not guilty of fraud was ignorant.

Barrington v O'Brien (1809) 1 Ball&B 180 (IR)

iv CONDITIONS OF DEFEASANCE

1 Conditions of defeasance generally

LAW See Halsbury's Laws (4th edn) vol 42 para 738 et seq

CROSS REFERENCES See WILLS vol 50 (reissue) no 3513 et seq (certainty requirement), vol 51 (reissue) no 13526 et seq (shifting clauses); INFANTS vol 28(3) (2nd reissue) no 1424 et seq (settlement of infant's property: shifting clause on becoming Roman Catholic); PERPETUITIES vol 37(1) (reissue) no 538 et seq (application of rule against perpetuities)

1608 Construction of shifting clauses — Strictly construed

Shifting clauses, which take away an estate from the owner, are construed strictly.

Walmesley v Gerard (1861) 29 Beav 321; 30 LJ Ch 435; 7 Jur NS 1041; 54 ER 651

1609 Construction — Will of "even date" — Will referred to of later date

Under a proviso in a settlement, to which A and his eldest son B were parties, a use which was limited to a younger son P and his issue, was made to shift to B, in the event of P becoming entitled in possession to the manor of S, under certain limitations,

which in the settlement were described as being contained in the will of A, bearing "even date" therewith. The will of A contained the limitations mentioned in the settlement, but did not bear even date therewith, but a posterior date, which was written upon an erasure not accounted for: *Held* inasmuch as, under the circumstances of the case, the variance between the real date of the will and that mentioned in the settlement did not affect the substantial intention of the parties, the arrangement between them could not in equity be carried into execution notwithstanding such variance.

Honywood v Honywood (1843) 2 Y&C Ch Cas 471; 63 ER 211

1610 Construction — Clause excluding eldest son — "For time being entitled in tail" — Time for ascertaining

In a settlement where there is clause excluding the eldest son from the benefit of a fund provided for children other than an eldest son, the time for ascertaining who fills the character of eldest son is the period fixed by the settlement for the distribution of the fund.

Collingwood v Stanhope (1869) LR 4 HL 43; 38 LJ Ch 421; 17 WR 537, HL

ANNOTATIONS **Consd** Domvile v Winnington (1884) 6 Ch D 382; Reid v Hoare (1884) 26 Ch D 303 **Distd** Re Fitzgerald's SE, Saunders v Boyd [1891] 3 Ch 394 **Consd** Restawell's Trusts, Poole v Riversdale [1909] 1 Ch 534

1611 Construction — "Succession" to "devolve upon" next heir to barony — Settlement following patent of peerage

By letters patent the barony of B was conferred on E for life, with successive remainders to her second and other sons and the heirs male of their respective bodies. The patent contained a proviso that if the second son of E or any other person taking under the letters patent should succeed to the earldom of D the "succession to" the dignity of B should "devolve upon" the son of E or the heir who should be next entitled to succeed to the barony of B, if the person so succeeding to the earldom of D was dead without issue male. Lands having been devised by testatrix of trustees and their heirs, upon trust "to convey, settle, and assure" the same "in a course of entail to correspond as nearly as may be with the limitation of" the barony of B, "and the provisos affecting the same contained in the letters patent"— a settlement was executed in which was inserted a clause providing that, if the second son of E, who had then by the death of E become Baron B, or any other person taking under the limitations therein contained should succeed to the earldom of D, the "succession to" the lands thereby settled should "devolve upon" the son of E or the heir who would be next entitled to succeed to the barony of B, if the person so succeeding to the earldom of D was dead without issue male. The second son of E afterwards succeeded to the earldom of D. He had issue male: *Held* upon the construction of the clause, that upon the second son of E succeeding to the earldom of D the third son of E became entitled in possession to the settled estates.

Cope v De la Warr (Earl) (1873) 8 Ch App 982; 42 LJ Ch 870; 29 LT 565; 22 WR 8, LJJ

1612 Construction — "Tail male" — Construed as "Tail general"

By a marriage settlement made in 1886 it was provided that if the eldest son of the settlor should become entitled to M's real estate under his will for an estate in tail male he should be excluded from all share in the trust funds subject to the settlement. E was settlor's eldest son, and under the limitations of the will of M who died in 1868, he became entitled to testator's real estate for an estate in tail general. The trustees of the settlement took out a summons to determine whether he had lost his right to a share in the settlement funds: *Held* inasmuch as the intention of the settlor was clear and at the date of the settlement she must have known that if E came into testator's real estate it must be for an estate in tail general, not an estate in tail male the insertion of the word "male" in the settlement must be treated as a misdescription, and the settlement construed as if the word were omitted; and E was excluded from sharing in the settlement moneys, without prejudice to his claims if the younger son died.

Re Alexander's Settlement, Jennings v Alexander [1910] 2 Ch 225; 79 LJ Ch 656; 102 LT 909; 54 Sol Jo 602

1613 Construction — Designated contingency — Reality and substance

By a deed of appointment dated 28 November 1975 the trustees of a settlement comprising a fund held on discretionary trust for, *inter alia*, the settlor's son, irrevocably appointed capital and income of part of the fund in favour of the settlor's son absolutely free from the trusts and from all further exercise of the powers contained in the settlement, contingently on his surviving a designated person for one day. The designated person was described in the deed of appointment as the person whose death occurred on Saturday, 29 November 1975 and who was the first in alphabetical order of the persons dying on that date to be named in the "deaths" column of the earliest edition of The Times newspaper published in London on Monday, 1 December 1975 (or if there was no edition published on that date then of the earliest edition published after that date) and if no person answered that description the designated

person was to be the person who would satisfy that description if references to the Daily Telegraph were substituted for references to The Times. The death of a Major B who died on 29 November 1975 was announced in The Times on 1 December 1975 and the settlor's son survived beyond midnight on 30 November 1975. In proceedings in respect of an assessment of capital transfer tax the question arose whether the interest conferred was in reality and in substance contingent on the settlor's son surviving another person (who might or might not materialise) for a period of one day or whether it was only contingent on his surviving until a specified time and date. There was evidence before the court that on at least one Monday over an unspecified period no death occurring on the preceding Saturday was reported in the "deaths" column of the The Times: *Held* a contingency was an event which might or might not happen, and if there was no real possibility that it would not happen, so that it was as good as certain that it would, it was a contingency without reality and substance and hence no contingency at all. But a real possibility was not the same as a probability; and, although it might be highly improbable that an event would happen, so long as there was a real possibility, however remote, that it would, the contingency was one of reality and substance. In the circumstances it was unnecessary to have more than one instance of a Monday edition of The Times during the following five months or so containing no report of a death on the previous Saturday in order to establish that on 28 November 1975 there was a real possibility that there would be no such report either in The Times or in the Daily Telegraph for the following Monday, and since there was evidence that there was at least one such instance it followed that the settlor's son's interest was dependent on a real contingency of his surviving another person of one day.

IR Comrs v Trustees of Sir John Aird's Settlmt [1982] 1 WLR 270; [1982] STC 245; [1981] TR 493

1614 Operation — Limitations of estate extrinsic to settlement — And charge created

By indenture of settlement, two estates, A and B, were limited to the father for life and subject thereto, the estate A was limited to the first and other sons in tail male, and the estate B was limited to the second and other sons in like manner; and it was provided that if the second son should become an eldest son, and as such should become entitled to the actual possession or to the receipt of the rents and profits of the estate A, the limitations of the estate B should cease and determine as if such second son were dead without issue. The second son, by the death of his elder brother, became the eldest son, and joined his father in suffering a recovery of the estate A, the uses of which were declared to the joint appointment of the father and son and subject thereto to the old uses: in exercise of this power the father and son, by a mortgage in fee of the estate A, raised a sum of money which was paid to the father and son: *Held* (1) on the death of the father, the estate B shifted from the second son under the terms of the proviso contained in the settlement; (2) the recovery suffered by the father and son did not by itself prevent the operation of the proviso, and the mortgage had not that effect, but notwithstanding both the recovery and the mortgage, the second son came on the death of his father into possession of the estate A within the meaning of the terms of the settlement; (3) the party entitled to the estate A might, previously to the happening of the event mentioned in the proviso, have so exercised his rights over the estate as to have prevented from ever coming into the possession of the second son within the meaning of the terms of the settlement.

I take the law to be settled that, generally speaking, where, as in that case (*Fazakerly v Ford* (1832) 1 Ad & EL 897; 2 Neu & MKB 1; 2 LJKB 111; 110 ER 1451) the limitations of the estate are extrinsic to the settlement containing the shifting clause, if a charge is created, for a charge is just as much taken from the estate as if a portion of the estate were taken from it, the clause will not operate (*Lord St Leonards C*).
Harrison v Round (1852) 2 De GM&G 190; 22 LJ Ch 322; 20 LTOS 118; 17 Jir 563; 1 WR 26; 42 ER 844, LC

ANNOTATIONS As to (1) **Consd** Langdale v Briggs (1856 3 Sm&G 255; Macoubrey v Jones (1856) 2 K&J 684; Re Wright's Trustees & Marshall (1884) 28 Ch D 93. As to (2) **Consd** Meyrick v Laws, Meyrick v Mathias (1874) 9 Ch App 237; Re Constable's SE [1919] 1 Ch 178 **Distd** Re Meeking, Meeking v Meeking [1922] 2 Ch 523 **Consd** Parr v A-G [1926] AC 239

1615 Operation — Effect of disentail — Followed by resettlement and mortgage — Second son "coming into possession"

Harrison v Round no 1614 ante

1616 Operation — Effect of accession to part of property

Harrison v Round no 1614 ante

1617 Operation — Effect of accession to part of property

A so devised his estate of G that no female issue of any son of B, his first devisee, could take or inherit. B being himself possessed of another estate of C, and having succeeded to the G estate, made a will by which he devised his original estate to C to his sons successively in tail male; then to the children of his sons in tail general; then to his own eldest daughter

for life. He added a shifting clause, declaring that his own devised estates should not be held or enjoyed by any one of his sons or daughter, or his, her, or their issue, after such son or daughter, or his, her, or their issue, should have come into possession of the estate devised by A; but that as often as much estate of A should come to the possession of any of his, B's, sons or daughters, or any of their issue, then that person next in remainder under the limitations of his, B's, will, should be entitled to the C estate; and also from time to time, as often as the event might happen, in such manner and as if the person so becoming possessed of the G estate had died, or was then dead, without issue: *Held* "issue" here only meant those who would take under the limitations anterior to the devise "to the person next in remainder," and excluding them alone from taking under those limitations. The effect of the shifting clause was therefore simply to propel or accelerate the next remainder, but not to carry over the estate in a different class of remainder.

Jellicoe v Gardiner (1865) 11 HL Cas 323; 5 New Rep 465; 34 LJCP 282; 13 LT 127; 11 Jur NS 249; 13 WR 528; 11 ER 1357; sub nom

Gardiner v Jellicoe (1865) 20 CBNS 198, HL

1618 Operation — Effect a statement that divested party "otherwise provided for" — Where provision referred to invalid

By a marriage settlement a sum of stock was settled, subject to the husband's and wife's life interests therein upon trusts for the children and issue of the marriage, except an eldest son entitled to certain settled estates, as the husband and wife, or the survivor of them, should appoint, and in default of appointment, for the children, except as aforesaid, in equal shares, the shares of sons to be vested at twenty-one, of daughters at twenty-one or marriage, and it was provided that if the husband should die in his wife's lifetime, leaving an only child, a son, such son should be entitled to the whole trust fund, but if the wife should survive the husband, and there should be only two children or only one child, except as aforesaid, who should attain twenty-one or marry, such two only children or one only child, except as aforesaid, should not be entitled to any part of the trust fund, but it should go to the husband absolutely, as in that event such two children or one child, except as aforesaid, were otherwise provided for by a deed of even date creating a charge upon the settled real estates. There were two children of the marriage: a son who died an infant and a daughter who married, and became, on her brother's death, entitled to the settled estate. The wife survived the husband. The deed purporting to create a charge upon the settled estates, turned out to be invalid: *Held* upon the construction of the settlement, and without resting the decision upon the invalidity of the charge, the daughter took an absolutely vested interest in the trust fund, and it did not go to the husband's representative. *Semble*: if it had been otherwise, the invalidity of the charge would have been sufficient to displace the claim of the husband's representative.

Carter v Ducie (Earl) (1871) 41 LJ Ch 153; 25 LT 656; 20 WR 228

1619 Operation — Provisos avoiding jointures and portions

Testatrix, by will dated in 1860, devised freeholds to the use of trustees and their heirs, upon trust for E for life, remainder to the use of C, the first of E, for life, without impeachment of waste, remainder to the use of his first and other sons successively in tail male; with remainders in like form to the use of the third, passing over the second, fourth, and other younger sons of E for life, and their respective first and other sons in tail male, with divers remainders over. The settlement contained powers to the sons of E thereinbefore named of jointuring and of charging portions. By letters patent, dated in April 1864, the barony of B was conferred upon E for life; and, after her death, upon R, the second son of E, and the heirs male of his body; and in default of such issue, to the third, fourth, and fifth sons of E, and the heirs male of their bodies respectively. The letters patent contained a proviso, that if any person taking thereunder should succeed to the earldom of D, and there should then or thereafter be a younger son, or heir male of a younger son, then the succession to the barony should devolve upon the son of E, or the heir who would be next entitled to the barony. Testatrix, by a codicil, dated in May 1864, revoked the devise contained in her will, and in lieu thereof devised the freeholds to trustees, upon trust, as soon as conveniently might be after her decease, to "convey, settle, and assure" the same "in a course of entail, to correspond as nearly as may be with the limitations" of the barony, and "the provisos affecting the same contained in the letters patent," . . . and with all such "powers, provisos, declarations, and agreements" as the trustees should consider proper, or as their counsel should advise. E died; and the House of Lords having declared that the estates devised by the codicil ought to be limited in strict settlement to R and the younger sons of E for their respective lives, without impeachment of waste, with remainder to their first and other sons in tail male; that such settlement ought to contain powers of jointuring and charging portions for younger children to the limits contained in the will; and that in the settlement there ought to be inserted a shifting clause in the words of the letters patent: *Held* (1) the

settlement ought not to contain a clause postponing the vesting of portions until the death of the person creating them; (2) the settlement ought not to contain a proviso avoiding jointures and portions in the event of the estates shifting on the accession of the earldom.

Holmesdale (Viscount) v West (1871) LR 12 Eq 280; 40 LJ Ch 795

1620 Necessity for certainty — Condition to defeat vested estate — Event must be ascertainable

A condition which is to defeat a vested estate must depend on an event ascertainable from the beginning.

GC gave his real and personal estates to trustees, upon trust, among other things, to invest his personal estate, and pay the interest to his son, TJC, for life, then to all the children of his son, and their heirs; and he gave all the residue amongst all the children, to be paid as they should attain twenty-one; "provided that the devises hereinbefore contained to the children of my said son are made upon this express condition, that they be educated in England, and in the Protestant religion according to the rites of the Church of England; and in case any one or more of such children shall be educated abroad, or not in the Protestant religion, according to the rites of the Church of England, then I do hereby revoke," etc, and there was a gift over: *Held* the children took equitable estates tail, subject to be divested upon certain contingencies; the proviso constituted a condition subsequent to defeat vested estates, and was therefore to be construed strictly.

Clavering v Ellison (1859) 7 HL Cas 707; 29 LJ Ch 761; 11 ER 282, HL; affg (1857) 8 De GM&G 662, LJJ; affg (1856) 3 Drew 451

ANNOTATIONS **Consd** Re Exmouth, Exmouth v Praed (1883) 23 Ch D 158; Jeffreys v Jeffreys (1901) 84 LT 417 **Apld** Re Moore's Trusts, Lewis v Moore (1906) 96 LT 44; Re Sandbrook, Noel v Sandbrook [1912] 2 Ch 471 **Consd** Re Lanyon, Lanyon v Lanyon [1927] 2 Ch 264; Re Hanlon Heads v Hanlon [1933] Ch 254; Re Borwick, Borwick v Borwick [1933] Ch 657; Re Tegg, Public Trustee v Bryant [1936] 2 All ER 878; Sifton v Sifton [1938] 3 All ER 435 **Apld** Re Hatch, Public Trustee v Hatch [1948] 2 All ER 288 **Consd** Re Murray, Martins Bank Ltd v Dill [1954] 3 All ER 129 **Folld** Re Krawit's Will Trusts, Krawitz v Crawford [1959] 3 All ER 793 **Distd** Re Lowry's Will Trusts, Barclays Bank Ltd v Board of Governors of United Newcastle-upon-Tyne Hospitals [1966] 3 All ER 955

1621 Necessity for certainty — Condition to defeat vested estate — Event must be ascertainable

A testator by his will devised and bequeathed his real and personal property to his executors upon trust to manage the *corpus* of the estate and to pay "to or for my said daughter [the appellant] a sum sufficient in their judgment to maintain her suitably until she is forty years of age, after which the whole income of the estate shall be paid to her annually. The payments to my said daughter shall be made only so long as she shall continue to reside in Canada": *Held* the provision that the payments were to be made "only so long as she shall continue to reside in Canada" was a condition subsequent which was void for uncertainty.

Sifton v Sifton [1938] AC 656; [1938] 3 All ER 435; 107 LJPC 97; 159 LT 289; 54 TLR 969; 82 Sol Jo 680, PC

ANNOTATIONS **Consd** Re Coxen, MacCallum v Coxen [1948] 2 All ER 492 **Apld** Re Bouverie, Bouverie v Marshall [1952] 1 All ER 408 **Distd** Re Gape's Will Trusts, Verey v Gape [1952] 2 All ER 579 **Consd** Re Brace, Gurton v Clements [1954] 2 All ER 354 **Folld** Re Krawitz's Will Trusts, Krawitz v Crawford [1959] 3 All ER 793 **Distd** Re Gulbenkian's Settlmt Trusts, Whishaw v Stephens [1968] 3 All ER 785

1622 Necessity for certainty — Both in expression and operation — Condition subsequent

When a trust is created to secure the devolution of chattels as heirlooms, any limitations which are to take effect by way of postponement or defeasance of an absolute interest are subject to all the rules which govern the validity of conditions subsequent. Such limitations, therefore, must be certain, not only in expression, but also in operation, and it is essential to their validity that it should be capable of ascertainment at any given moment of time, whether the limitation has or has not taken effect. Testator, who was a peer, bequeathed chattels to trustees, upon trust to permit and suffer the same to go and be held and enjoyed with the title, so far as the rules of law and equity would admit, by the person who for the time being should be actually possessed of the title, in the nature of heirlooms, and so that no person in existence at the time of testator's decease, or born in due time afterwards, and afterwards coming to the title, should have any other than a life interest in the same, and so that no person should acquire an absolute interest in the same till the expiration of twenty-one years after the decease of all such persons as should be in existence at the time of testator's decease and afterwards attaining the title: *Held* the latter clause of the limitations was void for uncertainty in operation, and the first person born after the death of testator who attained the title acquired an absolute interest in the chattels, notwithstanding that there was still living a person who was alive at the time of

testator's death, and who was capable of inheriting the title.

Re Exmouth (Viscount), Exmouth (Viscount) v Praed (1883) 23 Ch D 158; [1881–5] All ER 647; 52 LJ Ch 420; 48 LT 422; 31 WR 545

ANNOTATIONS **Apld** Jeffreys v Jeffreys (1901) 84 LT 417 **Consd** Sifton v Sifton [1938] 3 All ER 435

1623 Necessity for certainty — Condition against marriage out of particular religion

A testator, who gave a legacy and a share or residue to an unmarried daughter which he settled on her and her issue, provided by a clause in his will that, if she should at any time after his death marry a person "not of Jewish parentage and of the Jewish faith," the trusts, powers and provisions in favour of her and her issue and any husband so married to her should cease and determine and his will should operate as if she had died at the date of the marriage. The testator having died, the daughter married a man who was not of Jewish parentage or faith: *Held* there was one condition of forfeiture and not two alternative conditions, so that the condition would be void as a whole if one limb of it were void; the first limb of the condition (as to Jewish parentage) was void for uncertainty; and the second limb (as to Jewish faith) was also void.

Clayton v Ramsden [1943] AC 320; [1943] 1 All ER 16; 112 LJ Ch 22; 168 LT 113; 59 TLR 75; 86 Sol Jo 384, HL

ANNOTATIONS **Apld** Re Donn, Donn v Moses [1944] Ch 8 **Folld** Re Moss's Trusts, Moss v Allen [1945] 1 All ER 207 **Apld** Re Hatch, Public Trustee v Hatch [1948] 2 All ER 288 **Distd** Re Allen, Faith v Allen [1953] 2 All ER 898 **Consd** Re Brace, Gurton v Clements [1954] 2 All ER 354; Re Tarnpolsk, Barclays Bank Ltd v Hyer [1958] 3 All ER 479 **Distd** Re Selby's Will Trust, Donn v Selby [1965] 3 All ER 386; Blathwayt v Lord Cawley [1975] 3 All ER 625; Re Tuck's Settlmt Trusts, Public Trustee v Tuck [1978] 1 All ER 1047

1624 Necessity for certainty — Conditions qualifying beneficiary to receive income — Degree of certainty required

Re Tuck's Settlmt Trusts, Public Trustee v Tuck no 482 ante

1625 Modification of invalid clause — Shifting clause

Testator devised his freehold estates in Worcestershire to his third son and his issue male, with remainder to his fourth son and his issue male, in strict settlement; and he devised his freehold estates in Cardiganshire to his fourth son and his issue male, with remainder to his fifth son and his issue male, in strict settlement. By a shifting clause it was provided that if his fourth son, or any issue male of his fourth son, should become actually entitled to the possession of his Worcestershire estates, and if his fifth son or any of his issue male should be then living, the limitations of his Cardiganshire estates in favour of his fourth son, or his issue male, should absolutely cease. He bequeathed his leasehold estates in Cardiganshire to trustees upon such trusts as, regard being had to the difference in the tenure of the premises respectively, would best or most nearly correspond with the uses declared of the Cardiganshire freeholds. The third son died a bachelor in the lifetime of the fourth son, who thereupon entered into possession of the Worcestershire estates: *Held* the fifth son was entitled to the rents and profits of the Cardiganshire leaseholds, because they were given upon an executory trust; and assuming the shifting clause, if applied *verbatim* to the leaseholds, to be bad for remoteness, it ought to be so modified as to render it free from that objection.

Miles v Harford (1879) 12 Ch D 691; 41 LT 378

ANNOTATIONS **Folld** Re Beresford-Hope, Aldenham v Beresford-Hope [1917] 1 Ch 287 **Consd** Re Curryer's Will Trusts, Wyly v Curryer [1938] 3 All ER 574

1626 Forfeiture clause — Remainder to life tenant's issue — Forfeiture before birth of issue — Whether issue thereby excluded

In 1934 a testator settled property on trust for C for life with remainder on trust for C's eldest and other sons successively in tail male with remainder on trust for J for life with remainders over. A clause in the will declared that if any person who became entitled to an interest under the trusts should be or become a Roman Catholic, his interest should pass to the next beneficary as if the Roman Catholic beneficiary were dead. The testator died in 1936. C became a Roman Catholic in 1939. In 1940, the court ordered that C had forfeited his interest in the settled property and that J's interest had been accelerated. C's eldest son M was born in June 1949. In proceedings the same year, where the trustees of the settled property were plaintiffs, and J and M defendants, the court declared that J's life interest had not been terminated by reason of M's birth. M was baptised a Roman Catholic as an infant. He attained his majority on 15 January 1970. In September 1970 M executed a deed of disentail of the settled property and assigned to J all the interest to which he was entitled in equity in the settled property. In further proceedings in 1971, the court held that on the death of J or on the forfeiture of the estate limited to him, the settled property would be held on the same trusts as would have taken effect if C had previously died without having had children. M appealed against this holding: *Held* allowing the appeal, (i) (*Lord Wilberforce* and *Lord Fraser of Tullybelton* dissenting) though M was

born after his father had forfeited his life interest, this did not prevent him from taking an entailed interest on birth. Since at no time up until the 16th September when M executed the disentailing deed, had he had an entailed interest in possession, he incurred no forfeiture by remaining a Roman Catholic; (ii) the forfeiture clause was not void for uncertainty or as being contrary to public policy; (iii) as the remaindermen after J were not parties to the 1949 proceedings, there was no mutuality and M was not estopped by that order from claiming against them that either on his birth, or subject to J's interest, he had become entitled to an entailed interest.

Blathwayt v Lord Cawley [1975] 3 All ER 625; [1975] 3 WLR 684; 119 Sol Jo 795, HL

2 Name and arms clauses

A Generally

LAW See Halsbury's Laws (4th edn) vol 42 para 743 et seq

1627 Method of compliance — Addition of prescribed name — Before or after present name

Under a name and arms proviso requiring a devisee to take testator's surname: *Held* adding testator's surname before his own was not a compliance by the devisee, but adding testator's surname after his own was so.

D'Eyncourt v Gregory (1876) 1 Ch D 441; 45 LJ Ch 205; 24 WR 424

ANNOTATION **Distd** Re Eversley, Mildmay v Mildmay [1900] 1 Ch 96

1628 Method of compliance — Addition of prescribed name — Before or after present name

Joicey-Cecil v Joicey-Cecil (1898) Times, 11 June

1629 Method of compliance — Addition of prescribed name — Before or after present name

Under a name and arms clause directing a devisee to assume and use the prescribed name "alone or together" with his own family name: *Held* the devisee had an option to use the prescribed name either before or after his own family name, and the use of the prescribed name before his own surname was a sufficient compliance with the terms of the devise.

Re Eversley, Mildmay v Mildmay [1900] 1 Ch 96; 69 LJ Ch 14; 81 LT 600; 48 WR 249; 16 TLR 6; 44 Sol Jo 11

1630 Method of compliance — Addition of prescribed name — Before or after present name

Under a name and arms clause in a will: *Held* in order to comply with the clause the specified surname must be added after that of the devisee, and prefixing it to that of the devisee would not be a compliance.

Re Llangattock, Shelley v Harding (1917) 33 TLR 250

1631 Method of compliance — Addition of prescribed name — Before or after present name

Re Berens, Re Dowdeswell, Berens-Dowdeswell v Holland-Martin no 1672 post

1632 Method of compliance — Meaning of "family" arms

By his will a testator, IJ, directed that any person who under the trusts therein should become entitled to the yearly rents and profits of certain property, and who was not then using the name of IJ, should within one year take that name and quarter the arms of IJ with "his or her own family arms".

Plaintiff had already changed his name from H to IJ but he had no arms of any kind: *Held* (1) "his . . . own family arms" included arms granted directly to the devisee; included a grant made after the clause in the will had taken effect; and included arms taken in either the name H or the name IJ; (2) as the penal clauses in the will were to be construed strictly but fairly, the obligation to quarter testator's arms with "his . . . own family arms" required the devisee to obtain "his . . . own family arms" with which to quarter testator's arms.

Per *Megarry J*: I think "family" is a Janus-like word, often looking backwards ancestrally, but sometimes looking forward to posterity. In relation to "arms" I can see no real reason why the word should be used merely ancestrally.

Re Neeld, Inigo-Jones v Inigo-Jones [1969] 2 All ER 1025; [1969] 1 WLR 988; 113 Sol Jo 527

1633 Adoption and subsequent discontinuance of changed name

A name and arms clause in a will provided in effect that the persons therein mentioned "as and when and within the space of twelve calendar months next after they should severally become entitled in possession" to the estates should "assume and take upon themselves respectively the surname of Blagrove, they respectively not being of that name, and by such name only, and no other, thenceforth should style and describe themselves, etc, and also should bear the arms of testator's family alone, etc, and in case any of the persons aforesaid should refuse, decline, neglect or discontinue to take, assume and use such surname and arms respectively, etc, for the space of twelve calendar months after they should severally

so become entitled as aforesaid, then" from and immediately after the expiration of the said space of twelve calendar months, their estate was to be determined, and go over to the persons next entitled in remainder. HB, one of the persons referred to in the above clause, became entitled to the estates, subject to the condition, in 1844, having previously by royal licence duly assumed taken the name and arms of Blagrove. In 1856 he, by licence, assumed and still used the name and arms of "Bradshaw" only: *Held* the person next in remainder was entitled to the estates under the gift over in the name and arms clause.

Blagrove v Bradshaw (1858) 4 Drew 230; 27 LJ Ch 440; 30 LTOS 363; 4 Jur NS 107; 6 WR 266; 62 ER 89

1634 Adoption and subsequent discontinuance of changed name

Testatrix devised her real estate in strict settlement, the will containing an ordinary name and arms clause; and she bequeathed personal estate to trustees, in trust for the person or persons who for the time being should by virtue of the will be beneficially entitled to the real estate, for such or the like estates or interests, to the intent that the personal estate should go along with the real estate, so far as the nature of the personal estate and the rules of law and equity would permit, and testatrix directed that the name and arms clause relating to the real estate should not affect the personal estate, but in lieu thereof she directed (*inter alia*), that if any person, being a male, who should be entitled under any of the limitations of the will to an absolute beneficial interest in possession by purchase in the personal estate should refuse or neglect to assume, use, and bear the name and arms of C within the period therein mentioned, provided such period should expire within twenty-one years next after the death of the survivor of three persons named, or should, after having assumed the name and arms, discontinue to use and bear the same, or either of them, for six months at any time within the period of twenty-one years, then and in any of such cases, and from time to time, the estate and interest of the person so refusing, or neglecting, or discontinuing in the personal estate should absolutely cease, and the personal estate should from time to time go over to the person or persons who would have been entitled to the real estate under the limitations of the will in case the party whose estate should so cease, being tenant for life of the real estate, were dead, or, being tenant in tail of the real estate, were dead without issue, for such or the like estates or interests as such person or persons would have been entitled to in the real estate. Within the proper time after the death of testatrix the first tenant for life under the will assumed the name and arms of C and continued to use them until his death. Plaintiff was his first son and the first tenant in tail of the real estate under the will. After he had attained twenty-one he executed a disentailing deed of the real estate and limited it to himself in fee simple. He then claimed to be indefeasibly entitled in possession to the personal estate: *Held* (1) the forfeiture clause relating to the personal estate was valid, and the effect of it was to make the interest of the tenant in tail, in case it should be forfeited, go over to the person who would have been entitled to the real estate under the limitations of the will in case the tenant in tail had been dead without issue, and no disentailing deed had been executed; (2) plaintiff was not indefeasibly entitled to the personal estate; but that his interest was liable to forfeiture in case within the period of twenty-one years he should discontinue to use the name and arms of C.

Re Cornwallis, Cornwallis v Wykeham-Martin (1886) 32 Ch D 388; 55 LJ Ch 716; 54 LT 844

1635 Adoption and subsequent discontinuance of changed name

Where a will requires that a person shall within a specified time after becoming entitled under the limitations of the will take and use a certain surname, and there is a condition of forfeiture if such person shall "refuse or neglect to take or use such surname as aforesaid and in manner aforesaid," a continued use of the surname after the period is to be implied.

Although such clause requires the surname to be used "in deeds and documents and on all other occasions," it imposes no obligation except on occasions when a surname is commonly used. There is no forfeiture for signing a family letter with a Christian name alone, nor, in the case of a peeress, for signing an ordinary business letter with the Christian name and title, or using these latter on her visiting-cards.

Re Drax, Dunsany v Sawridge (1906) 75 LJ Ch 317; 94 LT 611; 54 WR 418; 22 TLR 434; 50 Sol Jo 325

ANNOTATIONS **Apld** Re Howard's Will Trusts [1961] 2 All ER 413 **Consd** Re Neeld, Carpenter v Inigo-Jones [1962] 2 All ER 335

1636 Costs of compliance

The tenant for life under a will must pay the expenses of taking testator's name and arms as directed by the will.

Re Mercer, Drewe-Mercer v Drewe-Mercer (1889) 6 TLR 95

1637 Effect of non-compliance — Ignorance of clause

The terms "forfeiture" and "breach of condition" used in Real Property Limitation Act 1833 (c 27) ss 3, 4 (repealed) were to be read in the largest sense,

and extended to forfeitures which operated to accelerate an estate under a conditional limitation, as well as to forfeitures of which the heir-at-law only could take advantage. Ignorance of a condition annexed to a gift by will does not protect the devisee or legatee from the consequences of not complying with the condition. An estate was devised in strict settlement, subject to a clause directing that every person who should become entitled in possession under the will should, on becoming so entitled, assume testator's name and arms; and it was provided, that in case any such person should fail or neglect so to do for twelve calendar months, after he should become so entitled in possession, his estate and interest should cease and the estate should go to the person who should be next in remainder and then *in esse*, as if the person so failing or neglecting were then dead. A tenant in tail, who did not comply with the clause, remained in possession of the estate for more than twenty years. At his death the next remainderman was in India, and being ignorant of his rights under the will, did not comply with the clause: *Held* (1) the tenant in tail had not acquired a title by adverse possession, but on his death, by virtue of Real Property Limitation Act 1833 (c 27) s 4 (repealed), the remainderman became entitled to the estate; (2) the remainderman's estate was forfeited by reason of his non-compliance with the name and arms clause.

Astley v Earl of Essex (1874) LR 18 Eq 290; 43 LJ Ch 817; 30 LT 485; 22 WR 620

ANNOTATION As to (2) **Distd** Re Quintin Dick, Cloncurry v Fenton [1926] Ch 992

1638 Effect of non-compliance — Ignorance of clause

Testator who died in 1858 by his will devised and bequeathed real and personal estate to persons in succession in strict settlement, and directed that every person who should become entitled thereto should take and use the surname and arms of D, and that if any such person so becoming entitled should refuse or neglect to take and use such surname and arms within three months of becoming so entitled, the limitations to him should cease determine and be utterly void, and the estate should go and devolve to the person or persons next entitled in remainder, in the same manner as if the person whose estate should so cease and determine were dead.

Upon the death of a tenant for life without issue in 1923, a period of over a year elapsed before the next tenant in tail could be discovered. Eventually it was found that he was living in Canada, and had never heard of the terms or existence of testator's will: *Held* being ignorant of the condition he could not be said either to have "refused" or "neglected" to comply with it. The expression "refuse or neglect" is not equivalent to "fail" or "omit," as it implies a conscious act of volition. The tenant in tail therefore had not forfeited the estate.

Re Quintin Dick, Cloncurry (Lord) v Fenton [1926] Ch 992; [1926] All ER 644; 96 LJ Ch 9; 136 LT 23; 42 TLR 681; 70 Sol Jo 876; subsequent proceedings [1927] 1 Ch 593

ANNOTATION **Apld** Re Hughes, Rea v Black [1943] Ch 296

1639 Effect of non-compliance

Semple v Holland (1863) 33 Beav 94; 55 ER 302

1640 Effect of non-compliance — As against public policy — Married woman

A testator by his will left the residue of his estate in trust for the eldest son of the tenant for life of his estate on his attaining the age of twenty-one years or, failing him, for the tenant for life's eldest daughter who should attain that age or marry. By clause 9 he provided; "It shall be a condition appurtenant to the taking of the gift of my estate . . . that the person so taking shall take and continue to bear my surname." The tenant for life married after the testator's death and had two children, both daughters. The elder daughter married and by this summons, asked whether the condition was void or effectual and, if it was effectual, when the plaintiff had to "take" the testator's surname, over what period she had to "continue to bear" it and whether it would be a sufficient taking of his surname for her to bear it in conjunction with her own married surname and in front of (*ie*, before) it: *Held* the condition was a condition subsequent; and the clause was void for the following reasons: (*a*) it was repugnant to the antecedent absolute gift, since there was no gift over on breach; (*b*) even if it could be operative, it would infringe the rule against perpetuities, and (*c*) it was contrary to public policy, being coercive and quasi-punitive, and intended to force the plaintiff to take and use the testator's surname both while unmarried and when married.

Re Fry, Reynolds v Denne [1945] Ch 348; [1945] 2 All ER 205; 115 LJ Ch 3; 173 LT 282; 61 TLR 449; 89 Sol Jo 349

ANNOTATIONS **Folld** Re Lewis' Will Trust, Whitelaw v Beaumont [1951] 2 TLR 1032 **Consd** Re Bouverie, Bouverie v Marshall [1952] 1 All ER 408 **Folld** Re Howard's Will Trusts [1961] 2 All ER 413 **Consd** Re Neeld, Carpenter v Inigo-Jones [1962] 2 All ER 335

1641 Effect of non-compliance — As against public policy — Married woman

Re Delme-Radcliffe (1961) 105 Sol Jo 529

1642 Effect of non-compliance — Gift absolute

Testatrix, who died in 1832, settled her freehold estate upon her grandchildren, a share becoming vested in one of them, Lucy, in fee simple in possession; and the will contained a proviso that any person becoming entitled in possession to the estate, should within one year thereafter, take and use the name of "Jones," and that in case any such person should refuse or neglect to use the name of Jones within one year, then the estate limited to him or her should be void, and should first go to her niece, Catherine Jones, since deceased, for her life, and after her decease to the person or persons next in remainder under the trusts of the will, in the same manner as if the person so refusing were dead. Lucy was twice married, and neither she nor either of her husbands ever took the name of Jones: *Held* the gift being in fee simple, and there being necessarily no person entitled in remainder, the name clause was void, and that there had consequently been no forfeiture by Lucy.

Musgrave v Brooke (1884) 26 Ch D 792; sub nom *Re Brooke, Musgrave v Brooke* (1884) 54 LJ Ch 102; 33 WR 211

ANNOTATION **Consd** Re Fry, Reynolds v Denne [1945] Ch 348

1643 Effect of non-compliance — Only heir can take advantage of omission — Effect upon making title to property

After devising a freehold estate to trustees and giving his daughter and granddaughter and her husband successive equitable life interests therein, with remainder to the use of the granddaughter's first and other sons in tail male, with divers remainders over, testator provided and declared that every person becoming entitled to the estate as tenant for life or tenant in tail in possession, and the husband of every such person if female and married, should within twelve calendar months of becoming entitled in possession assume testator's surname and arms. There was no provision for continued user of the name and arms and no gift over on non-compliance with the proviso. Neither testator's daughter or granddaughter, both of whom succeeded to the estate, nor the husband of either, assumed his name and arms in compliance with the proviso. Objection to title was taken on a sale by the granddaughter under the powers of the Settled Land Acts, on the ground that she was not, and had not the powers of, a tenant for life, her estate, as the purchasers alleged, having ceased by reason of her non-compliance: *Held* the vendor could make good title, for even if the expression of testator's desire contained a condition it would be a common law condition of which testator's heir alone could take advantage by entry, which he had not done, nor was there anything in the will to show that it was the intention of testator that the estate should go over on non-compliance with his desire, so as by necessary implication to convert the expression of that desire into a conditional limitation.

Re Evans's Contract [1920] 2 Ch 469; 89 LJ Ch 626; 124 LT 188

1644 Change by person entitled — When right accrues — Condition subsequent

Malloon v Fitzgerald (1683) 3 Mod Rep 29; Skin 179; 2 Show 315; 87 ER 17

ANNOTATION **Consd** Doe d Kenrick v Beauclerk (1809) 11 East 657

1645 Change by person entitled — When right accrues — Condition subsequent

Devise to the heir at law in tail, with a proviso for taking testator's name, is not a conditional limitation.

This is not a condition precedent. It cannot be complied with instantly. It is "to take the name for themselves and their heirs." Now many acts are to be done, in order to oblige the heirs to take it, such as a grant from the King, or, an Act of Parliament. It is not, therefore a condition precedent; but being penned as a condition, it must be a condition subsequent. It cannot be a limitation; for, the next proviso, against waste, shows that testator knew how to limit over, when he thought proper to do so, and in that case, he did think it proper to do it; and therefore that proviso is turned into a limitation (*Lord Mansfield*).

Gulliver d Corrie v Ashby (1766) 4 Burr 1929; 1 Wm Bl 607; 98 ER 4

ANNOTATION **Apld** Re Evans Contract [1920] 2 Ch 469

1646 Change by person entitled — When right accrues — Condition subsequent

Testator directed his estate to be settled on GR for life, with remainder to his issue in tail male, in strict settlement; upon condition that all persons from time to time to come into possession of the estates, should take and use the name and arms of T: *Held* the estates ought to be settled on GR for life, with remainder to his sons successively in tail male, with remainder to his daughters as tenants in common in tail male, with cross remainders in tail male; and the proviso to be inserted in the settlement, as to taking the name and arms, and for giving over the estates on default, ought to be so expressed, as to take away the estates from the defaulting party and his descendants only: that is, if a grandson of GR were the defaulting party, the

consequence ought not to extend to the grandson's brothers.

Trevor v Trevor (1842) 13 Sim 108; 11 LJ Ch 417; 6 Jur 863; 60 ER 42; on appeal (1847) 1 HL Cas 239, HL

1647 Change by person entitled — When right accrues — Condition subsequent

Testator was, under a deed of resettlement of his family estates, entitled to a reversion in fee, subject to an estate for life in his only son, who was a bachelor, and to remainders in tail to the first and other sons of that son. Testator soon afterwards devised all his real estates to his eldest daughter for her life, with remainder to her first and other sons in tail, with remainders to his other daughters for life and to their sons in like manner. The will contained a name and arms clause determining the estate of any person who should become "entitled to the possession or to the receipt of the rents and profits" of the estates, and not assume the family name and arms within a year after becoming so entitled. In several other parts of the will provisions were made respecting persons who, by virtue of the will, should be in the "actual possession" of the property or "entitled to the rents and profits thereof." The son died without issue two years after testator, and the first tenant for life under the will assumed the name and arms of H within a year after her brother's death: *Held* there was no forfeiture, either as to the family estates, or as to property to which testator had become entitled in fee simple in possession after the date of the will.

Langdale (Lady) v Briggs (1858) 8 De GM&G 391; 26 LJ Ch 27; 28 LTOS 73; 2 Jur NS 982; 4 WR 703; 44 ER 441, LJJ

ANNOTATION **Apld** Re Greenwood, Goodhart v Woodhead [1903] 1 Ch 749

1648 Change by person entitled — When right accrues — Condition subsequent

Testator devised an estate to trustees on trust to allow his widow to reside in the mansion house during widowhood, rent free, with use of the furniture, plate, and stores, and subject thereto for his nephew, C, for life, with remainder to his issue in tail, with remainder for certain other nephews in tail male. Declaration that every person who, under those limitations, should become entitled as tenant for life or in tail male to the actual possession or receipt of the rents and profits of the estate should, within one year after becoming so entitled, take the name of V, and in case of neglect the limitations in his favour should determine, and the estate go to the person next in remainder as if the person so neglecting being tenant for life were dead, or being tenant in tail male were dead and there were a general failure of his issue inheritable thereunder; but such determination, in case of a tenant for life, was not to prejudice his issue, but the estate should remain in the trustees during his life, who should pay the rents to the person entitled to the next vested estate in remainder. Testator died in 1875. C, the tenant for life, died in 1889 without issue, and without having taken the name of V. T, the next tenant in tail, was now living and unmarried, but had not taken the name. R, the next tenant in tail, took the name of V in 1891. Owing to a charge on the estate there had not been any profits therefrom for the persons entitled under the limitations in the will. The widow was still living: *Held* although the widow was entitled to occupy part of the estate rent free, she was not thereby tenant for life, and although there had not been any profits, C had become on testator's death entitled to the actual possession or receipt of the rents and profits within the meaning of the will; C had forfeited his interest in 1876 by not taking the name of V, but C being tenant for life only, time did not run against T until C's death in 1889; T having failed to take the name of V his interest was forfeited in 1890, and R, having taken the name within one year from T's forfeiture, was now tenant in tail of the estate.

Re Varley, Tornton v Varley (1893) 62 LJ Ch 652; 68 LT 665

1649 Change by person entitled — When right accrues — Condition subsequent

Testator, who died in 1853, devised his real estate upon trust for his daughter for life, and after her death for her children; and if she should have no child he devised his real estate to N in fee, on condition that in case testator's wife should be then living she should have the use for the then remainder of her life of testator's residence, and on further condition that N should "take and use" testator's name only, but subject to the payment of certain legacies which testator bequeathed only if his daughter should have no child, and should be payable at her death exclusively out of the estates devised to N.

Testator's daughter and N both survived testator, but his wife was dead. The daughter, who was now in her fifty-ninth year, was married, but had had no children. N died in her lifetime intestate, without having taken testator's name: *Held* upon the construction of the will the condition requiring N to take and use testator's name was a condition subsequent that is, a condition to operate only upon N becoming entitled to the possession of the estate by the death of the daughter without children, and not before; and as he had been prevented from performing it by the act of God, the estate would, on the death of the daughter without children, vest absolutely in his

legal personal representative freed from the condition.

Re Greenwood, Goodhart v Woodhead [1903] 1 Ch 749; [1900–3] All ER 332; 72 LJ Ch 281; 88 LT 212; 51 WR 358; 19 TLR 180; 47 Sol Jo 238, CA

1650 Change by person entitled — When right accrues — Condition subsequent — Infant beneficiary

A will contained a clause which directed every person who should become entitled under the will to the lands thereby appointed as tenant for life, or in tail possession, who should not then bear the surname and arms of E, should within six months after becoming so entitled assume the surname and arms, and apply for a royal licence for the purpose; and that in case such person should "refuse or neglect" to take such surname and arms, then at the end of the six months, if the person should be tenant in tail, the limitation to him should determine and the hereditaments should go over to other persons.

F, who was still an infant of eighteen years of age, had, in one view of the true construction of the will, become entitled to the estates as tenant in tail in possession more than six months previously. F, who did not bear the surname or arms of E, had not assumed them or taken any steps for the purpose: *Held* F being an infant, could not be said to have refused or neglected to assume the surname or arms; no distinction could be drawn for the purpose between an infant of tender years and another infant; and if F had become entitled in possession, he nevertheless had not forfeited the estates.

Re Edwards, Lloyd v Boyes [1910] 1 Ch 541; 79 LJ Ch 281; 102 LT 308; 26 TLR 308; 54 Sol Jo 325

ANNOTATION **Follď** Re Quintin Dick, Cloncurry v Fenton [1926] Ch 99

1651 Change by person entitled — When right accrues — Condition subsequent

In general a name and arms clause following the language of established precedent is not void for uncertainty merely because it imposes an obligation to "take and use", or to "assume" or "use on all occasions" a surname, or because it provides for defeasance if the propositus "disuses" or "discontinues to use" the surname, nor is such a clause contrary to public policy merely because it is so drawn as to impose an obligation of change of name on a husband to whom a woman is married or whom she may thereafter marry. A testator, who died on 3 October 1956, devised and bequeathed his net residuary estate on trusts under which RC (a brother of testator) was life tenant, subject to a name and arms clause (clause 14). Testator specifically devised certain lands on trusts under which H (a grandson of testator) became entitled in equity to a life interest subject to a similar name and arms clause (clause 17). There lands were settled in tail on the sons of H, who had two sons, and on failure of his issue on trust for testator's daughter for life and for her issue in tail male. Clause 14 (the name and arms clause relevant to the life interest in residue) made applicable a name and arms clause contained in a will of 1855. Except that this extended so as to require husbands of female beneficiaries to assume the name and arms, it was similar in terms to clause 17 of the testator's will which, so far as relevant, provided as follows— ". . . any person (with the exception of my daughter . . .) who under the trusts of this my will shall become entitled to the actual receipt of the yearly rents and profits [of the property] and who shall not then use the surname of . . . [shall] within the space of one year . . . take upon himself and use upon all occasions the surname of . . . only and quarter the arms of . . . with his or her own family arms . . . and in case any of the said persons (with the exception only of my daughter . . .) shall refuse or neglect or discontinue to take or use such surname and arms . . . then after the expiration of the said space of one year the . . . estate hereby limited to [that] person . . . and also the limitation hereinbefore contained to the use of the said trustees . . . during the life of such person in case he or she shall be tenant for life [of the property] shall absolutely cease and immediately [the property] shall go over" to those who would be entitled if the defaulting beneficiary were dead. Neither RC nor H had complied with the requirements of clause 14 or clause 17. The administration of testator's estate had not been completed. Moreover an application by testator's widow, to whom he had given no benefit by his will, was pending under Inheritance (Family Provision) Act 1938 (c 45), as amended, and on this application provision might be made for her that would absorb the whole or some part of the rents and profits of the land specifically devised to H for life. On questions of the validity of clause 14 and clause 17 and of the forfeiture of the interest of H: *Held* (1) the name and arms clauses were valid because—(*a*) there was not such uncertainty of expression in clause 14 as could not be resolved and in clause 17 the requisite missing words could be supplied; so construed the clauses satisfied the test re-stated in *Sifton v Sifton* (WILLS vol 50 (reissue) no 3510); (*b*) there was nothing in the name and arms clauses which was contrary to public policy, because they did not operate in restraint of marriage or so as to weaken the marriage bond, notwithstanding that a spinster might be obliged to change her name and retain that name on marriage, and that a husband might be obliged to change his name in order that his wife should enjoy the benefits conferred on her; (2) on the true construction of clause 17, and having

regard to the operation of relevant enactments of the real property legislation of 1925, H would not become entitled to the "actual receipt" of the yearly rents and profits within clause 17 until either a vesting assent was executed in his favour or he was entitled to call for such execution.

Per *Upjohn & Diplock LJJ*: mistakes of forgetfulness in the use of the new surname, even if made after the expiration of the year laid down in the clauses of testator's will, should be treated as *de minimis*.

Re Neeld, Carpenter v Inigo-Jones [1962] Ch 643; [1962] 2 All ER 335; [1962] 2 WLR 1097; 106 Sol Jo 449, CA

ANNOTATION **Apld** Re Howard's Will Trusts [1961] 2 All ER 413

1652 Change by person entitled — No time limit given — Clause void

Testator, by codicil after appointing two persons trustees, as also their heirs and assigns, to his will and codicil, desired that his sister A should do what she pleased with his remaining property after payment of certain legacies, excepting a tenement at W, and a sum of stock, of which she should only receive the interest and rent during her natural life, and afterwards to his sister's eldest son, on his taking the name of M; but should he refuse to take the name of M, or his sister A depart this life without a son, then the tenement at W and stock should go to P, on his taking the name of M, and so on to his heirs, each taking the name of M, none of them being allowed to touch the principal, and no one should, after his sister A, inherit the said property or enjoy the interest who did not take or possess the name of M: *Held* the trustees took an estate in fee by virtue of their appointment, and A was entitled to an estate for life in the tenement and stock, with a remainder in fee in the tenement, and stock, with a remainder in fee in the tenement, and an absolute interest in stock to the first born of A vested on his birth and baptism by the name of M.

The court will not necessarily hold a condition as to name and arms a condition subsequent, although it inclines to hold it so.

On the supposition that the shifting clause is valid, it has been contended, on the part of defendant, that, in point of fact, the condition has been performed, inasmuch as the eldest son was baptised M. On the other hand, it is contended that that is not a compliance with the condition, because testator intended that the name M must be taken as a surname. Now I do not see that that is to be concluded from the language of the codicil. Testator has, in the latter part, spoken of "taking or possessing" the name of M; and there is no gift to any family or individual bearing the surname of M. Moreover, this being a shifting clause, it must be construed strictly; and when testator speaks of taking the name of M, without saying as a surname, it appears to me that the court cannot import such a requisition, and that the person who has taken the name, whether as a Christian name or as a surname, has complied with the condition imposed by testator.

The effect on the whole of the view I have taken of the case, and which, I think, presents less difficulty than any other, is this, that testator has expressed the intention, with regard to the realty, to give an estate for life to A, with remainder in fee to her first born son, to vest immediately on his coming into *esse*; and that he intended to create a shifting clause in the event of such eldest son not taking the name of M, but without prescribing any time within which he must perform the condition; for which reason the clause is void, and that, even if not void, the condition has been fulfilled, and I see no reason for coming to a different conclusion as to the personalty (*Kindersley V-C*).

Bennett v Bennett (1864) 2 Drew&Sm 266; 34 LJ Ch 34; 11 LT 362; 10 Jur NSS 1170; 13 WR 66; 62 ER 623

ANNOTATION **Consd** Re Fry, Reynolds v Denne [1945] Ch 348

1653 Change by person entitled — Clause void for uncertainty

A testator by his will and first codicil settled certain property, known as the C estate on a strict settlement and provided as follows—by clause 8: "Every person who . . . becomes entitled as tenant for life . . . to the possession . . . of the [C estate] and also the husband of any female becoming so entitled shall unless prevented by death or accident assume the surname of Murray either alone or in substitution of his or her usual surname (yet so that the name of Murray shall be the last or usual name) and shall apply for proper authority to bear and use my family arms"; by clause 9: "In case any person becoming so entitled or being a married woman her husband shall refuse or neglect to assume the surname of Murray and arms aforesaid or to make such application as aforesaid within one year after he or she shall so become entitled" then the interests of that person should absolutely determine; and by clause 10: "It is my earnest wish and desire that every person becoming entitled as tenant for life . . . to the possession . . . of [the C estate] or in the case of a married woman her husband shall continue to use the surname of Murray as aforesaid and to bear my family arms so long as they are entitled to the possession of [the C estate] . . ." Testator having died, the question arose whether these provisions for the assumption of the surname of Murray and for applying to proper

authority to bear and use testator's family arms were valid: *Held* the court was not justified in reading words into or remodelling the provisions for assumption of name and arms so as to assist a forfeiture, and accordingly the provisions were void for uncertainty because, if they were not remodelled, the court could not see from the beginning (*ie*, from the time when the first tenant for life entered into possession) precisely and distinctly on the happening of what event it was that the estate of the tenant for life was liable to be determined.

Re Murray, Martins Bank Ltd v Dill [1955] Ch 69; [1954] 3 All ER 129; [1954] 3 WLR 521; 98 Sol Jo 716, CA

1654 Clause included in marriage settlement — Conditions imposed on husband

The court sanctioned the insertion of a clause making it compulsory on successive owners or their husbands to assume the name and arms of the ancestor from whom settlor derived the estates.

Re Williams (1860) 3 LT 76; 6 Jur NS 1064; 8 WR 678

1655 Change of surname not stipulated — Christian name changed

Bennett v Bennett no 1652 ante

1656 Validity of clause — Certainty

By his will testator settled the C estate, the F estate, and the M estate (collectively referred to as his settled estates) on strict settlement, by separate dispositions, under which, subject to the life interest of testator's daughter in the whole of the settled estates, the first life interests were taken by WL (a grandson), Mrs B (a granddaughter) and Mrs W (also a granddaughter), respectively, subject to a name and arms clause (clause 8) applicable to the settled estates generally. By clause 8 testator declared that "every person (other than [testator's daughter]) who under the limitations hereinbefore contained becomes entitled as tenant for life . . . to the possession . . . of my settled estates or any part thereof and does not at the time of becoming so entitled use and bear the surname and arms of Howard shall within one year after becoming so entitled . . . and also every person (other than [the daughter's then husband] . . .) being the husband of a woman becoming so entitled shall within one year after his marriage or within one year after his wife becomes so entitled . . . (whichever of the . . . last mentioned events last happens) unless in any case prevented by death take use and bear and every person becoming so entitled who already uses the name of Howard shall continue to use and bear in all deeds and writings which he or she shall sign and upon all occasions the surname of Howard . . . and shall also use the arms of Howard . . . and further that in case any person or the husband of any person becoming so entitled (other than [the daughter and her husband] . . .) and not having already taken or used and borne such surname and arms should refuse or neglect within the time aforesaid to take use and bear the same respectively . . . or if any person or the husband of any person so entitled and using or bearing such surname and arms should discontinue to use and bear the same (except in the case of a woman upon marriage) then and in every such case immediately after the expiration of the said term of one year or immediately after such discontinuance as aforesaid as the case may be . . ." the estate of the person concerned should absolutely determine. Testator died in 1934. Both granddaughters were married at the date of his death. The daughter, while tenant for life, released part of her interest in the F estate to Mrs B, and in the M estate to Mrs W. She died on 5 January 1960. At the date of her death Mrs B was a widow. No steps had been taken by any of the persons concerned to comply with clause 8 of the will. On the question of the validity of the clause: *Held* (1) the name and arms clause was expressed with sufficient precision and distinctness to enable the court and the parties to see from the beginning exactly what had to be done to avoid or bring about a termination of the relevant interest, because (*a*) the word "discontinue", in its context, was certain and clear and meant that one case of failure brought about a forfeiture and (*b*) the words "on all occasions" referred to all occasions on which a surname was used; therefore, the clause was not void for uncertainty; (2) a name and arms clause was void as contrary to public policy only in so far as it purported to affect either a woman who was married at the date when the obligation to use the name and arms arose or her husband, but such a clause was not so avoided as regards widows; clause 8 was to be separately and individually applied to each of the three estates which were separately limited by testator's will, and, since the tenants for life at the relevant date (*viz*, the date of the death of testator's daughter) were respectively, a man, a widow and a married woman, clause 8 was valid in the case of WL and Mrs B, but was void in the case of Mrs W; (3) the partial release by testator's daughter of her life interest in the F estate did not bring into operation the name and arms clause, but the clause began to operate on 5 January 1960, the date of the death of testator's daughter.

Re Howard's Will Trusts, Levin v Bradley [1961] Ch 507; [1961] 2 All ER 413; [1961] 1 WLR 821; 105 Sol Jo 347

1657 Name of class or stock specified in will — Assumption of name by stranger — Before testator's death

Devise of a mansion house and lands to trustees upon trust until John Luscombe Manning should attain the age of twenty-one years, and then to him for life, he taking and using testator's surname of Luscombe instead of his own surname, with limitations over to his first and other sons in strict settlement, they severally taking and using testator's surname instead of their own. There were other limitations over to other persons. The will then contained a proviso, that when any of the premises thereby devised should vest in any person not bearing the surname of Luscombe, that person should, as soon as he should be in possession of the estate, take upon himself the name of Luscombe, and use the same as for and instead of his own surname, and should, within three years then next after, procure his own name to be altered to testator's surname of Luscombe by Act of Parliament, or some other effectual way for that purpose, and in case any of the persons to whom the estate was limited, and who should be in possession of the same, should not take and use testator's surname, but should neglect to get an Act of Parliament, or some other authority as effectual for that purpose as aforesaid, for the space of three years next after he should be in possession, then the estate devised for the benefit of such person so neglecting to get such Act of Parliament, or other authority, should cease, and become void, as if no such use or estate had been thereby devised; and the same should immediately, upon the expiration of the three years, go over to and vest in the person next in remainder or reversion, in the same manner as if such person so neglecting to change his surname and was dead without issue, upon this express condition, that such person so to take did and should also take testator's surname, and get an Act of Parliament, or some other authority as effectual for that purpose, otherwise the estate was to go over again. JL Manning, before he came of age, or entered into possession of the premises demised, took upon himself, used, and bore the surname of Luscombe and no other. But no Act of Parliament had ever been obtained authorising him to change his name, nor was the King's licence for that purpose obtained within three years after he so entered into possession: *Held* inasmuch as he bore the surname of Luscombe at the time when the estate came to him, he had substantially complied with the directions of testator, and he did not incur a forfeiture of that estate by not obtaining an Act of Parliament, or other authority, the proviso only applying to persons not bearing the surname of Luscombe at the time when the estate vested in them.

A name assumed by the voluntary of a young man at his outset into life, adopted by all who know him, and by which he is constantly called, becomes, for all purposes that occur to my mind, as much and effectually his name as if he had obtained an Act of Parliament to confer it upon him (*Abbott CJ*).

Doe d Lusombe v Yates (1822) 5 B&Ald 544; 1 Dow&Ry KB 187; 106 ER 1289

1658 Name of class or stock specified in will — Assumption of name by stranger — After testator's death

A gives a legacy of £1,000 to B payable at the date of her marriage, in case she should marry any person of the surname of S but if she should not, he gave the legacy to W. B married a person who assumed the surname of S but it was held that this was not a performance of the condition, so as to entitle B and her husband to the legacy.

Barlow v Bateman (1735) 2 Bro Parl Cas 272; 1 ER 939, HL

ANNOTATIONS **Consd** Wakefield v Wakefield (1807) 1 Bag Con 394; Leigh v Leigh (1808) 15 Ves 92

Scottish, Irish and Commonwealth Cases

1659 Method of compliance — Addition of prescribed name — Before or after present name

Testator, by his trust-disposition and settlement, destined his estate of T in life rent and fee to a series of heirs, under the condition that the heirs taking benefit under the destination should "assume and constantly thereafter use as their surname, arms, and designation the surname, arms, and designation of M of T as their proper surname, arms, and designation in addition to their own surname, arms, and designation"; with a clause of forfeiture in the event of a contravention of the condition: *Held* in the absence of express direction the assumed surname should be the last, a beneficiary was entitled to prefix the surname M to his own surname of S.

Munro's Trustees v Spencer [1912] SC 933 (SCOT)

1660 Change by person entitled — When right accrues — Condition subsequent

Real estate was limited by a will to EN and her heirs male, "she and they and her husband taking the name and bearing the arms of N": *Held* these words formed no portion of the limitation of the estate tail, but imported at most a condition subsequent.

Vandeleur v Sloane [1919] 1 IR 116 (IR)

1661 Effect of clause not clear

The devise was to one C, subject to a condition that he should within two years take the name and arms of testator, in default of which, or in case of his death before testator there was a devise over to one D, through whom plaintiff claimed. The evidence of facts necessary to show the effect of this devise not being clear, a new trial was granted.

Nicholson v Burkholder (1861) 21 UCR 108 (CAN)

1662 Whether against public policy

Canadian courts should be sympathetic to the approach of domestic tranquillity taken in *Re Kersey* [1952] WN 541, which held that a "name and arms clause" in a will requiring the husband of a beneficiary to change his name was against public policy.

Re Corlet (1961) 28 DLR (2d) 695; 34 WWR 145 (CAN)

B Change of name

LAW See Halsbury's Laws (4th edn) vol 42 para 746

1663 Change of name — Christian name

A testator directed his trustees to hold his residuary estate, subject to the life interest of his widow in the income, in trust for "Tim Harington Spencer Cox" (in the will called "Tim Spencer Cox") if on his attaining the age of twenty-one years he should assume and take the name of "Walter Tim Spencer Parrot" and assume, take or otherwise use the testator's crest and coat of arms "interspread" with the crest and coat of arms "interspread" with the crest and coat of arms of another family: *Held* both conditions were impossible of performance and void for uncertainty; Tim Harrington Spencer Cox was absolutely entitled in reversion, expectant on the death of the testator's widow, to the residuary estate; and he was under no obligation to assume any name or any coat of arms.

The law relating to the alteration of Christian names and surnames considered.

Re Parrot, Cox v Parrot [1946] Ch 183; [1946] 1 All ER 321; 115 LJ Ch 211; 175 LT 190; 62 TLR 189; 90 Sol Jo 139

1664 Change of name — Name of infant

A wife, who had obtained a divorce and custody of the daughter of the marriage (aged ten years at the time of the present application) in an undefended suit, subsequently re-married and later executed a deed-poll whereby she purporting to act as legal guardian of the infant and acting in fact without her former husband's knowledge or consent, renounced on the infant's behalf her surname and assumed on the infant's behalf the surname she (the mother) then had by virtue of her re-marriage: *Held* if there were a right to change an infant's surname, it rested primarily with the infant's father as the natural guardian of the person of the infant, or, if the father were not alive or not available, with the legal guardian of the infant; the order granting custody of the infant in the present case did not deprive the father of this right, and accordingly the deed-poll of 24 August 1961 was ineffective to change the infant's name.

Re T (orse H) [1963] Ch 238; [1962] 3 All ER 970; [1962] 3 WLR 1477; 106 Sol Jo 1011

Scottish, Irish and Commonwealth Cases

1665 Right to change

Forlong Petitioner (1880) 7 R (Ct of Sess) 910; 17 Sc LR 647 (SCOT)

1666 Right to change

As a person does not require the authority of the court to change his name, the court will not grant authority except on special cause shown.

Johnston Petitioner (1899) 2 F (Ct of Sess) 75; 37 Sc LR 57; 7 SLT 343 (SCOT)

1667 Right to change

Petition by a chartered accountant, who held several offices to which he had been appointed by the court, for authority to change his surname, and to ordain the petition and the court's deliverance thereon to be recorded in the Books of Sederunt, refused as not necessary.

Robertson Petitioner (1899) F (Ct of Sess) 127; 37 Sc LR 82; 7 SLT 224 (SCOT)

1668 Whether infant may change

Semble: it is impossible for an infant to accomplish the act of taking or assuming a surname by any voluntary action on his part.

Re Tallot [1932] IR 714 (IR)

C Assumption of arms

LAW See Halsbury's Laws (4th edn) vol 42 para 747

CROSS REFERENCES See COURTS vol 16 (2nd reissue) no 2743 et seq (Court of Chivalry); ECCLESIASTICAL LAW vol 19(2) (2nd reissue) nos 1132, 1133 (arms in church); PEERAGES vol 37(1) (reissue) no 294 et seq (College of Arms)

1669 Assumption of arms — Jurisdiction of Court of Chivalry

In 1842 a coat of arms, crest and supporters were granted to the Manchester Corporation by the Kings of Arms. Subsequently, over a period of many years, defendant company, which owned a theatre in Manchester, used the Corporation's arms as the company's common seal and displayed them in the auditorium of the theatre. In April 1954, defendant refused a request by the Corporation to cease using and displaying the Corporation's arms, and the Corporation thereupon presented a petition to the Court of Chivalry asking for reparation. The Court of Chivalry had not sat for some two hundred years. Defendant did not claim that the jurisdiction of the court had become obsolete, but contended, among other things, that by the Statute 8 Ric 2 c 5 and the Statute 13 Ric 2 stat 1 c 2 (which were repealed by the Statute Law Revision and Civil Procedure Act 1881), the court had jurisdiction in relation to armorial bearings only when they were carried to war outside the realm, or displayed at a tournament within the realm, or, possibly, in a civil war: *Held*

(1) the Statutes 8 Ric 2 c 5 and 13 Ric 2 stat 1 c 2 were intended merely to confine the jurisdiction of the Court of Chivalry to matters of dignity and arms and to prevent the court from entertaining matters cognisable by the ordinary courts, and, as the right to bear arms was not a matter cognisable at common law, the Court of Chivalry had jurisdiction to deal with complaints relating to the usurpation of armorial bearings; (2) the display of the Corporation's arms in the auditorium of defendant's theatre would not be, by itself, a ground for intervention by the court since armorial bearings were widely used as a decoration or embellishment without complaint; but the use of the Corporation's arms as defendant's common seal was a legitimate subject of complaint, because a deed sealed with an armorial device was thereby authenticated as the act and deed of the person entitled to bear the arms; and, in the circumstances, the court would inhibit and enjoin defendant from any display of the Corporation's arms.

Per *Lord Goddard CJ* (*The Surrogate*): Once it is established that this court exists, whatever interval may have elapsed since its last sitting, there is no way, so far as I know, of putting an end to it save by an Act of Parliament.

Manchester Corpn v Manchester Palace of Varieties Ltd [1955] P 133; [1955] 1 All ER 387; [1955] 2 WLR 440; 119 JP 191; 99 Sol Jo 150; 53 LGR 269

1670 Assumption of arms — Method of assumption

A name and arms clause contained a proviso that in case the devise should "refuse or neglect within one year to take, use, and bear the surname" of A, or should at any time afterwards "discontinue to use and bear such surname or arms," then, and in every such case, immediately after the expiration of a year, or immediately after such discontinuance, the devise should determine and become void. The devisee assumed the surname, and also used his best endeavours to comply with the direction as to the arms, but failed to obtain a grant from the Heralds' College of the right to use the identical arms used by A: *Held* (1) the estate of the devisee had not been divested by the failure to obtain a grant of the identical arms used by A.

(2) *Semble*: a name and arms clause requires a taking of arms by a proper grant from a proper authority, namely the College of Arms, and is not satisfied by a mere voluntary assumption of a coat of arms.

Austen v Collins (1886) 54 LT 903

1671 Assumption of arms — Method of assumption

A person cannot "lawfully assume" a coat of arms by mere user, or otherwise than by obtaining a grant of the arms in one or other of the ways recognised by the custom and usages of society with regard to arms—*viz*, by an Act of Parliament, a grant from the College of Heralds, or a Royal Licence.

Testator directed that every person becoming entitled under his will to his settled real estates should in certain events "lawfully assume" a coat of arms used by testator, but being in fact the arms of a certain ancient family with which testator could not be proved to be connected, and in default should, in effect, forfeit his estate. Upon evidence being given as to the impossibility of obtaining a grant of the arms from the Heralds' College to plaintiff, who was devisee of the settled estates: *Held* the direction in the will was void as a condition subsequent which was impossible of performance, and plaintiff's estate was not forfeited.

Re Croxon, Croxon v Ferrers [1904] 1 Ch 252; 73 LJ Ch 170; 89 LT 733; 52 WR 343; 48 Sol Jo 191

1672 Assumption of arms — Method of assumption

Plaintiff, George Berens, in 1915 became tenant for life in possession of Pull Court under the will of W Dowdeswell, which declared that unless within twelve months plaintiff assumed and used under the sanction of an Act of Parliament or licence from the Crown the surname and arms of Dowdeswell his estate should cease and the subsequent limitations be accelerated. The arms which testator in fact used belonged to another family of the name of Dowdeswell. Plaintiff obtained by patent a grant of the right to use the name of Dowdeswell after his own name of Berens and to bear the Dowdeswell arms with certain variations.

In 1924 plaintiff became tenant for life in possession of the S estate under will of H Berens, which provided that every person so becoming entitled who should not bear the surname and arms of Berens must within a stated period "bear and use exclusively the surname and arms of Berens," on the non-performance of which condition the will provided for the defeasance of the estate.

By the Berens arms testator meant a coat of arms used by his family for many years, but never granted or confirmed or recorded in the College of Arms, matriculated in the Lyon Register in Scotland, or confirmed in the Register of Arms in Ireland: *Held* (1) plaintiff did not bear the surname of Berens but the composite name of Berens Dowdeswell; (2) the obligation to assume the Berens arms would not be satisfied by a mere *de facto* user, but only by the authority of a royal licence through the College, and plaintiff, not having proved that he could not obtain a licence, was bound by the clause in the Berens will; (3) as regards the Dowdeswell will, as the College would refuse to grant the Dowdeswell arms, as

having already been allowed to others, the Court would assume that Parliament would not authorise their assumption in violation of the rights of third parties and of the laws of arms; and therefore the condition requiring plaintiff to assume those arms under the sanction of an Act or licence from the Crown was impossible and not binding.

The argument is that in so far as the name and arms clause requires him to bear the surname of Berens he bears it, and in so far as it requires him to assume and bear the Berens arms it requires an impossibility. As regards the first point, in my opinion he does not bear the surname of Berens. His surname is Berens-Dowdeswell; one composite name of which no doubt the word Berens forms part; but the surname which he bears is not Berens; it is Berens-Dowdeswell, and nothing else. The point is not susceptible of lengthy argument: but certain authorities were cited, none of which appear to me to be of real assistance in the matter. They seem to show that in the absence of special words, you will not comply with a requirement to take and use a particular surname by placing the required name in front of your existing surname, though special words in the clause may authorise this being done (*Russell J*).

Re Berens, Re Dowdeswell, Berens-Dowdeswell v Holland-Martin [1926] Ch 596; 95 LJ Ch 370; 135 LT 298; 42 TLR 267, 314; 70 Sol Jo 405

Scottish, Irish and Commonwealth Cases

1673 Name and arms clause — Void for uncertainty

By his will a testator settled estates known as the Curragh, Bohard and Courtbrack estates and all other his real estate on his wife, IC de V for life with remainder to the use of any one or more of his cousins thereinafter named or their respective issue for such estates or estate interests or interest and in such manner as his wife should by deed or will or codicil appoint, with remainders in default of appointment. Clause 8 of the will provided:—"I declare that every person who under the limitations hereinbefore contained becomes entitled as tenant in tail male or in tail by purchase to the possession or the receipt of the rents and profits of the premises hereby settled shall unless prevented by death or accident take use and bear and continue to use and bear in all deeds and writings which he or she shall sign and upon all occasions the surname of" de V "either without any other or with and after any other surname and also use and continue to use the arms of" de V "or quarter the same with his or her family arms and apply for and endeavour to obtain the Royal licence or take such other steps as may be requisite to authorise the user and bearing of the said surname and arms and further that in case any person becoming so entitled shall refuse or neglect to take use and bear the surname and arms aforesaid or to take such steps as aforesaid or shall at any time discontinue to use and bear the surname and arms aforesaid then and in every such case if the person who shall so refuse or neglect or discontinue as aforesaid should be tenant for life the estate for life of that person and all powers annexed thereto shall absolutely determine and become void." After making provisions in case such determination should take place the clause continued:—"Provided also that in every case (except a case of discontinuance to use and bear the surname and arms aforesaid) one year from the date when the obligations became binding shall be allowed for compliance there with and (except in a case of discontinuance as aforesaid) the proviso for the cesser of estates shall be postponed accordingly but shall take effect immediately upon the expiration of such one year if the obligations have not then been complied with." IC de V appointed that all the property subject to the trusts of the testator's will should go to the first-named defendant for his life and after his death to his first and every other son successively according to seniority in tail male, with remainder over. The deed of appointment contained the following proviso:—"The provisions of the said will as to taking and using the surname and using or quartering the arms of 'de V' and the determination and avoidance of the estate of any person refusing or neglecting to take and use the said surname and use and quarter the said arms or discontinue to use the said surname or to use or quarter the said arms shall apply to the persons to whom estates for life or in tail male are hereby limited as if the same were herein repeated and expressed *mutatis mutandis*". IC de V died on 9 January 1959. The first-named defendant refused to adopt the name and arms of de Vere and more than one year had passed since the death of IC de V: *Held* the defeasance clause was void for uncertainty.

Re De Vere's Will Trusts, Jellett v O'Brien [1961] IR 224 (IR)

1674 Failure to comply — Beneficiary applying for grant of arms after attaining twenty-one

Bevan v Mahon-Hagan (1893) 31 LR Ir 342 (IR)

1675 Grant of arms — Challenge — Scottish heraldry

Stewart-Mackenzie v Fraser-Mackenzie [1922] SC 39 (SCOT)

1676 Jurisdiction of Lord Lyon King of Arms to determine question of disputed chiefship of a clan

In a petition to the Lord Lyon King of Arms by a daughter, as heir of line of her father, for a rematriculation in her name of the arms matriculated by her deceased father, the petitioner, in the petition as originally presented, craved in addition (1) a finding to be inserted in the rematriculation that, as lineal heir and representative of the house, branch or family she was "head or chieftainess" of the house, branch or family; (2) a patent of supporters to be added to the arms; and (3) a birthbrief recognising her as "head or chieftainess." Her right to obtain the rematriculation so as to exclude the heir made and her right to the chieftainship were disputed by the heir make collateral: *Held* neither chiefship of a whole clan nor chieftainship of a branch of a clan was a legal status justifiable in a court of law, but had the character of a social dignity only, and accordingly, the Lord Lyon had no jurisdiction to decide the disputed question of who had right to the chieftainship either directly or incidentally when disposing of the claims for supporters and for a birthbrief.

Maclean of Ardgour v Maclean [1941] SC 613 (SCOT)

v INTERESTS IN REMAINDER

1 In general

CROSS REFERENCES See EQUITY vol 20(3) (2nd reissue) no 1021 et seq (equitable doctrines affecting property); EXECUTORS vol 24 (2nd reissue) no 8424 et seq (descent generally); REAL PROPERTY vol 38 (reissue) no 4940 et seq (concurrent interests generally), no 4818 et seq (interest in remainder generally)

1677 Remainder to illegitimate child not in esse — Void

A remainder limited to a bastard not *in esse* is void.

Blodwell v Edwards (1596) Cro Eliz 509; Moore KB 430; 78 ER 758; sub nom

Bladwell v Edwards (1596) Noy 35

ANNOTATION **Consd** Occleston v Fullalove (1874) 9 Ch App 147

1678 Remainder to illegitimate child not in esse — Void

Where by deed an estate was limited to an after-born illegitimate son in fee, and if he should die before he attained twenty-one, then in fee to a living illegitimate child, who died an infant, and an after-born illegitimate son attained the age of twenty-one: *Held* the last limitation failed, and the devised estate resulted to the heir of the grantor.

Lomas v Wright (1833) 2 My&K 769; 3 LJ Ch 68; 39 ER 1138

1679 Remainder to settlor's fifth son — How computed — Eldest son dead at time of settlement

A remainder in a settlement was limited to the settlor's fifth son: *quaere* whether, in computing the fifth, the eldest son, who was dead at the time of the settlement, ought to be included.

Grove v Wollescutt (1673) 1 Freem KB 76; Cart 219; 89 ER 56

1680 Remainder to daughters until payment of sum certain — By next remainderman — Fee simple determinable on payment of sum

Blagrave v Clunn (1706) 2 Ven 576; 23 ER 975

1681 Remainder to eldest daughter — Eldest daughter when remainder vests in possession

A limitation to the eldest daughter is not to be construed as exclusively to the eldest born daughter, but must be extended to the eldest daughter at the time the succession opens.

Shepherd v Grant (1838) 2 Jur 487, HL

1682 Remainder to settlor and his heirs — Settlement in favour of settlor until marriage of heir — Death before marriage of heir — Heir takes estate in fee

Settlement of premises to T and his heirs, to the use of W and his heirs, until a marriage between R and E then to the use of W for the life of R, with several limitations over on the death of R in favour of his wife and children, with a term for 300 years in T, to commence on the death of R, for securing a rent-charge to the wife of T, and to determine on the performance of that trust, and subject to the foregoing, to W and his heirs. W died before the marriage of R, who was his heir at law, leaving a will and executors: *Held* the executors did not take any interest in the premises, and R took a fee in them, subject to the term for 300 years.

Trevelyan v Trevelyan (1826) 3 Bing 616; 12 Moore CP 19; 5 LJOSCP 114; 130 ER 651

1683 Settlement and recovery by tenant for life — Remainders under previous settlement not barred

Under a voluntary settlement lands were limited unto J and N and their heirs, to the use of such persons as J and A should jointly appoint; and in default of appointment, to the use of J for life, and after his death to the use of A for life, remainder to the use of J and N and their heirs to support contingent remainders, and from and after the death of the survivor of J and A to the use of W during the term of 100 years for certain purposes, and subject thereto to the use of T, son of J for life, remainder to the use of J and N and their heirs, to support contingent remainders; and after the death of T to the use of his first and other sons in tail male, with remainders over: *Held* a settlement and recovery suffered by T in consideration of his marriage and after he came into possession as tenant for life were ineffectual to bar the limitations under the previous voluntary settlement.

Lewis v Rees (1856) 3 K&J 132; 26 LJ Ch 101; 28 LTOS 229; 3 Jur NS 12; 5 WR 96; 69 ER 1052

1684 Remainder to heirs of deceased person — Heirs take estate in fee

Under a limitation of real estate in a marriage settlement after the decease and failure of issue of husband and wife, "in trust for nephews and nieces then living, and the several and respective heirs of nephews and nieces then dead, having left lawful issue living at the time of the failure of issue of the marriage, as tenants in common": *Held* nephews and nieces took life estates, and the eldest son of a nephew deceased at the time of such failure of issue took in fee.

Marshall v Peascod (1861) 2 John&H 73; 70 ER 976

2 Where no words of limitation

1685 General rule — Remainderman takes life estate

Remainder in a settlement, after successive estates tail in the sons, to the daughters as tenants in common and not as joint-tenants, and in default of such issue to the right heirs of the father, admitted without argument an estate for life only in the daughters.

Snell v Silcock (1800) 5 Ves 469; 31 ER 687, LC

ANNOTATION **Consd** Lucas v Brandreth (No 2) (1860) 28 Beav 274

1686 General rule — Remainderman takes life estate

Real estate was vested in a trustee in fee for a party for life, with remainder to her children equally: *Held* the children took life estates only all words of limitation being omitted.

Holliday v Overton (1852) 15 Beav 480; 21 LJ Ch 769; 19 LTOS 211; 16 Jur 346; 51 ER 623; affd sub nom

Halliday v Overton (1852) 20 LTOS 12, LJJ

ANNOTATIONS **Apld** Lucas v Brandreth (No 2) (1860) 28 Beav 274; Tarham v Vernon (1861) 29 Beav 604 **Distd** Re Irwin, Irwin v Parkes (1904) 2 Ch 752 **Consd** Re Tringham's Trusts, Tringham v Greenhill [1904] 2 Ch 487 **Distd** Re Bostocks Settlmt, Norrish v Bostock [1921] 2 Ch 469

1687 General rule — Remainderman takes life estate

Lucas v Brandreth (No 2) no 2924 post

1688 General rule — Remainderman takes life estate

Real estate was conveyed to trustees upon the ultimate trust to convey and divide the trust estate to and among all the children of the settlor, and the issue of such children who should be living at the death of the wife of the settlor, as tenants in common: *Held* the children took life estates only.

Tatham v Vernon (1861) 29 Beav 604; 4 LT 531; 7 Jur NS 814; 9 WR 822; 54 ER 762

ANNOTATIONS **Consd** Re Tringham's Trusts, Tringham v Greenhill [1904] 2 Ch 487; Re Clarke's Settlmt Trust, Wankyn v Streatfield [1916] 1 Ch 467 **Distd** Re Bostocks Settlmt, Norrish v Bostocks [1921] 2 Ch 469

1689 General rule — Remainderman takes life estate

An equitable limitation, by way of trust executed, now has the same construction as a legal limitation.

The settlement contains a series of formal limitations in favour of the settlor's wife, the settlor, and their children; but when you come to read the actual words of limitation to the children, the words "heirs" or "fee simple" are not used. If the case had to be decided according to the doctrine of legal limitation, it is plain that these children would only take life interests; but the limitations are, as a fact, only of an equitable interest, and on this point some of the other text writers, such as *Cruise* vol 1 p 343, and *Hayes, Hayes' Conveyancing* 5th ed vol 1 p 91, seem to have been of opinion that equity regarded the intention of the settlor in these cases, and did not follow the law; so that the court had some considerable latitude in the construction of equitable limitations like the present; but the more modern text writers seem to have rather come round in their opinions, and in *Elphinstone on the Interpretation of Deeds* it is stated an equitable limitation by way of trust executed has the same construction as a legal limitation. . . . Without considering it necessary to review all the authorities again in detail, I hold that these children took a life interest only under the settlement (*Chitty J*).

Re Whiston's Settlement, Lovatt v Williamson [1894] 1 Ch 661; 63 LJ Ch 273; 70 LT 681; 42 WR 327; 38 Sol Jo 253; 8 R 175

ANNOTATIONS **Apld** Dearberg v Letchford (1895) 72 LT 489 **Distd** Re Irwin, Irwin v Parkes [1904] 2 Ch 752 **Consd** Re Tringham's Trusts, Tringham v Greenhill [1904] 2 Ch 487; Re Gillies' Settlmt, Archer v Penney [1917] 2 Ch 205; Re Bostocks Settlmt, Norrish v Bostock [1921] 2 Ch 469; Banks v Ripley [1940] Ch 719

1690 General rule — Remainderman takes life estate

By a settlement made upon his second marriage the husband conveyed freeholds, subject to existing mortgages thereon, to trustees in fee simple to the use of the wife and himself for successive life interests and after his decease "in trust for the child or children" of the husband "now born or hereafter to be born who shall attain the age of twenty-one years and if more than one in equal shares as tenants in common and if there shall be no such child then in trust for the right heirs" of the husband. The husband then assigned leaseholds, chattels and a policy of insurance upon similar trusts which so far as the children were concerned were expressed in identical terms. The settlement also contained a provision enabling the trustees to "mortgage or charge the premises hereinbefore expressed to be hereby conveyed and assigned with any sum or sums not exceeding together one-half of the expectant share of any child" and to "apply same for his or her benefit or advancement." There was also a hotchpot clause to the effect that no child of his first marriage was "to take any part of the trust premises herein comprised without bringing into hotchpot all sums of money and other benefits which he or she may receive" under an earlier settlement: *Held* the limitations in trust having been perfected and declared by the settlor, they must have the same construction as in the case of legal estates executed, and in the

absence of words of limitation the children took life estates only in the freeholds.

Re Bostock's Settlement, Norrish v Bostock [1921] 2 Ch 469; 91 LJ Ch 17; 126 LT 145; 66 Sol Jo WR 7, CA

ANNOTATIONS **Consd** Re Arden, Short v Camm [1935] Ch 326; Banks v Ripley [1940] Ch 719

1691 Exception to rule — Clear intention to pass fee simple

If the intention of a deed be clear to pass an equitable estate in fee simple, it is not necessary that the proper words of inheritance should be used for the purpose.

By deed of settlement, on 7 March 1818, certain leaseholds were settled, as to a third share thereof, in trust, in the events which happened, for A and B absolutely in equal shares. In 1819, certain freeholds were settled "upon such and the same trusts, and for such and the same ends, intents, and purposes, and subject to such and the same powers provisos, and declarations as in the indenture of 7 March 1818, are expressed, declared, and contained of and concerning the premises therein mentioned and described, or as near thereto as the difference of the respective estates of C, M, and J" (the trustees) "and their respective heirs, executors, and administrators, therein respectively would admit, to the intent that the rents, issues and profits of the hereditament and premises might be had, received, and taken, and the hereditaments and premises held, sold, conveyed and assigned, and the produce thereof paid and applied unto such person or persons, and in such manner, and at such time and times, in every respect as in the indenture of 7 March 1818, is expressed and declared of and concerning the premises therein particularly mentioned and described": *Held* the want of proper words of inheritance was not fatal, but A and B took equitable estates in fee simple, and not for life only, in one-third share of the freeholds.

Pugh v Drew (1869) 17 WR 988

ANNOTATIONS **Consd** Re Irwin, Irwin v Parkes [1904] 2 Ch 752 **Folld** Re Tringham's Trusts, Tringham v Greenhill [1904] 2 Ch 487 **Consd** Re Bostock's Settlmt, Norrish v Bostock [1921] 2 Ch 469

1692 Exception to rule — Clear intention to pass fee simple

A limitation, in a deed, of a trust of real estate for A, without any words of inheritance, may confer the equitable fee upon him where the intention to do so is expressed or sufficiently shown upon the face of the instrument.

By surrender and a settlement dated in 1831 copyhold hereditaments were limited in trust for M for life, and after her death for her husband, and after the death of the survivor in trust for the children of the marriage equally as tenants in common, and in default of issue then to such uses as M should declare by her will, with remainder to the right heirs of M. There were three children of the marriage: *Held* there being upon the face of the instrument sufficient indication of intention on the part of the settlor that absolute interests should be given, the three children, notwithstanding the absence of any limitation to their "heirs," were entitled as tenants in common in equal shares for equitable estates in customary fee simple.

Re Tringham's Trusts, Tringham v Greenhill [1904] 2 Ch 487; 73 LJ Ch 693; 91 LT 370; 20 TLR 657

ANNOTATIONS **Distd** Re Irwin, Irwin v Parkes [1904] 2 Ch 752 **Apld** Re Oliver's Settlmt, Evered v Leigh [1905] 1 Ch 191 **Distd** Re Monckton's Settlmt, Monckton v Monckton [1913] 2 Ch 636 **Overd** Re Bostock's Settlmt, Norrish v Bostock [1921] 2 Ch 469 **Consd** Banks v Ripley [1940] Ch 719

1693 Exception to rule — Clear intention to pass fee simple

A limitation in a deed of a trust of real estate for a class of children without any words of inheritance may confer the equitable fee upon them where the intention to do so is expressed or sufficiently shown on the face of the instrument.

By a marriage settlement dated in 1831 real estate was conveyed to a trustee upon trust for the husband and wife successively for life, after their death upon trust to convey and transfer the trust estate between or among the children of the marriage as the husband and wife should jointly appoint, and in default as the survivor should appoint, and in default to all the children of the marriage who attained twenty-one, or married, in equal shares. The settlement contained a provision that no child taking under any appointment should receive anything more until all the other children had received shares equal in value to the appointed share; a power of advancement up to one-half the value of each child's share; and a gift over if no child attained a vested interest: *Held* there was on the face of the instrument amply sufficient indication of an intention that the children should take equitable interests in fee simple.

Re Oliver's Settlement, Evered v Leigh [1905] 1 Ch 191; 74 LJ Ch 62; 53 WR 215; 21 TLR 61

ANNOTATIONS **Consd** Re Bostock's Settlmt, Norrish v Bostock [1921] 2 Ch 469; Banks v Ripley [1940] Ch 719

1694 Exception to rule — Clear intention to pass fee simple

By a voluntary settlement made in 1869, the settlor after reciting that he was seised of or entitled to the hereditaments thereinafter described for an estate of inheritance in fee simple in possession and that, in consideration of the natural love and affection which he bore towards his wife and children, was desirous

of conveying the same to the uses upon the trusts and with and subject to the powers and provisions thereinafter declared granted unto the trustees therein named, their heirs and assigns certain freehold hereditaments and all the estate, right, title, property, claim and demand of the settlor in, to or out of the same hereditaments to hold the same unto the trustees and their heirs to the uses and upon the trusts thereinafter declared, that is to say, upon certain trusts in favour of the settlor and his wife during their joint lives and the life of the survivor, and subject thereto upon trust for such or more of their children as they should by deed jointly appoint, and in default of such appointment as the survivor of them should by deed or will appoint and in default of such appointment then in trust for all their children who being sons should attain twenty-one or being daughters should attain that age or marry in equal shares, the shares of daughters to be for their separate use. The settlor empowered the trustees to apply the annual income of the share or fortune, to which any child should for the time being be entitled in expectancy for his or her maintenance and further empowered them to sell the hereditaments and invest the moneys to arise from such sale and stand possessed of the investments and the income thereof upon the trusts thereinbefore declared of the hereditaments: *Held* under the trust in default of appointment the children were entitled to equitable estates in fee simple notwithstanding the absence of express words of limitation.

Re Gillies' Settlement, Archer v Penney [1917] 2 Ch 205; 86 LJ Ch 769; 117 LT 333

3 Estates tail

CROSS REFERENCE See REAL PROPERTY vol 38 (reissue) no 4189 et seq (entailed interests generally)

1695 Whether interest liable to be devested — On birth of second child — After death of father

If a conveyance, in consideration of an intended marriage, be made to the husband for life; remainder to the wife for life; with remainder to the use of all the issues female of their two bodies, and the heirs of the bodies of such issues female; and the husband dies leaving issue a daughter; the remainder in tail to the issues female is not so attached in that daughter as not to be devested for a moiety on the birth of another daughter before the particular estate determines.

Mathew v Tompson (1698) 5 Mod Rep 384; 87 ER 720

1696 Effect of covenant to bar entail — Tenant in tail in remainder — Entitled to freehold

One upon his marriage covenants to levy a fine of his freehold, and to surrender his copyhold, to the use of himself and his wife for their lives, remainder to the heirs male of their bodies, remainder to the heirs of their bodies, and dies leaving issue a son and a daughter before any fine levied, or surrender made. The son, for securing of money covenants to levy a fine of the freehold lands, and to surrender the copyhold, and surrenders the copyhold, but dies without having levied a fine and without issue: *Held* it being in case of articles for valuable consideration, the settlement should be to the first, etc, son of the marriage, with the remainder to the daughters; and the daughter was entitled to the freehold.

White v Thornborough (1715) 2 Vern 702; Gilb Ch 107; Prec Ch 425; 23 ER 1056, LC

1697 Effect of barring entail — Limitation by way of security — Until particular amount raised from rents and profits

Father and son, on the son's marriage, by lease and release, convey lands to trustees and their heirs, to the use of the father for life; remainder to his wife for life; remainder to the son for ninety-nine years, if he should so long live; remainder to trustees during his life, to support contingent remainders; remainder to the son's intended wife for life, for her jointure; remainder to the first and every other son of that marriage, in tail male; remainder of the daughter or daughters of that marriage, and the heirs of their bodies, till they shall, out of the rents, issues and profits, have received £3,000; remainder to the heirs of the body of the son; remainder to the second son of the father, and to his first and other sons; remainder to the right heirs of the son, for ever. There were issue of the marriage only two daughters, who being in possession after all the particular precedent estates determined, suffer a common recovery: *Held* this was no bar of the subsequent remainders, the limitation to them being only a security till the £3,000 was raised.

Stanhope v Thacker (1716) Prec Ch 435; 24 ER 194, LC

1698 Effect of barring entail — Proceeds of estate paid into court — Right to payment out — Quasi tenant in tail in possession

Order made for payment out of court of a sum of stock, of which the petitioner was quasi tenant in tail in possession under a settlement, on his producing the deed enrolled, or an affidavit of the enrolment of the deed, whereby, in pursuance of the provisions of Fines & Recoveries Act 1833 (c 74) s 71, he had

barred the estate tail and remainders over in the stock in question.

Re Smythe (1834) 3 My&K 249; 40 ER 94

1699 Effect of barring entail — Proceeds of estate paid into court — Right to payment out — Tenant for life and tenant in tail

Testator devised and bequeathed his real and personal estate unto and to the use of trustees, upon trusts for the benefit of his wife for life; from and after her death, the surplus rents were to be accumulated for the purpose of paying off mortgages on the real estates; and upon the expiration or other determination of the period of accumulation, but subject to the life interest of the wife, the trustees were directed to convey the real estates to the use of G in tail male; but if G should be then dead, to the use of the person who should then be the first heir male of the body of G, with remainder to the use of the person who for the time being should be entitled to the dignity and title of Earl of Cardigan in tail male, with remainder to the use of testator's right heirs. By a codicil testator revoked the devise of the estate tail to G, and devised the said estates, after the death of his wife, to R, in tail male, "with all the limitations as in any said will mentioned." B, with the consent of the wife, as protector of the settlement, had executed a disentailing deed of £100,000 Consols in court, representing proceeds of sale of the settled estates, and the trust for accumulations having now come to an end by the payment off of all the mortgages, R claimed to be absolutely entitled to this fund, subject to the wife's life interest. On a petition for payment out of this fund by the wife and her incumbrancers, with the consent of R: *Held* (1) as the petitioners and R together were claiming immediate relief, on the ground that between them they were now absolutely entitled to this £100,000 Consols, the question was ripe for decision, and the court had jurisdiction to decide it; and all necessarily unascertained persons were sufficiently represented by the trustees of the will; (2) on the question of construction, R was now entitled to a vested equitable estate in tail male in remainder expectant upon the decease of testator's wife, and the subsequent estates had been barred by the disentailing deed, being estates to take effect in a certain event after, if not in defeasance of the vested estate in tail male of R, and the £100,000 Consols in court could be paid out to the petitioners.

Cardigan (Lady) v Curzon Howe [1901] 2 Ch 479; 70 LJ Ch 763; 49 WR 715; 17 TLR 655; 45 Sol Jo 652

1700 Construction of settlement — Remainder to "first son"

By a marriage settlement an estate was limited to the use of JG for life, remainder to the use of the first son of JG upon AS, his intended wife, and for default of such issue to the use of the second, third, and other sons of JG upon AS severally and successively, and they shall be in seniority of age, and of the several heirs made of their several bodies; and for default of such issue, then, in case AS should be enciente by JG at the time of his death, to the use of TP until AS should be delivered, in trust for after-born child or children; and in case such child or children should be a son or sons, to the use of such after-born son and sons severally and successively, as they should be in priority of birth, and the heirs male of the body and bodies of such after-born son and sons: *Held* the eldest son of JG, the settlor, took an estate tail under the above limitations.

Galley v Barrington (1825) 2 Bing 387; 10 Moore CP 21; 130 ER 355

ANNOTATIONS **Consd** Lucas v Brandreth (No 2) (1860) 28 Beav 274; Locke v Dunlop (1888) 39 Ch D 387

1701 Construction of settlement — Exception of eldest son — Right of issue of younger son succeeding to father's estate

A father's estate was limited after his death to the eldest son in tail, and the mother's estates were limited after her death to the sons and daughters, other than an eldest son, as tenants in common in tail: *Held* the rule of construction was the same as to realty and personalty, and the son of a younger son who had succeeded to the father's estate was excluded from all interest in the mother's estates.

Re Bayley's Settlement (1871) 6 Ch App 590; 25 LT 249; 19 WR 789, LJJ

ANNOTATION **Consd** Re Wise's Settlmt, Smith v Waller [1913] 1 Ch 41

1702 Construction of settlement — Exception of eldest son — Right of only son

The only son of a marriage cannot succeed to an estate which had been limited to A, and his heirs in tail male, "except an eldest son," and does not come in under a proviso giving the estate to A and "all and every other the son of the body of A, save and except an eldest son."—"Eldest" and "first-born" to be treated as synonymous terms.

HT, who was possessed of an estate called S, married in 1792, C, who was possessed of an estate called B. They had three children, X, Y and Z. On the marriage of X in 1826, the estate of S was settled on HT and C, father and mother, for life, with an annuity to X and on the death of the father and mother the estate of S was to go to X for life, and then to his sons in tail male, in default, etc, to Y, and his sons in tail male. On the marriage of Y in 1834 the estate of B was settled on HT, the father, for life, then on his wife, then on X, for life, then to his sons in tail male, and in default, etc, to C for life, then to

the use of X then to the use of the second son of Y and his heirs male, and in default to the use of the third, fourth, fifth, and of "all and every other the sons of the body of X save and except an eldest son, severally, successively, and in remainder one after another," etc, "the elder of such son and sons, other than an eldest son as aforesaid, to be preferred," etc, "and in default or failure, etc, to the use of A, his heirs and assigns for ever." In case, under the deed of 1826, any person of the issue of Y other and except a youngest or only son, or the heir male of his body, should become entitled to S then the use of the estate of B should thereupon cease, and the lands of B should thereupon go over to the person next entitled. X had only one son. Y had no issue. C had been in possession of the estate B, and was dead: *Held* on her death the ultimate remainder in the estate of B given to A took effect under the words which excluded an eldest son of X holding S, from succeeding to the possession of B and an only son of X had no title to B, and was not to be treated as other than an eldest son under the clauses which gave B to the second, third, fourth, fifth, and all and every other son of X, save and except an eldest son.

Tuite v Bermingham (1875) LR 7 HL 634; 14 WR 540, HL

4 Cross-remainders

CROSS REFERENCE See no 1134 et seq ante

5 Contingent remainders

CROSS REFERENCE See REAL PROPERTY vol 38 (reissue) no 4894 et seq

1703 Whether vested or contingent — Remainder to son and intended wife — Variation if father remarry

Fosset v Fosset (1665) 1 Keb 886; 83 ER 1300

1704 Whether vested or contingent

Warman & Seaman (1675) 2 Cas in Ch 209; Freem Ch 306; Poll 112; 22 ER 914; sub nom *Seaman v Warman* (1675) Freem KB 306; 3 Keb 544; subsequent proceedings (1677) Cas temp Finch 279

1705 Whether vested or contingent — Remainder to heirs male — Limitation to elder son in tail male — Contingent interest of second son

A having two sons, B and C and being seised of lands in fee, covenants, in consideration of marriage to stand seised to the use of A and the heirs male of his body; and for want of such issue to his own heirs male, with remainder to his own right heirs in fee. B has issue one son D and five daughters, and dies in the lifetime of his father. The estate in tail on the death of A vests in D by purchase, and on the death of D without issue goes by descent to his uncle C *per formam doni*, as heir male of A.

Southcot v Stowel (1677) 2 Mod Rep 207; 1 Mod Rep 237; 1 Freem KB 225; 3 Keb 704; 86 ER 1028

ANNOTATIONS **Consd** Roe d Dodson v Grew (1767) Wilm 272; Winter v Perratt (1843) 9 Cl&Fin 606

1706 Whether vested or contingent — Remainder to heirs male — Variation if no provision for issue

It is a certain rule of law, that if such a construction can be put upon a limitation as that it may take effect by way of remainder, it shall never take place as a springing use or executory devise; and therefore a limitation in a settlement to trustees to the use of A the settlor, for life, remainder to B, his intended wife for life, except as thereafter excepted, remainder to the heirs of the body of A, begotten on B, remainder to A and his heirs, with a proviso, that if A should die, and leave such issue as aforesaid, without making any provision for such child or children in his lifetime, the said trustees should stand seised of one moiety, from and after the decease of A, to the use of such child: *Held* a contingent remainder, and not a springing use, and therefore barred by a fine levied by A and B.

Carwardine v Carwardine (1758) 1 Eden 27; 28 ER 594

1707 Whether vested or contingent — Remainder to husband — If wife die without issue

Settlement of the wife's estate on herself for life, remainder to the husband for life if any issue of the marriage so long live, remainder if she dies *sans* issue of one moiety to him in fee, and of the other to the wife's relations; his remainder in fee does not arise, unless he survives his wife.

Moorhouse v Wainhouse (1767) 1 Wim Bl 638; 96 ER 370

1708 Whether vested or contingent — Ultimate remainder in default of appointment — To right heirs of grandfather — Settlor himself heir of grandfather

A in a conveyance to uses, reciting that he was desirous that certain estates derived from his mother's family, should remain in the family and blood of SR, his maternal grandfather, in consideration of his natural love and affection to his relations, the heirs of SR, and to the intent that the said estates might continue in the family and blood of his late mother, on the side of her father, settles them to the use of himself for life, remainder to the heirs of his body; for default of such issue as he should appoint, and for default of

appointment to the use of the right heirs of SR, with a power of revocation and new appointment. The ultimate remainder is contingent, and will vest in the person who happens to be the right heir of SR, at the expiration of the estates previously limited.

Cholmondeley (Marquis) v Clinton (Lord) (1820) 2 Jac&W 1; 37 ER 527; on appeal (1821) 4 Bli 1, HL

ANNOTATION **Consd** Boidell v Golightly (1842) 12 LJ Ch 187

1709 Whether vested or contingent — Remainder to children living at death of husband

A fund was settled on trust for the wife for life and in case she should leave any issue living at her death for the husband for life and after his decease upon trust to divide it amongst the children of the marriage "that should be then living on their respectively attaining the age of twenty-one years" and in case there should be no child or of their all dying in the wife's life to pay the fund to such person as the wife should by will appoint and in default to the execution or administration of the husband and wife or the survivor of them; and in case the wife should survive her husband without leaving issue then living to pay the fund to the wife. The wife died leaving children who had attained twenty-one and the husband was still living: *Held* the limitation to the children remained contingent until the death of their father.

Re Wollaston's Settlement (1860) 27 Beav 642; 54 ER 255

1710 Whether vested or contingent — Remainder to class — Survivorship as to share of member dying without issue

Cole v Sewell no 571 ante

1711 Whether vested or contingent — Appointment among class — Living at death of appointor and wife — Survivorship as to share of appointee dying under twenty-five

In exercise of a power created by a marriage settlement of real estate, executed in 1819, the husband and wife by deed, executed in September 1848, jointly appointed that the estate should after the death of the survivor of them, they being tenants for life under the settlement, be to the use of the three children then born of the only son of the marriage, and all other his child and children who should be living at the death of the survivor of the appointors, and to the heirs and assigns of such of them as should attain the age of twenty-five equally as tenants in common. But in case either of the three named children of the son and any such other child and children as aforesaid should die under twenty-five, then immediately after his or her death to the use of the survivors or other of them, their, his, or her heirs and assigns. Provided that, in case the appointment intended to be thereby made to the afterborn children of the son should from any cause fail of effect, the appointors did thereby further declare that the deed should operate as an appointment of the hereditaments to the three then born children of the son, or such of them as should attain twenty-five, their respective heirs and assigns. The husband died in 1867, and his widow died in November 1873. There were seven children of the son, all of whom were then living, but only the three elder ones had attained twenty-five. The other four attained twenty-five subsequently: *Held* the limitations of the deed of appointment took effect as legal contingent remainders on the death of the widow, each of the seven children of the son took one-seventh of the property for life; and the three who had attained twenty-five at the death of the widow took the remainder in fee, subject to the life estates, equally between them as tenants in common.

Symes v Symes [1896] 1 Ch 272; 65 LJ Ch 265; 73 LT 684; 44 WR 521

1712 Whether vested or contingent — Conditional gift

By marriage settlement, C, the husband, in consideration of the intended marriage and of the fortune of S, the wife, to which C was to become entitled on the marriage, released land to the use of himself in fee until the marriage; and, after the marriage, to the use of himself for life; remainder to trustees to preserve contingent remainders; and, after the decease of C, in case S should survive him, to the use of S for life; remainder to trustees to preserve contingent remainders; and after the decease of the survivor of C and S, in case there should be only one child of the marriage, then living, and no other child then dead leaving issue, to the use of such child in fee; but, in case there should happen to be more than one such child living at the decease of the survivor of C and S, or any child or children then dead leaving issue, then to the use of all such children of C and S and such children's children, respectively, for such estates as C and S should jointly appoint, and, in default of such appointment, as the survivor should appoint: and in default of such appointment, to the use of all the children of the marriage as tenants in common and of the heirs of their respective bodies, with cross-remainders; and "for default of all such issue," to the use of four brothers and sisters of S as tenants in common in fee. S survived C: there were two children of the marriage, of whom both died, without leaving issue, in the lifetime of S. No appointment was made: *Held* the remainder to S's brothers and sisters took effect, as it was not a limitation in remainder after the determination of the estates given to the children as tenants in common

in tail by the limitation immediately preceding, but was an independent limitation to take effect in case there were, at the time of the death of the survivor of C and S, no issue in whom any of the previous limitations could vest.

Doe d Lees v Ford (1853) 2 E&B 970; 23 LJQB 53; 22 LTOS 184; 18 Jur 420; 2 CLR 654; 118 ER 1029

5 Settled Land Act trustees

i TRUSTEES FOR PURPOSES OF SETTLED LAND ACT 1925

LAW See Halsbury's Laws (4th edn) vol 42 para 748

1713 Existing trustees of settlement — With power of sale — Power to vary investments

By settlement (*a*), executed upon the marriage of A and B, it was declared that the trustees C and M should stand possessed of money upon trust that they and the survivor of them, his executors, administrators, and assigns, should continue the money on the present investments, or with the consent in writing of A and B or the survivor, and after the death of the survivor then of the proper authority of such trustees or trustee, to sell and transfer the securities and lay out and invest the proceeds, with power from time to time with such consent as aforesaid to vary the securities. All after-acquired property, both real and personal, to be assured and settled upon the same trusts, etc, as the principal sum. Power to appoint new trustees, and to maintain, enlarge, or diminish the original number; every new trustee to have the power, etc, of the trustee in whose place he was appointed. By settlement (*b*), executed upon the marriage of C and D, the sister of B, it was declared that the trustees M and N should stand possessed of money upon trust to continue same upon its then present security, or with the consent in writing of C and D or the survivor, and after the death of the survivor, of the proper authority of such trustees or trustee, to call in the principal money and again lay out same in their or his names or name upon the securities therein mentioned, with power for the trustees or trustee for the time being with such consent or at such discretion as aforesaid to alter, vary, and transpose the stocks, funds, or investments to be from time to time made under the authority of the aforesaid power in any other stocks, etc, of the nature or description contemplated by the trust for investment. Covenant to settle after-acquired property similar in terms to that in settlement (*a*). M had died, and three new trustees of settlement (*a*) had been appointed by A and B. N was the sole present trustee of settlement (*b*). Real estate had descended during their coverture upon B and D as coheiresses in undivided moieties. A contract for the sale of this real estate having been entered into by A and B and C and D as vendors. Upon summons under Vendor & Purchaser Act 1874 (c 78) (repealed): *Held* under the express power contained in settlement (*a*), and the implied power in settlement (*b*), the existing trustees of both settlements had full power within Settled Land Act 1882 (c 38) s 2(8) (repealed), to act as trustees under the Act, and it was not necessary to apply to the court under Settled Land Act 1882 (c 38) s 38 (repealed), for the appointment of new trustees for the purposes of the Act.

In the second settlement there is only one trustee surviving, but power is given to the trustees or trustee to act, and to receive and give receipts for capital given to him by the settlement. I cannot doubt, therefore, that this surviving trustee comes within the exception to Settled Land Act 1882 (c 38) s 39(1) [repealed] . . . and the exception to s 45(2) [repealed] (*Bacon V-C*).

Re Garnett Orme & Hargreaves' Contract (1883) 25 Ch D 595; 53 LJ Ch 196; 49 LT 655; 32 WR 313

1714 Existing trustees of settlement — With power of sale

Under a marriage settlement the trustees were directed to stand possessed of certain schedule shares, stock, and securities upon trust at any time, with the usual consents, to sell the same and invest the proceeds in various investments, including "the purchase of freehold ground rents," with power from time to time "to vary or transfer such stocks, funds, shares or securities into or for others of the same or a like nature." The trustees purchased freehold ground rents, and in 1901 the tenant for life under the settlement agreed to sell the same. The purchasers objected to the title on the ground that the trustees were not trustees for the purposes of Settled Land Acts: *Held* the word "securities" in this settlement meant anything to be purchased under the power, and, having regard to the power, to vary and transfer the "securities," the trustees had power to sell the ground rents, and were consequently trustees for the purposes of Settled Land Acts.

Re Tapp & London & India Docks Co's Contract (1905) 74 LJ Ch 523; 92 LT 829

1715 Existing trustees of settlement — With power of sale — Power must be general

Re Coull's Settled Estates no 1770 post

1716 Existing trustees of settlement — With power of sale — With consent of tenant for life — Whether power extends to sale of heirlooms

C, who was tenant for life under his father's will of large estates, desiring to exercise the power given by

Settled Land Act (repealed) to sell certain heirlooms given by the will, applied for the appointment of trustees for the purposes of the Act. The trustees of the will had a power of sale under the will, but only with the consent of the tenant for life; the power of sale did not extend to the heirlooms: *Held* the trustees of the will were "trustees with power of sale of settled land" within Settled Land Act 1882 (c 38) s 2(8) (repealed), though the power was only exercisable with the consent of the tenant for life, and were also trustees to receive notices under the Act with respect to the heirlooms, though their power of sale only extended to the land, and therefore it was unnecessary to appoint trustees.

Constable v Constable (1886) 32 Ch D 233; 55 LJ Ch 491; 54 LT 608; 34 WR 470

1717 Existing trustees of settlement — With power of sale — Exercisable after death of tenant for life

Re Cox & Seadon's Contract (1891) 91 LT Jo 241

ANNOTATION **Folld** Re Jackson's SE [1902] 1 Ch 258

1718 Existing trustees of settlement — With power of sale — Exercisable after death of tenant for life

Re Nieuwenhuys (1892) 43 Sol Jo 326

ANNOTATION **Dbtd** Re Jackson's SE [1902] 1 Ch 258

1719 Existing trustees of settlement — With power of sale — Exercisable after death of tenant for life

A tenant for life of settled land which was subject to a trust for sale exercisable after his death could be a trustee of the settlement for the purposes of Settled Land Acts (repealed).

Testator gave his wife a life interest in an estate and appointed her and another trustees of the estate with a trust for sale exercisable after her death: *Held* they were trustees for the purposes of Settled Land Acts (repealed).

Re Jackson's Settled Estate [1902] 1 Ch 258; 71 LJ Ch 154; 85 LT 625; 50 WR 235; 18 TLR 168; 46 Sol Jo 136

ANNOTATION **Folld** Re Davies & Kents' Contract [1910] 2 Ch 35

1720 Existing trustees of settlement — With power of sale — Exercisable after death of trustee

Re Earp (1899) cited in [1902] 1 Ch at p 260

ANNOTATION **Folld** Re Jackson's SE [1902] 1 Ch at p 258

1721 Existing trustees of settlement — With power of sale — Of land "comprised in settlement" — Land subsequently purchased

M, who died in 1885, by will devised land to trustees upon trust for S for life, then for his eldest son for life, and afterwards upon trusts corresponding to a strict settlement. He gave all his personal estate to the same trustees upon trust to invest in land, to be conveyed to them upon the same trusts as the land devised. He gave the trustees a power of sale over all the land except his mansion house and lands in the same parish. The trustees had invested part of the personal estate in the purchase of lands which were conveyed to them upon the trusts of the will. They had afterwards sold all the lands originally comprised in the will other than those excepted from the power of sale. The equitable tenant for life had entered into a contract for the sale of the mansion house: *Held* the purchased lands were "comprised in the settlement, and subject to the same limitations, as the land agreed to be sold" within Settled Land Act 1890 (c 69) s 16(1) (repealed), and the trustees were trustees for the purposes of Settled Land Acts (repealed).

Re Moore, Moore v Bigg [1906] 1 Ch 789; 75 LJ Ch 342; 95 LT 521; 54 WR 434; 22 TLR 342; 50 Sol Jo 310

1722 Existing trustees of settlement — Trustees of term — With power to raise money by any reasonable means

Re Carne's Settled Estates no 1840 post

1723 Existing trustees of settlement — Trustees appointed by Irish court — Land subsequently acquired in England

The vendor contracted to sell land in England under a contract fixing the commencement of title in 1874 and stating that he was selling as tenant for life under his statutory power under Settled Land Acts (repealed). The settlement in question was a compound settlement created by several instruments, some of which, including a will made in 1836, were dated or made prior to the time fixed for the commencement of title, and the last of which was a resettlement made in 1902. The vendor had, however, voluntarily furnished an abstract of all the earlier documents constituting the compound settlement except the will of 1836, which was recited in one of these documents dated in 1860. The compound settlement originally comprised land in Ireland alone, and by an order of the High Court of Justice in Ireland, made in 1908, the present trustees were appointed trustees of the compound settlement for the purposes of Settled Land Acts (repealed). In 1910 the land in England, the subject of the contract, was conveyed to the trustees and their heirs to the uses, upon the trusts, and subject to the powers, charges, and provisions to, upon, and subject to which under the compound settlement the freehold lands therein comprised stood limited. The conveyance contained a settlement to the effect that the purchase was made at the direction of the tenant for life out of capital

moneys in the hands of the trustees arising under the compound settlement: *Held* under the order of the court in Ireland the trustees were in the position of trustees of the settlement for the purposes of Settled Land Acts (repealed) in relation to the subsequently acquired land in England without being reappointed by the court in England.
Re Arran (Earl) & Knowlesden & Creer's Contract [1912] 2 Ch 141; 81 LJ Ch 547; 106 LT 758

1724 Tenant for life
Re Nieuwenhuys no 1718 ante

1725 Tenant for life
(1) Testator devised his real estate to trustees upon trust to pay the income to his three children, and, in the events which happened, to the survivors and survivor of them for their lives, with power for any child to appoint by will a life interest to his or her wife or husband, and directed that upon the death of the last survivor of all his children and any husband or wife to whom an appointment had been made, his trustees should sell his real estate and divide the proceeds equally between all his grandchildren then living. No appointment had been made to any husband or wife not born in testator's lifetime. One child died without issue, and the other two had become trustees of the will as well as tenants for life; they had sold part of testator's estate in 1898 as tenants for life, exercising the statutory power, and had also received the purchase-money as trustees: *Held* the tenants for life were good trustees for the purposes of Settled Land Acts (repealed).

(2) Where a tenant for life sold settled land by virtue of Settled Land Acts (repealed), the exercise of the statutory power overreached a mortgage by a remainderman, and his concurrence in the conveyance was not necessary.
Re Davies & Kent's Contract [1910] 2 Ch 35; 79 LJ Ch 689; 102 LT 622, CA

ANNOTATION As to (1) **Consd** Re Watson's Settlmt Trusts, Dawson v Reid [1959] 2 All ER 676

1726 Tenant for life — With conditional power of sale
Re Johnson's Settled Estates no 2264 post

1727 Personal representatives of testator
Re Shelton's Settled Estates [1928] WN 27

Scottish, Irish and Commonwealth Cases

1728 Existing trustees of settlement — With power of sale — Power exercisable only by concurrence of person whose consent cannot be obtained
Trustees having a power of sale, which can only be exercised with the concurrence of a person whose consent cannot be obtained are not trustees within the meaning of Settled Land Act 1882. In such cases, if a sale be desirable, it is expedient to appoint such persons as trustees for the purposes of the Act.
Re Johnstone's Settlement (1886) 17 LR Ir 172 (IR)

ii APPOINTMENT OF TRUSTEES

1 In general

LAW See Halsbury's Laws (4th edn) vol 42 para 754 et seq

CROSS REFERENCES See no 1063 et seq ante (necessity for appointment for purpose of sale), no 2440 et seq post (necessity for appointment for purpose of leasing); COURTS vol 16 (2nd reissue) no 1918 (jurisdiction of court to appoint trustees of settled land in Ireland); TRUSTS vol 48 (reissue) no 1628 et seq (appointment generally)

1729 Who should be represented at hearing of application — Persons entitled in remainder
Practice Note [1921] WN 222

1730 Effect of order — Interests of infant not prejudiced
The interest of an infant, as one of the next of kin of his father, in land which formerly belonged to a partnership of which the father was a member, and had been retained by the administrator *in specie*, was settled land within Settled Land Act 1882 (c 38) s 59 (repealed), so as to enable the court under s 38 (repealed) to appoint trustees to exercise the powers conferred by the Act. The order appointing new trustees would, however, have been made without prejudice to any question as to the interests of the infants.
Re Wells (1883) 48 LT 859; 31 WR 764

1731 Effect of order — Where separate settlements created by one instrument
Re Skerritt's Estate [1899] WN 240

1732 Effect of order — Where separate settlements created by one instrument
Re Ogle's Settled Estates no 1000 ante

Scottish, Irish and Commonwealth Cases

1733 Separate settlements created by one instrument — Separate applications necessary
Where application is made under Settled Estates and Settled Land Acts 1915 s 97, for the appointment as trustee of the settlement of the same trustee company in respect of two separate settlements created by the will, there being two separate applicants and the persons who are beneficially interested in the two cases being different, although the ultimate remainderman may possibly be the same, there

ought to be separate applications in regard to the respective settlements.
Re Field's Settlements [1925] VLR 143; 31 Argus LR 141 (AUS)

2 Who may be appointed

LAW See Halsbury's Laws (4th edn) vol 42 para 755

CROSS REFERENCES See no 1758 et seq post (compound settlement); TRUSTS vol 48 (reissue) no 1628 et seq (appointment generally)

1734 Appointee must be indifferent — To protect interest of remaindermen
In appointing trustees under Settled Land Act 1882 (c 38) (repealed), the court would be most careful to protect the interest of remaindermen, so far as possible, by appointing indifferent persons as trustees, and would not, if it could be helped, appoint a tenant for life of the settled property to be a trustee.
Re Harrop's Trusts (1883) 24 Ch D 717; 53 LJ Ch 137; 48 LT 937

ANNOTATION **Consd** Tempest v Camoys (1888) 58 LT 221

1735 Two appointees must be independent — Not nearly related to each other
(1) When a complete settlement of land had been made, and derivative settlements had been afterwards made by persons who took interests, not yet in possession, under the original settlement, the original settlement alone was the settlement for the purposes of Settled Land Act (repealed).

(2) The court would not in general appoint as trustees of a settlement for the purposes of the Act (repealed) two persons who were near relatives to each other. There ought to have been two independent trustees.
Re Knowles' Settled Estates (1884) 27 Ch D 707; 54 LJ Ch 264; 51 LT 655; 33 WR 364

1736 Tenant for life
Re Harrop's Trusts no 1734 ante

1737 Tenant for life
Re Price's Settlement [1883] WN 202

1738 Existing trustees of settlement — Subject to affidavits of fitness
Re Stoneley's Will (1883) 27 Sol Jo 554

1739 Existing trustees of settlement
Re Morgan no 1811 post

1740 Existing trustees of settlement
Re Nicholas [1894] WN 165

1741 Solicitor to tenant for life
J, by his will, devised an estate to trustees upon trust to receive and pay the rents to his grandson for life, and after his decease to sell and to stand possessed of the moneys for all the grandson's children. The tenant for life was upwards of seventy years of age, and a widower. He had one child only, a daughter, and she and her husband in July 1880, contracted to sell her reversion in the estate to plaintiff. Settled Land Act 1882 (c 38) (repealed) came into operation in January 1883, and the tenant for life at the end of that month advertised the estate for sale under the powers of Settled Land Act 1882 (c 38) (repealed). Plaintiff brought an action for an injunction to restrain the tenant for life from selling, and to restrain the other defendants, devisees of the legal estate under the will of the survivor of trustees of J's will appointed by the court, from executing any assurance of the estate, and on motion for that purpose: *Held* (1) the tenant for life had power under Settled Land Act 1882 (c 38) (repealed) to sell the fee simple and inheritance of the property if he should comply with the provisions of Settled Land Act 1882 (c 38) (repealed); (2) there were no trustees to whom he could, under Settled Land Act 1882 (c 38) s 45 (repealed), give notice; and an injunction was granted to restrain him from selling until trustees had been properly appointed for the purposes of Settled Land Act 1882 (c 38) (repealed); (3) plaintiff was entitled to be served with any summons for the appointment of new trustees, and plaintiff objecting, defendant's solicitor ought not to be appointed.

Wheelwright v Walker (1883) 23 Ch D 752; 52 LJ Ch 274; 48 LT 70; 31 WR 363; sub nom

Re Walker's Trusts (1883) 48 LT 632; 31 WR 716; subsequent proceedings 48 LT 867

ANNOTATION As to (2) **Apld** Re Fisher & Grazebrook's Contract [1898] 2 Ch 660

1742 Solicitor to tenant for life

Testator devised his real estate to the use of G and W in fee upon trusts in strict settlement, and bequeathed to them his residuary personal estate upon trust to invest it in the purchase of land to be conveyed to them upon the same trusts. The will contained no power of sale. W was the family solicitor, a person of good position and high character, and after the death of testator he acted as solicitor to the trustees and also to the tenant for life. The tenant for life being desirous of selling part of the estates under the powers of Settled Land Act (repealed), applied to the court to appoint G and W trustees for the purposes of the Act: *Held* W ought not to be appointed, for that although he was in all other respects a most proper person, his being solicitor to the tenant for life made him unsuitable for an office

the duties of which required him to check the proceedings of the tenant for life.
Re Kemp's Settled Estates (1883) 24 Ch D 485; 52 LJ Ch 950; 49 LT 231; 31 WR 930, CA

ANNOTATION **Consd & Expld** Re Stamford, Payne v Stamford [1896] 1 Ch 288

1743 Solicitor to tenant for life
It was the rule of the court not to appoint as trustee of a settlement for the purposes of Settled Land Act (repealed), the person who was solicitor to the tenant for life under the settlement, nor to sanction such an appointment; but that rule of practice did not prevent a tenant for life who was the donee of the power of appointment of new trustees from so exercising the power, and the court would not declare such an appointment invalid merely because the person appointed was solicitor to the tenant for life.
Re Stamford (Earl), Payne v Stamford [1896] 1 Ch 288; 65 LJ Ch 134; 73 LT 559; 44 WR 249; 12 TLR 78; 40 Sol Jo 114

ANNOTATIONS **Distd** Re Spencer's SE [1903] 1 Ch 75 **Apld** Re Cotter, Jennings v Nye [1915] 1 Ch 307

1744 Solicitor to tenant for life
Re Spencer's Settled Estates no 1765 post

1745 Persons resident abroad — Acting under invalid appointment
All the persons interested under a settlement of land in Wales, some of whom were infants, were resident in America. The settlement contained a power of sale exercisable by the trustees with the consent of the tenant for life. All the trustees were dead, and the power of appointing new trustees was vested by the settlement in the heir of the last surviving trustee, who could not be found. All the *cestuis que trust* presented a petition asking for the appointment as trustees of three persons, of whom two were resident in America and had been acting as trustees of the settlement under an invalid appointment, and the third, L, who was in this country, had collected the rents as their agent at a remuneration, the continuance of which the court was asked to authorise. No other persons could be found to act as trustees, and L would not act without remuneration: *Held* under the circumstances the three proposed trustees might be appointed and the remuneration allowed, subject, however, to the production by L of evidence as to the number and nature of the tenancies and the propriety of the proposed remuneration, and to an undertaking by the trustees who were out of the jurisdiction that in case of the death of L they would not appoint any one out of the jurisdiction without the leave of the court.
Re Freeman's Settlement Trusts (1887) 37 Ch D 148; 57 LJ Ch 160; 57 LT 798; 36 WR 71

ANNOTATIONS **Apld** Re Masters, Coutts & Co v Masters [1953] 1 All ER 19 **Consd** Re Norfolk's (Duke) Settlmt Trusts [1978] 3 All ER 907

1746 Persons resident abroad
Where an infant domiciled in Australia was entitled under a will to a small share of real property in this country which the co-owners proposed to sell, and in order to effectuate the sale of the infant's interest it was necessary to apply to the court for the appointment of trustees under Settled Land Act 1882 (c 38) (repealed), the court, upon proof that the sale was for the benefit of the infant, appointed two persons domiciled in Australia trustees of the settlement effected by the will for the purposes of the Act.
Re Simpson, Re Whitchurch [1897] 1 Ch 256; 66 LJ Ch 166; 76 LT 131; 45 WR 277; 41 Sol Jo 240, CA

1747 Persons resident abroad
There is no absolute bar to the appointment of a foreign resident as a trustee of an English settlement. Accordingly persons having the power of appointing new trustees may in exceptional circumstances, eg where the beneficiary is resident in a foreign country, properly and validly appoint new trustees residing outside United Kingdom; the provision of Trustee Act 1925 (c 19) s 36(1) that a trustee who remains out of United Kingdom for more than twelve months may be supplanted, does not have the effect of making persons resident abroad ineligible to be appointed as new trustees.
Re Whitehead's Will Trusts, Burke v Burke [1971] 2 All ER 1334; [1971] 1 WLR 833; 115 Sol Jo 389

1748 Agent of trustees — Collector of rents on commission
Re Freeman's Settlement Trusts no 1745 ante

1749 Nominee of tenant for life
Williams v Jenkins no 1853 post

1750 Nominee of tenant for life
Re Nicholas no 1740 ante

1751 Public Trustee
Re Leslie's Hassop Estates no 1778 post

1752 Public Trustee — Scottish settlement
It is not competent to the Public Trustee to accept the trusteeship of any settlement other than an English one.

Where, therefore, the trustees of a marriage contract, which, when executed, was in form and substance a Scottish settlement, desired to appoint the Public Trustee to be sole trustee of the settlement, on the ground that the matrimonial domicil, the present trustees, the beneficiaries, and the trust investments were all English: *Held* the settlement still remainded a Scottish settlement to be construed according to Scottish law, and there was no statutory

power enabling the Public Trustee to accept the trusteeship of what was a foreign settlement.
Re Hewitt's Settlement, Hewitt v Hewitt [1915] 1 Ch 228; 84 LJ Ch 358; 112 LT 287; 31 TLR 81; 59 Sol Jo 177

Scottish, Irish and Commonwealth Cases

1753 Existing trustees of settlement
Re Belfast Improvement Acts, Ex p Reid [1898] 1 IR 1; 50 ILT 171 (IR)

1754 Persons resident abroad
Where estates in England and Ireland were devised upon similar limitations and all the persons beneficially interested resided in England, the court appointed as trustees of the Irish Estates for the purposes of Settled Land Act 1882, two persons who had been appointed by the Chancery Division in England trustees of the English estates, for the purposes of the Act, notwithstanding their residence in England.
Re Maberley's Settled Estate (1887) 19 LR Ir 341 (IR)

1755 Public Trustee
Re Ardagh's Estate [1914] 1 IR 5 (IR)

1756 Trustee company — Appointment as sole trustee — Where two trustees at will already appointed by testator
The court has power, under Settled Estates and Settled Lands Act 1915 s 97, to appoint a trustee company as sole trustee of the settlement, although the testator has appointed two trustees of the will by which the settlement is constituted.
Re Jones' Settlement [1926] VLR 369; 48 ALT 38; [1926] Argus LR 323 (AUS)

1757 Settled property in Ireland — Tenant for life resident in England
A tenant for life in receipt of the rents and profits derived from certain settled property situate in Ireland, and who resided in England, applied to the court that D and B should be appointed trustees of the settlement for the purposes of the Settled Land Acts. D permanently resided in England and B, who resided in Ireland, was a chargeant on the said property: *Held* in the special circumstances of the case D and B were proper persons to be appointed.
Re Lindsey-Brabazon's Settlement [1938] IR 282 (IR)

3 Compound settlements

LAW See Halsbury's Laws (4th edn) vol 42 para 752

CROSS REFERENCE See no 1061 et seq ante (for purpose of sale by tenant for life)

1758 Necessity for appointment of trustees
Re Du Cane & Nettlefold's Contract no 2069 post

1759 Necessity for appointment of trustees — Where trustees of original settlement existing
Where there had been a settlement of land on a tenant for life and a tenant in tail in remainder, and they had concurred in executing a disentailing assurance, conveying their estates to a grantee to uses, and limiting to themselves a joint power of appointment, and limiting the settled land, in default of appointment, to the use of the tenant for life in restoration of his former life estate and of the powers annexed thereto, with remainder over, the tenant for life could sell the land under Settled Land Acts (repealed) and make title thereto as tenant for life under the original settlement, and could require the purchase-money to be paid to the persons appointed by the original instrument of settlement to be the trustees of the settlement thereby made for the purposes of those Acts; and it was not necessary for the trustees of the compound settlement, consisting of the original settlement and the disentailing assurance, to be appointed. This was the case, notwithstanding the judgment of the Court of Appeal, *Re Constable's Settled Estates* (no 1074 ante) that words in a deed purporting to restore a life estate thereby or previously parted with were themselves ineffectual actually to give back to the tenant for life the very same estate he originally had.

Inasmuch as, under Settled Land Act 1882 (c 38) s 50 (repealed), the powers under that Act of a tenant for life were not capable of assignment or release, and remained exercisable by him notwithstanding any assignment of his life estate, it followed that in the above case the original "settlement," as defined in that Act, was not brought to an end by the tenant for life so conveying away his life estate, but continued to subsist so long as the powers given by the Act to the tenant for life under that settlement remained exercisable, notwithstanding that no portion charged under that settlement might remain to be raised and no rentcharge thereby created continued payable.
Re Cope & Wadland's Contract [1919] 2 Ch 376; 88 LJ Ch 489; 122 LT 156

ANNOTATION **Folld** Re Curwen & Frame's Contract [1924] 1 Ch 581

1760 Necessity for appointment of trustees — Where trustees of original settlement existing
By a settlement made in 1892, land was settled to the use of trustees upon certain trusts during the life of C, with remainder to his first and other sons successively in tail, with power for him by deed or will to appoint the rents and profits to any wife surviving him for her life; and trustees were appointed of the settlement for the purposes of Settled Land Acts (repealed). By deed poll C, on his marriage, exercised that power and appointed that the settled land should upon his death remain to the use of the trustees of the settlement during the life of his wife upon trust to pay the rents and profits thereof to her. The

appointor died in 1897, and his widow and his eldest son, the first tenant in tail, joined in disentailing the settled land and conveyed the same to uses for raising certain charges, and subject thereto, to the use of the settlement trustees during the life of the widow in restoration of the estate limited to them by the deed of appointment, with all powers annexed to such estate or vested in them or the widow during the continuance thereof, with remainder to the eldest son in fee simple. On the sale of part of the settled land by the widow, as tenant for life under Settled Land Acts (repealed), the purchasers raised an objection to the title on the ground that there were no trustees for the purposes of those Acts of the compound settlement consisting of all three deeds, or at any rate of the settlement created by the original settlement and the deed of appointment: *Held* the land stood limited in trust for persons by way of succession under or by virtue of a deed, namely, the settlement of 5 September 1892, within Settled Land Act 1882 (c 38) s 2(1) (repealed); and, as there existed trustees of that settlement for the purposes of Settled Land Acts (repealed), it was not necessary to have trustees for those purposes of either of the compound settlements aforesaid, and, consequently, the purchasers' objection to the title failed.
Re Curwen & Frames' Contract [1924] 1 Ch 581; 93 LJ Ch 290; 131 LT 220; 68 Sol Jo 459

1761 Who are trustees under Settled Land Act — Trustees of single instrument in series
Re Ailesbury (Marquis) & Iveagh (Lord) no 1045 ante

1762 Who are trustees under Settled Land Act — Trustees of original settlement — Where declaration in vesting deed
Re Alington (Lord) & London County Council's Contract no 1028 ante

1763 Who are trustees under Settled Land Act — Trustees of original settlement — Where reference to previous instrument
Re Adair, Adair v Treherne no 1059 ante

1764 Who are trustees under Settled Land Act — Different settlements on same limitations — Same persons trustees of both settlements — Trustees for aggregate estate
Re Symons, Symons-Jeune v Bunbury no 1054 ante

1765 Who may be appointed — Trustees of original settlement
(1) A compound settlement consisted of a settlement made in 1863 and a disentailing deed and a resettlement made in 1898. The resettlement deed contained a declaration that the trustees of it should be trustees of the compound settlement for the purposes of Settled Land Acts (repealed). A jointress and portioners, whose interests arose under the settlement of 1863 and were outstanding, were not parties to the resettlement deed: *Held* the trustees of the resettlement deed were not validly appointed trustees of the compound settlement. *Semble*: if all the persons interested under the settlement had been parties to the resettlement deed, the declaration of appointment would have been effectual.

(2) The trustees purported to be appointed were the existing trustees of the original settlement, one being the tenant for life's solicitor. The court, being asked to appoint trustees of the compound settlement, declined to appoint the tenant for life's solicitor to be one, in accordance with the ordinary rule that it will not, in the absence of special reason, appoint the tenant for life's solicitor to be a trustee of the settlement.
Re Spencer's Settled Estates [1903] 1 Ch 75; 88 LT 159; 51 WR 262; sub nom
Re Hammond Spencer's Settled Estates (1903) 72 LJ Ch 59

ANNOTATION As to (1) **Distd** Re Spearman SE [1906] 2 Ch 502

1766 Who may be appointed — Trustees of original settlement
Limited owners with joint absolute dominion over the estates comprised in a strict settlement, eg, the life tenant and tenant in tail male in immediate remainder of estates unfettered by any charges or powers of charging, could resettle the estates as they pleased and if they chose to keep the original settlement alive by a sufficient partial restoration of the subsisting uses, trusts and powers, they could appoint Settled Land Act trustees of the compound settlement constituted by the settlement and resettlement.
Re Spearman Settled Estates [1906] 2 Ch 502; 75 LJ Ch 829; 95 LT 605

ANNOTATION **Expld** Re Cope & Wadland's Contract [1919] 2 Ch 376

1767 Who may be appointed — Trustees of original settlement
Re Cradock's Settled Estates no 1052 ante

1768 Who may be appointed — Trustees declared in resettlement deed — Where all interested persons not parties
Re Spencer's Settled Estates no 1765 ante

1769 Who may be appointed — Trustees declared in resettlement deed
Re Spearman Settled Estates no 1766 ante

1770 Who may be appointed — Trustees of subsequent instrument
Testator by his will dated in 1870 devised a residential estate in settlement. In the midst of and surrounded by the estate and near to the mansion

house there was a smaller property which belonged to other persons. The tenant for life under the will purchased this property for £7,800, and having mortgaged it for £7,000, himself providing the balance, he by deed in 1904 settled it on the subsisting uses of the will, but subject to the mortgage and to repayment to himself of his costs, charges, and expenses arising out of the transaction. It was proved that the acquisition of this additional property was most desirable and beneficial. Neither in the will nor in the deed of 1904 was any general power of sale conferred on the trustees of those instruments, but the deed contained a proviso that the trustees thereof should have power, by sale or mortgage of the property thereby assured, to raise the amount of the costs, charges, and expenses above referred to. The tenant for life applied to the court for its sanction to his raising the amount of the incumbrance and costs, charges, and expenses by a mortgage of the entirety of the estate, and that the trustees of the deed of 1904 might be appointed trustees for the purposes of Settled Land Acts (repealed) of the settlement created by the will and the deed of 1904: *Held* (1) the trustees of the deed of 1904 ought to have been appointed trustees of the compound settlement for the purposes of Settled Land Acts (repealed), as otherwise there would have been no one to whom notice could have been properly and adequately given under Settled Land Act 1882 (c 38) s 45(1) (repealed); (2) the proviso contained in the deed of 1904 had not the effect of making the trustees of that instrument trustees for the purposes of Settled Land Acts (repealed), as those Acts contemplated trustees having a general and not a limited power, that is, a power exercisable at any time and for any purpose, and not a power exercisable in a contingency and for a particular purpose.
Re Coull's Settled Estates [1905] 1 Ch 712; 74 LJ Ch 378; 92 LT 616; 53 WR 504

4 Appointment of new trustees

LAW See Halsbury's Laws (4th edn) vol 42 para 754

CROSS REFERENCES See TRUSTS vol 48 (reissue) no 1651 et seq (appointment of new trustees generally), no 1660 et seq (appointment under power in instrument)

1771 Necessity for application to court — Original trustees appointed by court
Where trustees of a settlement for the purposes of Settled Land Acts (repealed) had been appointed by the court, and one of them was desirous of retiring, it was doubtful whether the continuing trustee could appoint a new trustee in his place under Conveyancing Act 1881 (c 41) s 31 (repealed), and it was proper for application to be made to the court to appoint a new trustee under Settled Land Act 1882 (c 38) s 38 (repealed).
Re Wilcock (1887) 34 Ch D 508; 56 LJ Ch 757; 56 LT 629; 35 WR 450

1772 Notice of application to court — Service as "trustees"
Re Leggett's Settlement [1920] WN 212

1773 Power to appoint — By whom exercisable — Settled Land Act 1925 (c 18) s 108(2)
Re Maryon-Wilson's Settlmts (or Instruments), Blofeld v Maryon-Wilson no 2005 post

Scottish, Irish and Commonwealth Cases

1774 Appointment must be beneficial
Burke v Gore (1884) 13 LR Ir 367 (IR)

1775 Jurisdiction to appoint — Registrar
A registrar has no jurisdiction in the absence of a judge of the Supreme Court to appoint new trustees under Settled Land Act 1886 s 13.
Re Luxton (1905) 24 NZLR 687 (NZ)

1776 Who may be appointed — New appointee must be independent — Not partner of continuing or surviving trustee
The court will not, on a motion for the appointment of a new trustee under Settled Land Act 1908, in lieu of a trustee who has died, or *semble* retired, appoint as trustee the partner of a surviving or continuing trustee, the *cestuis que trust* being entitled to the benefit of the solvency as well as the assistance of two independent persons in the administration of the trust.
Re Thompson (Deceased) (1909) 28 NZLR 356 (NZ)

1777 Grounds for — Trustee taking up residence abroad
One of three trustees appointed by the court under Settled Land Act 1882 s 38, having gone to reside abroad, the court appointed a new trustee, for the purposes of that Act, in his place, under s 38.
Re Kane's Trusts (1888) 21 LR Ir 112 (IR)

iii NUMBER OF TRUSTEES

LAW See Halsbury's Laws (4th edn) vol 42 para 754

CROSS REFERENCE See TRUSTS vol 48 (reissue) no 1977 et seq (number generally)

1778 Authority to appoint sole trustee — In spite of contrary direction by settlor
The court has express jurisdiction under Public Trustee Act 1906 (c 55) s 5, to appoint the Public Trustee sole trustee of a settlement, although it con-

tained a provision that the trustees should not at any time be less than three.

Re Leslie's Hassop Estates [1911] 1 Ch 611; 80 LJ Ch 486; 27 TLR 352; 55 Sol Jo 384; sub nom *Re Hassop Settled Estates, Re Leslie's Will, Re Trustee Act 1893* (1911) 104 LT 563

1779 Authority to appoint sole trustee — In spite of contrary direction by settlor — By persons with statutory power

Persons having the statutory power to appoint new trustees may appoint the Public Trustee to be sole trustee although the trust instrument expressly provides that upon any appointment of new trustees the number is not to be reduced below three.

Re Moxon [1916] 2 Ch 595; 86 LJ Ch 33; 115 LT 673; 61 Sol Jo 42

ANNOTATION **Apld** Re Duxbury's Settlement Trusts [1995] 3 All ER 145

iv ADMINISTRATIVE POWERS AND DUTIES

CROSS REFERENCES See INFANTS vol 28(3) (2nd reissue) no 1399 et seq (maintenance and advancement of infants); TRUSTS vol 48 (reissue) nos 4392 et seq, 4703 et seq (generally)

6 The estate owner

i TENANT FOR LIFE OR STATUTORY OWNER

1 Nature of tenant for life

LAW See Halsbury's Laws (4th edn) vol 42 para 759 et seq

1780 Persons within term — Acts construed broadly

(1) Testatrix devised all her real estate to trustees upon trust "to enter into possession or receipt of the rents and profits of or to manage or superintend the management of the same." The will gave the trustees extensive powers of management. Testatrix then directed the trustees to pay certain annuities to her daughters, and, subject thereto, to apply such annual sums as should be necessary for keeping certain mansion houses and the gardens and grounds thereof "in a fit state for residence," including the payment of wages of all servants and other persons employed by the trustees in and about such mansion houses, gardens, and grounds, "and shall permit my daughter at any time and from time to time during her life to reside at the mansion houses, gardens, and grounds"; and that during any and every such residence by her daughter, "under such permission as aforesaid," the trustees should, out of the rents and profits, subject to the prior payments thereout thereinbefore directed, pay to her daughter an allowance of £80 per week during such residence; and testatrix, after giving similar rights of residence to grandchildren, directed that the furniture, etc, in the "residence," respectively should be annexed thereto as heirlooms to be enjoyed by the person or persons for the time being entitled to the same residences under the limitation thereinbefore directed: *Held* the daughter came within the definition of a "tenant for life" in Act 1882 (c 38) s 2(5) (repealed), as being "the person for the time being beneficially entitled to possession of settled land for her life."

(2) The policy of the law is to regard the provisions of the Settled Land Acts (repealed) as being beneficial, and not to cut down the class or number of persons coming within the definition of "tenant for life."

Re Llanover's (Baroness) Will, Herbert v Freshfield [1903] 2 Ch 16; 72 LJ Ch 406; 88 LT 648; 51 WR 418; 19 TLR 338; 47 Sol Jo 385, CA

1781 Application of Law of Property (Amendment) Act 1926 (c 11) Schedule — Limitations subsisting before commencement of Act to be regarded — Not subsequent dealings or devolution

By the Schedule to Law of Property (Amendment) Act 1926 (c 11), the following paragraph was added to Law of Property Act 1925 (c 20), Sch 1 Pt IV: "Where, immediately before the commencement of this Act, there are two or more tenants for life of full age entitled under the same settlement in undivided shares, and after the cesser of all their interests in the income of the settled land, the entirety of the land is limited so as to devolve together, not in undivided shares, their interests shall, but without prejudice to any beneficial interest, be converted into a joint tenancy, and the joint tenants and the survivor of them shall, until the said cesser occurs, constitute the tenant for life for the purposes of Settled Land Act 1925 (c 18), and this Act": *Held* (1) in ascertaining whether the paragraph applies, regard must be had to the limitations of the settlement subsisting immediately before the commencement of the Act but not to any dealing with or devolution of the interest of any person taking under the limitations of the settlement; (2) the paragraph only applies where the interest of the tenants for life are followed by a vested indefeasible limitation not in undivided shares.

Where testator by his will gave his residuary real estate to trustees upon trusts under which the prop-

erty was immediately before 1 January 1926, held upon trust for two persons during their lives in undivided shares and subject thereto upon such trusts for the benefit of testator's sons and grandsons as L should by deed or will appoint and in default of and subject to any such appointment in trust for testator's heir: *Held* the paragraph did not apply, but the property was vested in the trustees of the will upon the statutory trusts pursuant to Law of Property Act 1925 (c 18) Sch 1 Pt IV para 1(3).

Re Colyer's Farningham Estate [1927] 1 Ch 677; [1927] All ER 181; 96 LJ Ch 348; 137 LT 413; 71 Sol Jo 351

1782 Application of Law of Property (Amendment) Act 1926 (c 11) Schedule — Necessity for estates for life in undivided shares — Followed by vested indefeasible limitations not in undivided shares

Re Colyer's Farningham Estate no 1781 ante

1783 Application of Law of Property (Amendment) Act 1926 (c 11) Schedule — Land settled upon trust for sale and division of proceeds

By his will, W directed that, after the death of his wife, which took place in 1922, his trustees should receive the whole income arising from his trust estate, and should divide the same equally between all his children and the child or children of any child who might be dead, such child or children taking between them the share their deceased parent would have been entitled to if living; and when and so soon as all his children should be dead except two, his trustees should sell and convert all his trust estate, and divide the proceeds equally between his two surviving children and the child or children of deceased sons and daughters, such last-mentioned children, if more than one, to take equally between them one equal share of the proceeds of sale. On 31 December 1925, the property was held upon trust to divide the income arising therefrom amongst ten children, seven grandchildren, and the legal personal representative of a deceased grandchild of testator: *Held* the entirety of the land being settled land held under one and the same settlement in equity in undivided shares the property was vested in the trustees of the will of W in fee simple upon the statutory trusts referred to in the Law of Property Act 1925 (c 18) Sch 1 Pt IV para 1(3), and it was not affected by para 4, added to Pt IV, of Sch 1 to the Act of 1925, by the Sch to Law of Property (Amendment) Act 1926 (c 11).

In my opinion, land settled upon trust for sale and division of the proceeds cannot by any stretch of imagination be described with accuracy as land so limited as to devolve or descend—for that, I take it, is what is meant by the word "devolve"—as an undivided whole (*Eve J*).

Re Higgs' & May's Contract [1927] 2 Ch 249; [1927] All ER 748; 96 LJ Ch 413; 137 LT 803; 71 Sol Jo 761

ANNOTATIONS **Folld** Re Robins, Holland v Gillam [1928] Ch 721 **Apld** Re House, Westminster Bank v Everett [1929] 2 Ch 168

1784 "Beneficially entitled" — For own benefit — Not as trustee

Re Jones no 1812 post

1785 "Possession" — Antithesis of "remainder" or "reversion"

Re Atkinson, Atkinson v Bruce no 1860 post

1786 "So entitled" — Entitled for life

Re Atkinson, Atkinson v Bruce no 1860 post

1787 Discretionary trust to apply income — For benefit of husband, wife and children

Re Atkinson, Atkinson v Bruce no 1860 post

1788 Property on trust for sale — Covenant by beneficiaries not to take in specie — Beneficiaries entitled to bid at sale

Under a settlement land was appointed to the use of a father for his life, and after his death to the use of trustees during the life of his son W, and after his death to the use of his sons successively in tail male, with remainder to the use of the trustees during the life of the father's son G, with remainders over; and it was declared that the appointments to the trustees were made on trust that they should as soon as might be, absolutely sell the life estates and pay the net proceeds of sale to W and G in equal shares as tenants in common; and it was provided that until sale the rents and profits of the life estates should be paid to W and G in equal shares as tenants in common; and W and G covenanted with the father, and also separately with the trustees, that neither of them would claim to have the life estates thereby appointed made over to them or either of them *in species*, it being the intention of the parties that the trusts for sale should be absolute and irrevocable, notwithstanding any law of equity authorising beneficiaries of proceeds of sale to elect to take the property in lieu of the proceeds of sale. After the death of the father, W and G contracted to sell some of the land in fee. The purchaser objected that the vendors were not tenants for life within Settled Land Act 1882 (c 38) (repealed): *Held* as either W or G alone, or both of them together, might bid at any sale by the trustees, they must be treated as if they had bought the life estates back, in which case they would be tenants for life, and could therefore sell under the powers of the Act.

Re Hale & Clark (1886) 55 LJ Ch 550; 34 WR 624; sub nom

Re Hale & Smyth's Contract (1866) 55 LT 151

1789 Several persons constituting tenant for life — Undivided shares

Where land was settled in undivided shares by an instrument which gave the trustees a power of sale over the entirety, Settled Land Act 1884 (c 18) s 6(2) (repealed) rendered it sufficient if the consent of the tenant for life of any one of such shares was obtained to the exercise of the trustees' power.

Testator by his will directed his trustees to hold his residuary real and personal estate upon trust for the children of his two marriages in equal shares, the income of the share of each son to be paid to him for life, subject to trusts to prevent alienation or incumbrance of income, the income of each daughter to be paid to her for life, independently of her husband and subject to similar trusts, and on the decease of each child upon trust for their children respectively as therein mentioned. In the event of the death of any child of testator without issue his or her share was to accrue for the benefit of his surviving children. The will gave the trustees a discretionary power to sell testator's real and leasehold property and to convey the same free from the trusts of the will. There were five children now living, who, and the widow of a son who had died, were each entitled to a life interest in one undivided ninth share of the trust estate. Four of them had signed a written consent to sales by the trustees, but the other two had declined to do so. The trustees had entered into a provisional contract for the sale of a leasehold house which formed part of the estate: *Held* the tenants for life of the undivided shares were persons entitled for "concurrent estates or interests" within Settled Land Act 1882 (c 38) s 2(6) (repealed), and together constituted the tenant for life of those shares, and therefore, under Settled Land Act 1884 (c 18) s 6(2) (repealed), the consent of one only of those persons was necessary to the exercise by the trustees of their power of sale.

Quaere: whether in the circumstances of the case there was any tenant for life at all of the entirety of the settled land.

Re Morris' Settled Estates [1920] 2 Ch 229; 89 LJ Ch 407; 123 LT 690, CA

ANNOTATION **Follld** Re Hone & Parker's Contract [1922] 2 Ch 424

1790 Several persons constituting tenant for life — Undivided shares — Some shares settled — Others held absolutely

Where trustees had a power of sale over an entire land estate, which was held by the beneficiaries in undivided shares, some absolutely, and some by life tenants and remaindermen, there was no conflict within Settled Land Act 1882 (c 38) s 56(2) (repealed), between the trustees' power of sale over the entirety and that of the life tenants over the settled undivided shares. The trustees' power of sale could therefore be exercised without the consent of any of the life tenants.

Re Hone & Parker's Contract [1922] 2 Ch 424; 91 LJ Ch 725; 127 LT 690; 67 Sol Jo 31

1791 Person entitled to reside

Re Llanover's (Baroness) Will, Herbert v Freshfield no 1780 ante

1792 Person entitled to reside — On exercise of option

Re Gibbons, Gibbons v Gibbons no 1845 post

1793 Tenant for life in remainder in fee — Subject to incumbrances

Re Marshall's Settlement, Marshall v Marshall no 1013 ante

1794 Tenant for life in remainder in fee — Subject to incumbrances

Re Monckton's Settlement, Monckton v Calder no 1014 ante

1795 Tenant in fee simple — Subject to charges

A rentcharge was limited by will to trustees who were appointed trustees for the purposes of Settled Land Acts, and ultimately to the use that if A should die in the lifetime of his wife, she should after the death of A and his father, receive a jointure and the rentcharge was limited to the trustees for a term of years for securing the jointure, and subject as aforesaid the rentcharge was limited to other trustees for a term of years to secure portions for the children of A as A should by deed or will appoint and, subject thereto the rentcharge was limited to the use of A in fee simple. A's father was dead, and he had had two children and had exercised his power of appointment on the marriage of two of them: *Held* (1) by virtue of Settled Land Act 1882 (c 38) s 2(1) and (5) (repealed), A had the powers of a tenant for life; (2) provided the price paid was the best price that could reasonably be obtained in accordance with s 4(1) (repealed) of the 1882 Act the vendor need not sell for cash but might sell for consideration as good as cash, in this case for Consols.

Re Sutton's Contract (1920) 65 Sol Jo 259

1796 "Statutory owner" distinguished from tenant for life — Person having powers under Settled Land Act 1925 (c 18) s 23(1)(a)

Under a resettlement of 1919 and in the events that happened the fifth Earl of Craven was entitled to a protected life interest in the net rents and profits of the Craven estates, but he had never been a life tenant proper, or a limited owner with an estate or interest in possession having the powers of a life tenant under

above Act s 20, or s 58 (repealed) of the 1882 Act. He was however given a life tenant's powers by the resettlement and had therefore full life tenant powers under s 23(1)(*a*). With the concurrence of the trustees he desired to be relieved of these powers: *Held* (1) the Earl, though having a life tenant's powers under s 23(1)(*a*), was not a life tenant within the definition of s 117(1)(xxviii), but only a statutory owner under s 117(1)(xxvi), therefore the court could not make an order under s 24(1) authorising the trustees to exercise the powers on the Earl's behalf, as that section was confined to life tenants proper or limited owners with an estate or interest in possession having life tenant powers under s 20, and did not apply to a mere statutory owner; (2) s 104(1) which prevents a life tenant releasing his powers, was similarly confined to those life tenants or limited owners, and did not apply to a mere statutory owner; therefore the Earl could release his powers by deed under Law of Property Act 1925 (c 20) s 155, and on his so doing Settled Land Act 1925 (c 18) s 23(1)(*a*), would cease to operate, and the trustees would have a life tenant's powers under subs (1)(*b*).

Re Craven Settled Estates [1926] Ch 985; [1926] All ER 693; 95 LJ Ch 559; 136 LT 121; 70 Sol Jo 1111

1797 "Of full age" — Equivalent to "not being an infant" — Application to corporation

Re Carnarvon's (Earl) Chesterfield Settled Estates, Re Carnarvon's (Earl) Highclere Settled Estates no 1031 ante

1798 Licence to occupy for life

Defendant's husband had worked for the landlords all his life. Until the husband's death he and defendant had lived in a cottage owned by the landlords. After his death the landlords made a written agreement with defendant by which, "in order to provide a temporary home" for her, they agreed to permit her to reside in and occupy the cottage "as tenant at will of them free of rent for the remainder of her life or until determined as hereinafter provided". The agreement provided that defendant might determine the "tenancy hereby created" by giving the landlords four weeks' notice in writing. It further provided that she should personally occupy and live in the cottage as a private residence and not assign or sublet it and "upon ceasing personally to live there vacant possession shall forthwith be given to the Landlords". The agreement contained obligations on defendant to keep and maintain the cottage in a proper condition and on the landlords to pay all rates, taxes and outgoings, and concluded: " . . . the tenancy hereby created shall unless previously determined forthwith determine on the death of [defendant]". Two years later the landlords sold property which included the cottage to plaintiffs. The landlords gave plaintiffs a copy of the agreement with defendant. In the contract of sale they inserted a clause which stated that the property was sold subject to defendant's tenancy of the cottage and continued: "The [plaintiffs] having been supplied with a copy of the . . . Tenancy Agreement . . . shall purchase with full knowledge thereof and shall not be entitled to raise any requisitions or objections in respect of any matters contained therein or arising thereout". By reason of that provision plaintiffs paid a reduced price for the property. Seven months after completion of the conveyance plaintiffs gave defendant notice to quit and subsequently brought proceedings claiming that defendant was a tenant at will and that, her tenancy having been determined, she was a trespasser: *Held* plaintiffs were not entitled to possession of the cottage for the following reasons: (1) although the words "tenant at will" were used in the agreement, the rest of the agreement contained terms which were quite inconsistent with a tenancy at will; thus defendant was to be permitted to stay for the remainder of her life and the landlords could not turn her out at will; defendant was not, therefore, a tenant at will; (2) although the agreement did not constitute a tenancy it did confer on defendant a contractual licence to occupy the cottage for the rest of her life, where an owner sold land to a purchaser and at the same time stipulated that he should take it "subject to" a contractual licence, the court would impose on the purchaser a constructive trust in favour of the licensee; accordingly defendant as a contractual licensee had acquired an equitable interest in the cottage which the court would protect by granting an injunction to restrain the landlord from turning her out; when plaintiffs bought the cottage "subject to" defendant's rights under the agreement, they took it on a constructive trust to permit defendant to reside there during her life or as long as she might desire; (3) the effect of the agreement was that the landlords held the cottage on trust to permit defendant to occupy it so long as she might desire; she was therefore a tenant for life within Settled Land Act 1925 (c 18), since plaintiffs took with express notice of the agreement which gave rise to the trust they could not turn her out of the cottage against her will.

Per *Lord Denning MR*: even if a purchaser does not take expressly "subject to" the rights of a licensee, he may do so impliedly, at any rate when the licensee is in actual occupation of the land. Whenever the purchaser takes the land impliedly subject to the rights of the contractual licensee, a court of equity will impose a constructive trust for the beneficiary.

Binions v Evans [1972] Ch 359; [1972] 2 All ER 70; [1972] 2 WLR 729; 116 Sol Jo 122; 23 P&CR 192, CA

ANNOTATIONS **Distd** GLC v Jones [1973] 72 LGR 320 **Apld** DHN Food Distributors Ltd v London Borough of Tower Hamlets [1976] 3 All ER 462; (dictum Lord Denning MR) Lyus v Prowsa Development Ltd [1982] 2 All ER 953 **Consd** Ungarian v Lesnoff [1990] Fam Law 93

Scottish, Irish and Commonwealth Cases

1799 Several persons constituting tenant for life — Undivided shares
Re Rowe [1926] VLR 4524; 8 ALT 68; [1926] Argus LR 366 (AUS)

1800 Person entitled to reside
C directed his trustees to permit his wife to reside in one of his two dwelling-houses to be elected by her within twelve months of his death and in default of her election that his trustee should elect: *Held* the widow might reside in the house at any time, and on her exercising her right of residence became a tenant for life under Settled Land Act and entitled to exercise the statutory powers.
Re Clarke (1915) 11 Tas LR 169 (AUS)

1801 Person entitled to reside
Land was devised to trustees upon trust to permit a beneficiary to reside rent free in a dwelling-house thereon for her life: *Held* the beneficiary was tenant for life of the land within Settled Estates and Settled Lands Act 1915 s 50(6).
Re Addis Settled Estates [1920] VLR 437 (AUS)

1802 Person entitled to use and occupation
Re McCabe (Deceased) (1909) 28 NZLR 780 (NZ)

2 Persons having the powers of tenant for life

A Generally

LAW See Halsbury's Laws (4th edn) vol 42 para 760

1803 Persons within term — Act construed broadly
At the dates of his will and death testator was lessee for a long term of a house called "The Grange," which he and his wife and family occupied at the same two dates. By his will testator devised "The Grange" specifically to his trustees, upon trust to permit his wife during her life to occupy it, she paying all rents, rates, taxes, assessments, and outgoings in respect of it; and observing and performing the covenants on the part of the lessee contained in the lease thereof, and with permission also to use and enjoy testator's effects in "The Grange." Testator provided that after her death the trustees were to hold "The Grange" upon trust to permit "such one or more of my children who shall for the time being be unmarried and shall desire to reside in "The Grange," to occupy "The Grange," and use and enjoy my effects in "The Grange" so long as one or more of my said children shall remain unmarried and shall desire to reside there, he, she, or they paying all rents, rates, taxes, assessments and outgoings in respect of "The Grange," and observing and performing the covenants on the part of the lessee contained in the said lease thereof. Then the will declared that, after the marriage of all testator's children or the death of the last unmarried child or in case all the unmarried children should notify the trustees their desire not to reside in "The Grange," the trustees should hold "The Grange" and the effects therein upon similar trusts in favour of a married son, S, to those thereinbefore declared in favour of testator's wife. Then followed a similar provision, after a provision for S's children, for H, another son of testator. After the deaths of testator and his widow, X and Y were the two youngest and the only unmarried children of testator. They resided together at and expressed their desire to continue to reside at "The Grange," and raised the question whether they were tenants for life of that property within the meaning of Settled Land Acts (repealed) and entitled to exercise the powers given to tenants for life by the Acts (repealed): *Held* X and Y, although not strictly tenants for life within Settled Land Act 1882 (c 38) s 2(5) (repealed), had, under Settled Land Act 1882 (c 38) s 58(1)(vi) (repealed), the powers given by the Act (repealed) to tenants for life.

Section 58 (repealed) of the Act was to be interpreted broadly, and included persons who fell within the definition in section 2(5) (repealed), of a tenant for life.
Re Boyer's Settled Estates [1916] 2 Ch 404; 85 LJ Ch 787; 115 LT 473; 60 Sol Jo 680

ANNOTATIONS **Folld** Re Gibbons, Gibbons v Gibbons [1920] 1 Ch 372 **Distd** Dent v Dent [1996] 1 All ER 659

1804 Persons within term — Persons within definition of tenant for life
Re Boyer's Settled Estates no 1803 ante

1805 Persons within term — Person named in last deed of compound settlement as tenant for life
Under a settlement of 1899 a jointure in favour of a widow was outstanding. In 1925 there was a resettlement by a disentailing deed under which a jointure rentcharge was created and certain charges by way of legal mortgage were made for raising jointures and portions. In 1932 applicant, who was beyond dispute the tenant for life of the 1925 resettlement, by a voluntary settlement appointed and granted the settled estates to trustees in fee simple subject to the mortgages and all equitable incumbrances affecting the same upon trust that the trustees should, as soon as they lawfully could, for the purpose of giving effect to the trust for sale thereby given them in respect thereof, obtain a grant of the legal estate in the estates. By a further clause it was declared that the powers

of a tenant for life under Settled Land Act were conferred upon the applicant during his life and after his death upon the trustees of the 1932 settlement: *Held* as Settled Land Act 1925 (c 18) s 23(1), vests the powers of a tenant for life in the person of full age on whom such powers are conferred by the settlement, applicant was, by virtue of the clause in the settlement of 1932, the tenant for life of the compound settlement.

Re Beaumont Settled Estates [1937] 2 All ER 353

1806 Persons within term — Undertaking to allow occupation of land for life — Whether undertaking constitutes life interest creating settlement of land

J, who was the tenant for life of a substantial settled estate held by trustees upon trust for sale, surrendered his life interest in the trust fund and made arrangements to divide the estate property between his sons. Part of the estate, which included a farmhouse (the property), was appointed both as to capital and income upon trust for his son C absolutely. Following the break-up of his marriage, J moved into the property, and lived there with his new wife, M, treating the property as their matrimonial home. Legal advice was subsequently taken in order to provide for M's security in the event of J's death. Protection was afforded by way of undertakings signed under seal, by means of which C granted exclusive occupation of the property to J during his lifetime or for such period as he might require and, after his death, to M on the same terms. The trustees undertook to fund the purchase of an alternative residence for J and after his death for M should they wish to move. Following J's death M contended that, since C's undertaking gave her an exclusive right of occupation for her lifetime, she had a life interest in the property which constituted a settlement under s 1(1) of the Settled Land Act 1925, and she accordingly applied for an order vesting the property in herself as tenant. C contended that there was no such tenancy and counterclaimed, in the alternative, that if a settlement had been created, his undertaking should be set aside on the grounds of mistake. *Held*— (1) An exclusive right to occupy property for life did not necessarily constitute a life interest in that property under the 1925 Act. Rather, the court would consider the context in which the right to occupy was granted or agreed to before determining the legal consequences as to whether it created a settlement under the 1925 Act, or some other property interest or form of licence. In the circumstances, the purpose of the undertakings was to formalise existing family arrangements, and not to effect any restructuring of the estate. The language used in C's undertaking was that of personal obligation, rather than that conferring any interest on J or M, and such permission to reside did not lead to the conclusion that a settlement of land "limited in trust" had thereby been created. It followed that C's undertaking, when read with the trustees' undertaking, did not create a settlement of property under the 1925 Act. M's application would accordingly be dismissed.

(2) Even if C's undertaking had conferred on M a life tenancy or powers of a life tenant under the 1925 Act, the court would have set aside that undertaking for mistake in so far as it conferred a Settled Land Act tenancy. The intention of C and the trustees in giving the undertakings was to provide legally binding obligations allowing J and M and the survivor of them to continue to occupy the property, with suitable undertakings regarding an alternative residence. They had never intended to create a strict settlement in favour of J or M which would have the effect of postponing the trustees' trust for sale over the property and thereby enabling either J or M to sell or lease the property away from the estate.
Dent v Dent [1996] 1 All ER 659

Scottish, Irish and Commonwealth Cases

1807 Persons within term — Persons within definition of tenant for life
Queensland Trustees Ltd v Finney [1905] SRQ 98 (AUS)

1808 Persons within term — Persons within definition of tenant for life
In the Will of Sullivan (1923) 19 Tas LR 41 (AUS)

1809 No specific gift during any person's life
Re Toohey's Settled Estate (1887) 3 QLJ 39 (AUS)

1810 Infant — Discretion of court
Where an infant was entitled to an undivided share of land the court refused to appoint one of the co-owners to exercise on behalf of the infant the power of concurring in a sale under Settled Estates Act. Upon a sale under the Act, the infant's share in the purchase-money was directed to be brought into court.
Re Greenville Estate (1883) 11 LR Ir 138 (IR)

B Person having estate or interest in possession

LAW See Halsbury's Laws (4th edn) vol 42 para 760

1811 Meaning of "in possession" — Contrasted with reversion — Not with possession of another person
(1) M, by his will, devised real estate to trustees, upon trust to pay the net rents and income to his wife, who was one of the trustees for the maintenance, education and benefit of his son J until he should attain twenty-one, and without being liable to account to his trustees or his son for the same, and

upon his attaining that age, then upon trust for him absolutely, but if he should die under twenty-one, without leaving issue, then upon trust as to the rent and income for his wife during life or widowhood and after her death or second marriage upon trusts for grandchildren: *Held* an infant son was a person having the powers of a tenant for life under Settled Land Act 1882 (c 38) s 58(1)(ii) (repealed).

(2) The words "in possession" in Settled Land Act 1882 (c 38) s 58(1) (repealed) referred to possession as contrasted with reversion or remainder, and not to possession personally, as contrasted with possession by another person.

Re Morgan (1883) 24 Ch D 114; 53 LJ Ch 85; 48 LT 964; 31 WR 948

ANNOTATIONS As to (1) **Consd** Re Coull's Settled Estates [1905] 1 Ch 712; A-G v Coole [1921] 3 KB 607

1812 Meaning of "in possession" — Contrasted with reversion

Subject to a term for raising certain sums, freehold estates were devised to the use of trustees during the life of A with remainder to the use of A's children and issue. The trustees of the life estate were directed to enter into possession of and manage the property, pay outgoings, keep down the interest on incumbrances, and during A's life pay out of the residue an annuity of £400 to the person next entitled in remainder, and pay the ultimate residue to A. The estates were so heavily incumbered that after payment of outgoings and interest there was not enough to pay the annuity of £400. A therefore had received nothing, and there was no prospect of his receiving anything for many years: *Held* (1) A was a person entitled to the income of land under a trust or direction for payment thereof to him during his life; (2) [A's income was] subject to expenses of management within Settled Land Act 1882 (c 38) s 58(1)(ix) (repealed), and therefore possessed the power of selling given by the Act (repealed) to tenants for life.

(3) I think that the words "where the estate or interest of each of them is in possession" means that the right is immediate and not in reversion or expectancy (*Baggally LJ*).

(4) "Beneficially entitled" in s 2 [repealed] does not mean "entitled and deriving a benefit from it," but entitled for his own benefit if there is anything to be derived from the estate and not simply as trustee for others (*Cotton LJ*).

Re Jones (1884) 26 Ch D 736; 53 LJ Ch 807; 50 LT 466; 32 WR 735, CA

ANNOTATIONS As to (1) **Apld** Re Cookes' Settled Estates, Cookes v Cookes [1885] WN 177 **Consd** Re Strangways, Hickley v Strangways (1886) 34 Ch D 423 **Distd** Re Llanover, Herbert v Ram [1907] 1 Ch 635. As to (2) **Apld** Re Clitheroe Estate (1885) 31 Ch D 135; Re Llanover, Herbert v Ram [1907] 1 Ch 635. As to (4) **Consd** Re Llanover's Will, Herbert v Freshfield [1903] 2 Ch 16

1813 Meaning of "in possession" — Contrasted with reversion —

Re Atkinson, Atkinson v Bruce no 1860 post

1814 What amounts to possession — Interest subject to term

Re Strangways, Hickley v Strangways no 1848 post

1815 What amounts to possession — Interest subject to term

Re Edwards' Settlement no 1838 post

C Tenant in tail

LAW See Halsbury's Laws (4th edn) vol 42 para 760

1816 "Purchased by money provided by Parliament" — Lands granted by Crown — Settled by Parliament

The lands comprised in the statutory settlement made by Amendment of Law Act 1705 (c 3) (repealed), and annexed to the Dukedom of Marlborough were Crown lands, granted by the Crown, and were not lands "purchased by money provided by Parliament," within Settled Land Act 1882 (c 38) s 58 (repealed), so as to have precluded the Duke of Marlborough, [the tenant in tail] from exercising the powers conferred on a tenant for life under that Act (repealed).

Re Marlborough's (Duke) Parliamentary Estates (1891) 8 TLR 179

1817 "Purchased by money provided by Parliament" — Lands granted by Crown — Settled by Parliament

Re Marlborough's (Duke) Blenheim Estates & Settled Land Acts (1892) 8 TLR 582

D Tenant in fee simple with executory limitation over

LAW See Halsbury's Laws (4th edn) vol 42 para 760

1818 Trust for son absolutely at twenty-one — Gift over on death under twenty-one

Re Morgan no 1811 ante

1819 Conditional gift — To provide residence for specified person — Gift over on failure

Testatrix gave her residuary estate, in the events which happened (*a*) to her niece C on condition that she resided in testatrix's house during the life of testatrix's sister M and provided there a home for M so long as she wished; (*b*) in the event of C not complying with the condition, to another niece upon the like condition; (*c*) in the event of neither niece complying with the condition, upon trust for M for

life with other trusts over on her death. At the date of testatrix's death M was a lunatic not so found, confined in an asylum, and was not expected to recover her faculties. Upon a summons by C under Settled Land Acts (repealed): *Held* C was a person having the powers of a tenant for life under Settled Land Act 1882 (c 38) (repealed); the condition as to providing a home was void so far as it prevented C from exercising her power of sale; and she was entitled to sell the house and keep the proceeds absolutely.

Re Richardson, Richardson v Richardson [1904] 2 Ch 777; 73 LJ Ch 783; 91 LT 775; 53 WR 11; 48 Sol Jo 688

1820 Gift to class — Contingently on attaining twenty-one — Power of member attaining twenty-one

Testator devised freehold premises upon trust after his daughter's decease for her children attaining twenty-one or marrying in equal shares. At the death of testator's daughter one child had attained twenty-one and three were infants: *Held* (1) the child, who had attained twenty-one had the powers of a tenant for life under Settled Land Act 1882 (c 38) s 58(1)(ii) (repealed), as having an estate in fee simple in possession with an executory limitation or disposition over in the event of other members of the class obtaining vested interests in the shares of the premises which had not for the time being vested in the other children of testator's daughter and was entitled to the possession of the title deeds; (2) she was entitled to the whole income of the trust premises subject to the divesting of a proportionate part upon a like contingency.

Re Walmsley's Settled Estates (1911) 105 LT 332; 55 Sol Jo 600

1821 Gift to class — Contingently on surviving life tenant — Provision for maintenance during minority

Testator's will contained a gift for life to a daughter, of the income of a share, and such share to be held after her death in trust for such daughter's children as shall be living at his death, or born afterwards, or shall have died in his lifetime leaving issue surviving him in equal shares. The will contained a provision that during minority the income of any share to which a minor might be entitled in expectancy, might be applied in maintenance. The two adult grandchildren of testator were held entitled to exercise the powers of a tenant for life under Settled Land Act 1882 (c 38) s 58(1)(ii) (repealed), as being tenants in fee simple, with an executory limitation gift or disposition over on failure of issue, or in any other event, such provision as to maintenance being held only an additional defeasance and not a partial disposition of the interest.

Re Dilks, Godsell v Hulse (1924) 131 LT 533; 68 Sol Jo 538

1822 Gift to person contingently on attaining twenty-one — Position of persons entitled on failure of contingency

Testator by his will, dated in 1917, devised and bequeathed certain lands and a house and its contents "Upon trust in fee simple or absolutely for such son, living at my death, of my son W as first or alone attains the age of twenty-one years, or, failing any such son, then upon trust as part of my residuary estate"; and he gave his residue in trust for both or either of his sons W and J who should survive him, and, if both, in equal shares. The will also provided that if and so long as some son, living at testator's death, of his son W should be living, but the property should not have become absolutely vested beneficially in any such son, the trustee should at the expense of the residuary estate maintain the house and keep up an establishment there, and allow the same to be used or enjoyed by any of the persons for the time being entitled in expectancy thereto. Testator died in 1919. His two sons survived him. W had four sons living at testator's death, the eldest of them being then thirteen years of age: *Held* (1) the interests of the grandsons were contingent, and until one of them should have attained the age of twenty-one or all of them should have died without attaining that age, W and J were entitled to the intermediate rents and profits of the property.

(2) W and J were not persons having the powers of a tenant for life under Settled Land Act 1882 (c 38) s 58(1)(vi) or (ix) (repealed).

I cannot see how the residuary legatees, who take subject to the powers and obligations of the trustees to which I have already referred can possibly be said to be tenants in fee simple . . . The trustee has an obligation to keep up this house and to spend money upon it in order to keep up an establishment and to keep it in repair for the purposes of the subsequent power that is given to the trustee to allow any one of the persons entitled in expectancy to occupy the house at any time that they wish. If, after the discharge of that obligation and the exercise of that power, should the trustee see fit to exercise it, there is anything left in the way of rents and profits arising from this property, then the residuary legatees are entitled to it. But how do they get it? They get it as a part of the residue otherwise undisposed of, and not as income of the property at all. Therefore, in my opinion, whether you put it in the words "during his own or any other life" or not, there is no trust

or direction for payment of the income of the land to these residuary legatees at all (*Lord Sterndale MR*).
Re Astor, Astor v Astor [1922] 1 Ch 364; sub nom *Re Astor (Viscount), Astor v Adams* (1922) 91 LJ Ch 277

ANNOTATIONS As to (2) **Apld** Re Alston-Roberts-West's Settled Estates [1928] WN 41 **Folld** Re Sharpe's Deed of Release, Sharpe & Fox v Gullick [1939] Ch 51

Scottish, Irish and Commonwealth Cases

1823 Trust for infant absolutely — Gift over on marriage without consent before twenty-one
Land was devised to an infant absolutely, subject to a proviso that if she married without the consent of testator's executors before attaining twenty-one, then the gift should become absolutely null and void. The income derived from the property was to be applied during her minority for her maintenance and education and the surplus accumulated for her: *Held* the infant had the powers of a tenant for life, under Settled Estates and Settled Lands Act 1909 no 2235 s 124(1)(ii) as being a person entitled in possession to an estate in fee simple subject to an executory limitation over.
Re Cheke, Cheke v Hamilton [1910] VLR 310 (AUS)

E Person entitled to base or determinable fee

LAW See Halsbury's Laws (4th edn) vol 42 para 760

1824 Person entitled to rent for remainder of lease — "If she should so long live" — Provision for annuity equal to rent after expiration of lease
Testator who had granted a lease of a house for a term of thirty-one years from 25 March 1859, at a rent of £50 a year by his will dated 20 June 1866, devised his freehold interest in such house to trustees upon trust to permit his wife to receive the rent for her own benefit "during the remainder of the term granted by the lease if she should so long live" and in case she should die "before the expiration of the term created by such lease" then he gave and devised the house to the children of his brother in fee, and he directed that if his wife should "happen to live after the expiration of the term created by such lease" then the trustees should sell the house and out of the income from the investment of the proceeds pay £50 a year to his wife during her life and subject thereto he gave the residue of the proceeds for his brother's children. Testator died in 1866 and the question being raised whether his widow could under Settled Land Act 1882 (c 38) (repealed), accept a surrender of such lease and grant a new lease of the house for a term of twenty-one years from 25 December 1883, at an increased rent: *Held* the widow was not a person under s 58 (repealed) of that Act entitled to the powers of a tenant for life and was therefore not able to accept a surrender and make a new lease of the house.

I think the object of that section [Settled Land Act 1882 (c 38) s 51 (repealed)] is to strike at and defeat (so far as they might control the powers given by the Act) all provisions even if contained in existing settlements which might be in their intention and substance prohibitory, obstructive or penal for the purpose of preventing alienations or other acts contemplated by the statutes. I do not think it was intended to enlarge or alter the substance of any original limitation of a particular estate (not properly an estate for life) which might be lawfully in force when the statute came into operation and as to which the author of the settlement had neither contemplated nor in any manner provided against any such acts as those in question, nor indeed could rationally have done so as the law stood when the settlement was made (*Lord Selborne C*).
Re Hazle's Settled Estates (1885) 29 Ch D 78; 54 LJ Ch 628; 52 LT 947; 33 WR 759, CA

ANNOTATION **Apld** Re Atkinson, Atkinson v Bruce (1885) 30 Ch D 605

F Tenant for years determinable on life

LAW See Halsbury's Laws (4th edn) vol 42 para 760

1825 Not tenant under lease at rent
A person who is a tenant of settled land under a lease at a rent is, as a matter of necessary implication from the language of s 20(1)(iv), of Settled Land Act 1925 (c 18), excluded from the class of persons upon whom the section confers the powers of a tenant for life. The amount of the rent is immaterial.
Re Catling, Public Trustee v Catling [1931] 2 Ch 359; 100 LJ Ch 390; 145 LT 613

G Tenant for life of another

LAW See Halsbury's Laws (4th edn) vol 42 para 760

1826 Whether beneficial ownership necessary — Executors of deceased tenant pur autre vie — Together with surviving tenants pur autre vie
Vine v Raleigh no 1019 ante

1827 Whether beneficial ownership necessary — Executors of deceased tenant pur autre vie — Together with surviving tenants pur autre vie
Persons beneficially entitled under a settlement to the income arising from real estate until the death of the last survivor of them and the executors of a

deceased person similarly entitled were together persons having the powers of a tenant for life under Settled Land Act 1882 (c 38) s 58(1)(ix) (repealed).
Re Johnson, Johnson v Johnson [1914] 2 Ch 134; 83 LJ Ch 758; 58 Sol Jo 611

1828 Whether beneficial ownership necessary — Trustees pur autre vie
Settled Land Act 1882 (c 38) s 58 (repealed), which gave the powers of a life tenant to the nine classes of limited owners therein described, only applied to beneficial owners, and therefore trustees with an estate *pur autre vie* could not exercise a life tenant's powers under s 58(1)(v) (repealed).
Re Jemmett & Guest's Contract [1907] 1 Ch 629; 76 LJ Ch 367

ANNOTATION **Distd** Re Johnson, Johnson v Johnson [1914] 2 Ch 134

H Tenant of life estate subject to liability to cesser

a In general

LAW See Halsbury's Laws (4th edn) vol 42 para 760

1829 Person entitled to rent for remainder of lease — "If she should so long live" — Provision for annuity equal to rent after expiration of lease
Re Hazle's Settled Estates no 1824 ante

1830 Persons entitled to surplus rents — During trust for accumulation
Re Drinkwater's Settled Estates (1905) 49 Sol Jo 237

1831 Persons entitled to surplus rents — During trust for accumulation
Re Llanover (Baroness), Herbert v Ram no 1866 post

1832 Person entitled on failure of contingency — Gift to persons contingently on attaining twenty-one
Re Astor, Astor v Astor no 1822 ante

b Interest during widowhood

LAW See Halsbury's Laws (4th edn) vol 42 para 760

1833 Right of widow to exercise powers — Notwithstanding trust for maintenance of children
Re Theaker's Settled Estates (1898) cited in 75 LJ Ch at p 121

ANNOTATION **Follld** Re Pollock, Pollock v Pollock (1905) 75 LJ Ch 120

1834 Right of widow to exercise powers — Notwithstanding trust for maintenance of children
Testator gave all his real and personal estate to trustees upon trust, as to a certain piece of land and a public-house for his wife during widowhood, for the benefit and maintenance of herself and her children and the proper bringing up of the latter: *Held* the widow had the powers of a tenant for life under Settled Land Act 1882 (c 38) s 58(1)(vi) (repealed) notwithstanding that her interest was charged with the maintenance of the children.
Re Pollock, Pollock v Pollock [1906] 1 Ch 146; 75 LJ Ch 120; 94 LT 92; 54 WR 267; 50 Sol Jo 111

Scottish, Irish and Commonwealth Cases

1835 Right of widow to exercise powers — Notwithstanding trust for maintenance of children
Testator gave the lands of F and personal property to trustees on trust after payment of debts, etc, to permit and suffer his wife G to manage the residue of the same, and to receive the interest, dividends, and annual produce thereof "for her life, or until she shall marry again for the benefit of herself and our children as she may think fit". A full life interest in part of the lands was by the effect of the will and two codicils thereto secured to her on her remarriage: *Held* G had the powers of a tenant for life as regards the lands of F under Settled Land Act 1882 (c 38) s 58(1)(vi), subject in effect to an equitable incumbrance on her interest in favour of the children.
Re Martin [1919] 1 IR 71 (IR)

c Interest during occupation of house

LAW See Halsbury's Laws (4th edn) vol 42 para 760

1836 Right of person occupying to exercise powers — Condition requiring occupation
Re Paget's Settled Estates no 2019 post

1837 Right of person occupying to exercise powers — Condition requiring occupation
Re Eastman's Settled Estates (1898) WN 170; 68 LJ Ch 122n; 43 Sol Jo 144

ANNOTATIONS **Apld** Re Carne's SE [1899] 1 Ch 324; Llanover's Will, Herbert v Freshfield [1902] 2 Ch 679 **Consd** Re Trenchard, Trenchard v Trenchard [1902] 1 Ch 378 **Distd** Re Burden, Mitchell v St Luke's Hostel Trustees [1948] Ch 160

1838 Right of person occupying to exercise powers — Trust to permit occupation — Necessity for exercise of option to reside
By a settlement dated in 1872 a freehold house was limited to trustees for a term of ninety-nine years upon trust to permit the premises to be personally occupied by C during her life, and so long as she should remain a widow and be desirous of personally

occupying the same, and after her death or second marriage then over. The trust in C's favour came into operation in 1894, but she never occupied or expressed any wish to occupy, and in 1896 joined with other persons interested in the premises in granting a lease of them for the term of five years: *Held* (1) during the continuance of the lease, C could not be regarded as tenant for life in possession for the purposes of the Settled Land Act (repealed). (2) *Semble*: upon the determination of the lease, if she exercised her right of personal occupation, she would have the powers of a tenant for life under Settled Land Act 1882 (c 38) s 58 (repealed).
Re Edwards' Settlement [1897] 2 Ch 412; 66 LJ Ch 658; 76 LT 774

1839 Right of person occupying to exercise powers — Trust to permit occupation — Necessity for exercise of option to reside
Testator by his will directed that his widow should, during life or widowhood, be entitled "to use and occupy" his residence "for her own personal use and occupation," and also the furniture in or about same. The wife never lived at the house, and when it was sold by the trustees of the will she joined as party to the conveyance, which recited that she had signified her intention of not wishing to use the house as a residence, and was willing to renounce such right and to join in the conveyance: *Held* (1) on the construction of the will she was not entitled to let the house and receive the rent or to receive the income of the proceeds of sale, but had only an option, liberty, or licence to occupy the house personally; and before the widow could claim to be a tenant for life or a person having the powers of a tenant for life within Settled Land Act 1882 (c 38) (repealed), she must have exercised the option by informing the trustees that she desired to reside in the house; (2) she was not entitled to the income of the proceeds of furniture which had been sold.
Re Anderson, Halligey v Kirkley [1920] 1 Ch 175; 89 LJ Ch 81; 122 LT 261

ANNOTATION **Consd** Morss v Morss [1972] 1 All ER 1137

1840 Right of person occupying to exercise powers — Trust to permit occupation
By a settlement a mansion house and lands were, subject to a rentcharge, vested in trustees for a term of 1,000 years, upon trust in the first place to allow plaintiff to occupy the mansion house and certain specified lands, rent free, for so long as she might wish to continue to do so; and upon further trust, by mortgage thereof, or by or out of the rents and profits thereof, or by any other reasonable ways or means, to raise some specified sums of money, and, subject to the term, to the use of one of defendants in fee: *Held* (1) plaintiff was tenant for life, within Settled Land Act 1882 (c 38) (repealed), of the mansion house and lands which she was to be allowed to occupy, and could in respect of them exercise the powers conferred by the Act (repealed) upon a tenant for life; (2) the trustees of the term were not trustees for the purposes of the Act (repealed), but trustees for those purposes must be appointed.
Re Carne's Settled Estates [1899] 1 Ch 324; 68 LJ Ch 120; 47 WR 352; sub nom
Re St Donats Settled Estate (1899) 79 LT 542

ANNOTATIONS As to (1) **Apld** Re Betty, Betty v A-G (1899) 80 LT 675; Re Trenchard, Ward v Trenchard (1900) 16 TLR 525; Re Llanover's Will, Herbert v Freshfield [1902] 2 Ch 679 **Distd** Dent v Dent [1996] 1 All ER 659

1841 Right of person occupying to exercise powers — Trust to permit occupation
Testator by his will gave his wife the use of his residence as long as she should desire it, his estate to pay all rates, taxes, and outgoings in respect thereof: *Held* she had the powers of a tenant for life in respect thereof under Settled Land Acts (repealed).
Re Trenchard (Deceased), Ward v Trenchard (1900) 16 TLR 525

ANNOTATIONS **Consd** Re Simpson, Clarke v Simpson [1913] 1 Ch 277; Re Patten, Westminster Bank v Carlyon [1929] 2 Ch 276

1842 Right of person occupying to exercise powers — Trust to permit occupation
Re Llanover's (Baroness) Will, Herbert v Freshfield no 1780 ante

1843 Right of person occupying to exercise powers — Trust to permit occupation — Direction must relate to specified house
Re Bond's Estate, Burrell v Bond (1904) 48 Sol Jo 192

ANNOTATION **Consd** Re Boyers SE [1916] 2 Ch 404

1844 Right of person occupying to exercise powers — Trust to permit occupation — Until marriage
Re Boyer's Settled Estates no 1803 ante

1845 Right of person occupying to exercise powers — Trust to permit occupation
Testator after providing for the upkeep of his house, grounds and furniture as a residence for his family until the youngest of his children should come of age, gave to his eldest son, as soon as that event happened, the option of occupying and enjoying the use of the house and furniture without payment of rent during his life, such option to be exercised by a written notice to the trustees of the will within three months from the time when the right to exercise it arose. Subject to this similar options were given in succession to the other two children of testator, and

there was an ultimate gift of his residuary estate to the trustees in trust for the three children. The youngest child having attained twenty-one the eldest son in 1913 gave notice to the trustees of the exercise of his option. He resided in the house until 1916 when he let it unfurnished and removed the furniture to another house, which he rented: *Held* the gift was not of a mere option to reside. Upon the exercise of the option the son became beneficially entitled to possession of the settled property within Settled Land Act 1882 (c 38) s 2(5) (repealed), and was therefore tenant for life under the settlement created by the will, and under s 58(1)(vi) (repealed), he had the powers of a tenant for life under the Act, including a power to let.

Re Gibbons, Gibbons v Gibbons [1920] 1 Ch 372; 89 LJ Ch 148; 122 LT 710; 36 TLR 203; 64 Sol Jo 274, CA

Scottish, Irish and Commonwealth Cases

1846 Right of person occupying to exercise powers — Condition requiring occupation

Re Hack (1918) 14 Tas LR 55 (AUS)

1847 Right of person occupying to exercise powers — Mere licensee

The persons qualified to exercise the powers of leasing under Conveyancing and Law of Property Act 1898 s 68, are those having an estate in land, either an estate for life or a chattel interest. A person having a mere right of personal residence in a house for his life has not an estate of any kind therein, but a mere licence, and, therefore, is not qualified to exercise the powers of leasing referred to.

Stevenson v Myers (1929) 47 NS WWN 94 (AUS)

d Interest subject to trust for accumulation

LAW See Halsbury's Laws (4th edn) vol 42 para 760

CROSS REFERENCES See nos 1830, 1831 ante (powers of persons entitled to receive surplus rents)

1848 Whether tenant for life entitled to exercise powers — Tenant having no estate in possession — Until determination of term for accumulation

Testator, who died in 1884, by his will made in 1874, devised his residuary real estate to trustees upon trust, during the period of twenty years after his death, out of the rents to manage and superintend his real estate, and improve the same, and to accumulate or invest in the purchase of land the unapplied part of the rents, and after the determination of the term of twenty years to settle and assure the devised and purchased real estate to the uses and upon the trusts of an existing settlement under which testator's son took certain estates as tenant for life: *Held* testator's son, not having any estate or interest in possession until the determination of the term, had not during its continuance, the powers of a tenant for life under Settled Land Act with respect to the hereditaments devised by the will.

Re Strangways, Hickley v Strangways (1886) 34 Ch D 423; 56 LJ Ch 195; 55 LT 714; 35 WR 83; 3 TLR 94, CA

ANNOTATIONS **Consd** Williams v Jenkins [1893] 1 Ch 700 **Distd** Re De Hoghton, De Hoghton v De Hoghton [1896] 1 Ch 855; Re Martyn, Coode v Martyn (1900) 69 LJ Ch 733; Re Llewellyn, Llewellyn v Llewellyn [1911] 1 Ch 451 **Consd** Re Mountgarret & Moore's Contract (1915) 112 LT 939 **Distd** Re Musgrave, Machell v Parry [1916] 2 Ch 417

1849 Whether tenant for life entitled to exercise powers — Tenant having estate in possession — Subject to term for accumulation

Where land is limited to trustees of a marriage settlement to the use of the trustees for twenty-one years and subject thereto to the use of the husband for life, and the trusts of the term are to manage the property, pay certain annuities, and to accumulate the residue, such accumulations to be capital moneys under Settled Land Act (repealed), the husband was a person having the powers of a tenant for life under Settled Land Act 1882 (c 38) s 58 (repealed).

Re Martyn, Coode v Martyn (1900) 69 LJ Ch 733; 83 LT 146; 44 Sol Jo 657

ANNOTATIONS **Folld** Re Llewellyn, Llewellyn v Llewellyn [1911] 1 Ch 451 **Consd** Re Beauchamp's Will Trusts, Cadge v Barker-Hahlo [1914] 1 Ch 676

1850 Whether tenant for life entitled to exercise powers — Tenant having estate in possession — Subject to term for accumulation

Testator by his will devised his capital mansion house and the whole of his real estates to his trustees in fee simple, upon trust to permit his daughter during her life to have the personal use or occupation of the mansion house free from rent, rates and taxes, and any liability for repair and upkeep, and he directed his trustees to stand possessed of all his hereditaments and premises, subject to the trust in favour of his daughter, upon trust to let and manage the same for twenty-one years after his death, and, after the payment of all outgoings, to accumulate the balance of the rents and profits, and apply them as therein mentioned, and upon the expiration of the period of twenty-one years, and subject to the trusts of the mansion house in favour of his daughter, testator directed that the whole of the devised hereditaments should be held upon trust for his eldest daughter for life, with remainder to her first-born son for life, with

remainders over. Upon the death of testator in 1912 questions arose (*inter alia*) as to the position of the daughter under the will. It was not disputed that she was tenant for life of the mansion house, but it was objected that she had not the powers of a tenant for life of the rest of the real estate: *Held* the daughter had the powers of a tenant for life in respect of testator's residuary estate under Settled Land Act 1882 (c 38) s 58(1)(vi) (repealed).

Re Beaucham's Will Trusts, Cadge v Baker-Hahlo [1914] 1 Ch 676; 83 LJ Ch 440; 110 LT 814; 58 Sol Jo 320

1851 Whether tenant for life entitled to exercise powers — Tenant having estate in possession — Subject to term for accumulation

M devised lands to four named grandsons as tenants in common for life with cross remainders between them, and directed that after the death of the survivor the same lands should fall into his residuary real and personal estate which was given upon other trusts. By a codicil testator directed the trustees of his will to let the lands by lease or otherwise and accumulate the rents for a period of ten years after his death and apply the accumulations towards the construction of a proposed carriage road over the Styhead Pass in Cumberland: *Held* the grandsons were, notwithstanding the term persons who the powers of tenants for life under Settled Land Act 1882 (c 38) (repealed), as being "a tenant for . . . life . . . whose estate . . . is subject to a trust for accumulation of income for payment of debts or other purpose" and whose estate was in possession, within Settled Land act 1882 (c 38) s 58(1)(vi) (repealed).

Re Musgrave, Machell v Parry [1916] 2 Ch 417; 85 LJ Ch 639; 115 LT 149; 60 Sol Jo 694

1852 Whether tenant for life entitled to exercise powers — Tenant having estate in possession — Subject to trust for accumulation until tenant attains specified age

Testator devised certain real estate unto and to the use of his trustees in fee simple to the use that it should be lawful for them to receive the rents, profits, and annual income thereof until his son, applicant, attained the age of twenty-seven years, paying thereout during such time the annual sum of £400 to applicant, and to accumulate the surplus which should devolve upon the same uses as the property itself, and subject thereto to the use of applicant and his assigns during his life, with remainders over: *Held* applicant, who had not yet attained the age of twenty-seven years, was by virtue of the provisions of Settled Land Act 1882 (c 38) s 58(1)(vi) (repealed), a person having the powers of a tenant for life under that Act.

Re Llewellyn, Llewellyn v Llewellyn [1911] 1 Ch 451; 80 LJ Ch 259; 104 LT 279; 55 Sol Jo 254

ANNOTATION **Apld** Re Beauchamp's Will Trusts, Cadge v Barker-Hahlo [1914] 1 Ch 676

1853 Whether tenant for life entitled to exercise powers — Suspension of life estate — During accumulation for payment of debts

Testator devised his real estate to trustees upon trust to permit his daughter to receive the rents and profits during her life for her separate use, and directed that if a certain claim against him for £1,000, settled by him on her marriage, should be enforced, then "all her interest and benefit from the estate" should "cease until all the debts and claims on the same" were paid; with a gift over at her death in favour of her children. After testator's death the claim for £1,000 was enforced. The personal estate of testator was insufficient for payment of the £1,000 and other debts and claims. The daughter, who was the heiress-at-law of testator, claimed a declaration that she had the powers of a tenant for life, under the settlement created by the will, within Settled Land Act 1882 (c 38) (repealed): *Held* the life estate given by the will to the daughter was not gone, but only suspended; there was an implied trust for payment of the debts and claims by the trustees; when those were paid the daughter would come in again by virtue of her suspended estate, and be equitable tenant for life; and that as the implied trust for payment of debts was one which might be properly carried out by accumulating the rents and profits, if it were necessary from time to time so to do, it was substantially a "trust for accumulation of income" for payments of debts within Settled Land Act 1882 (c 38) s 58(1)(vi) (repealed), and the daughter was therefore a person entitled to exercise the powers of a tenant for life.

Williams v Jenkins [1893] 1 Ch 700; 62 LJ Ch 665; 68 LT 251; 41 WR 489; 3 R 298

Scottish, Irish and Commonwealth Cases

1854 Whether tenant for life entitled to exercise powers — Tenant having estate in possession — Subject to term for accumulation

Re Woodhouse, Annesley v Woodhouse [1898] 1 IR 69 (IR)

I Tenant by the curtesy

LAW See Halsbury's Laws (4th edn) vol 42 para 760

CROSS REFERENCE See REAL PROPERTY vol 38 (reissue) no 4524 et seq (generally)

1855 Estate must be in possession

Under a will certain real estate was vested in trustees in trust for A for life, and on her death in trust for her children equally as tenants in common; the shares of daughters to be for their separate use without power of anticipation. On a sale of the real estate upon A's death, two of the vendors who were married women claimed to convey as tenants for life within Settled Land Act 1882 (c 38) (repealed). The purchaser contended that they must convey as absolute owners and obtain an order under Conveyancing Act 1881 (c 41) (repealed). In an action for specific performance: *Held* the husbands, if they survived, taking an estate by the curtesy by virtue of the general law and not under the will, and the estate given to the married woman being one and entire with no limitation to the husbands, the effect of the restraint on anticipation was not to bring the case within Settled Land Act 1882 (c 38) s 2 (repealed), as creating a settlement whereby the estate was limited to persons by way of succession; and, therefore, the married women were not tenants for life within the meaning of the Act (repealed).

The Act of 1882 [repealed] enumerates among the persons who have the powers of a tenant for life "a tenant by the curtesy." That means a tenant by the curtesy in possession (*Chitty J*).

Bates v Kesterton [1896] 1 Ch 159; 65 LJ Ch 108; 73 LT 656; 44 WR 150; 40 Sol Jo 97

J Person entitled to income

LAW See Halsbury's Laws (4th edn) vol 42 para 760

1856 Actual receipt of income not necessary — Whole income exhausted by incumbrances

Re Jones no 1812 ante

1857 Actual receipt of income not necessary — Whole income exhausted by incumbrances — Charges including maintenance of tenant for life

Re Cooke's Settled Estates, Cookes v Cookes [1885] WN 177

1858 Income subject to expenses of management — Direction for repairs of buildings

Testatrix by her will directed her trustees to stand possessed of the net rents of her real estate, upon trust to pay the same to W, a married woman, for life, for her separate use, her receipt alone to be a sufficient discharge to the trustees; and testatrix directed her trustees out of the rents of her real estate, to keep in repair all the buildings on the estate during the period of their trust, and also the chancel of P church. No power of sale or leasing was contained in the will: *Held* (1) notwithstanding the direction to the trustees with respect to repairs, W was equitable tenant for life of the settled land, and, as such, was entitled to be let into the possession and management of the estate, upon her undertaking to see the repairs; (2) inasmuch as there were no trustees of the settlement created by the will for the purposes of Settled Land Act 1882 (c 38) (repealed), W was not entitled to exercise the powers of a tenant for life under that Act until trustees of the settlement were appointed and a proper notice of her intention was given them.

Re Bentley, Wade v Wilson (1885) 54 LJ Ch 782; 33 WR 610

ANNOTATION As to (1) **Apld** Re Wythes, West v Wythes [1893] 2 Ch 369

1859 Term on trust to accumulate income — Life tenant not entitled to possession — Term determinable on satisfaction of trusts

Testator by will dated in 1883 devised an estate to the use of trustees for a term of 1,300 years and subject thereto to his son H for life, with remainders over in strict settlement. The trusts of the term were to raise portions, to pay annuities, H being one of the annuitants, and to apply the residue as a sinking fund to pay off mortgage debts and other charges. It was estimated that the trusts of the term would require from fifteen to twenty years for their fulfilment. Testator directed that the trustees should "during the continuance of the last-mentioned trusts" enter into and hold possession of the rents and profits of the estate "and not deliver the same to any person beneficially interested in any part thereof," and should manage the estate as therein mentioned. Very full powers of management were given to the trustees, provided that when all the trusts of the term should have been fully paid and satisfied the term should cease. He, moreover, gave to the trustees such other powers over the estate as were given to a tenant for life in possession by Settled Land Act 1882 (c 38) (repealed): *Held* H was a person having the power of a tenant for life of the estate within Settled Land Act 1882 (c 38) s 58(1)(ix) (repealed), and his consent was necessary under s 56(2) (repealed), to the effectual exercise by the trustees of the powers of sale and enfranchisement contained in the will.

Re Clitheroe Estate (1885) 31 Ch D 135; 34 WR 169; sub nom

Re Buccleuch's (Duke) (Clitheroe) Estate (1885) 55 LJ Ch 107; 53 LT 733; 2 TLR 133, CA

ANNOTATIONS **Expld & Distd** Re Strangways, Hickley v Strangways (1886) 34 Ch D 423 **Distd** Re Llanover, Herbert v Ram [1907] 1 Ch 635

1860 Discretionary trust for application of income — For benefit of husband, wife and children

(1) A trust, although it be to last during the life of A to apply the rents and profits of an estate for the

benefit of A and of his wife and his children, if any, does not constitute A or A and his wife together, a tenant for life of the estate under Settled Land Act 1882 (c 38) s 2(6) [repealed], or a person with the powers of a tenant for life under s 58 [repealed] of that Act.

(2) The word "possession" in s 2(5) [repealed] and in s 58(1) [repealed] is to be read as in antithesis to "remainder" or "reversion."

(3) The words "so entitled," in s 2(6) [repealed] mean entitled under the direction in the preceding sub-section [repealed], *ie* for life.

(4) To make s 51 [Settled Land Act 1882 (c 38) [repealed]] apply you must find in the settlement a limitation which, but for an attempted prohibition, would constitute a tenant for life capable of exercising the powers of the Act [repealed] (*Cotton LJ*).

Re Atkinson, Atkinson v Bruce (1886) 31 Ch D 577; 54 LT 403; 34 WR 445, CA

ANNOTATIONS As to (1) **Apld** Re Horne's SE (1888) 39 Ch D 84 **Consd** Re Beauchamp's Will Trusts, Cadge v Baker-Hahlo [1914] 1 Ch 676

1861 Discretionary trust for application of income — Discretion as to persons to receive income

The testatrix by her will gave freehold property unto trustees upon trust during the lifetime of her son, GHG, to enter into possession and to receive the rents and profits thereof with the powers of management of trustees in possession during the minority of an infant in tail, and, after payment of certain annuities, in so far as the same were not paid out of the residuary estate, and during the lifetime of her son, or such shorter period or periods, either continuous or discontinuous, as the trustees should think fit, to pay all or any part of the net rents and profits unto, or apply the same for the maintenance or benefit of, all or any one of a number of persons, of whom her son was one. In all these matters the trustees had an absolute discretion. There followed a power to allow all or any of the class of persons already referred to to occupy all or any of the freehold properties, and, subject to such discretionary trusts, the surplus of the rents and profits was to go as if the son were then dead without having exercised the power of appointment hereinafter referred to. There were then remainders in strict settlement, with a further remainder as the son should appoint, and, in default of appointment, to the right heirs of the son. GHG was alive at the time of the summons, having a wife living, but no children, and RG was the right heir of GHG: *Held* the interests of GHG and RG were too unsubstantial for either of them to be the tenant for life of the settlement, and the powers of the tenant for life were therefore exercisable by the trustees thereof.

Re Gallenga Will Trusts, Wood v Gallenga [1938] 1 All ER 106

1862 Instrument not creating succession — Various interest limited to same person

Re Pocock & Prankerd's Contract no 1005 ante

1863 Income payable to several persons — Annuitants

Testator devised his residuary real and personal estate to trustees upon trust to pay out of the rents and profits several life annuities to persons specified, and directed that if in any year there should be a surplus of the income of his residuary real and personal estate over the total amount of the annuities, the trustees should divide the same between such of the annuitants as should be living in shares proportionate to the amount of the annuities to which they should be then entitled: *Held* as the annuitants for the time being were, between them, entitled to the entire rents and profits of the residuary real estate, they were persons having together the powers of a tenant for life under Settled Land Act 1882 (c 38) s 58 (repealed).

Re Bennet, Bennet v Bennet [1903] 2 Ch 136; 72 LJ Ch 524; 88 LT 683

1864 Income payable to several persons — Forfeiture on remarriage — Surplus rents during widowhood

(1) By his will, made in 1903, testator devised all his real estate of every tenure unto and to the use of trustees upon trust that they should, out of the rents and profits thereof, and until the expiration of ten years after his death, or until the death or marriage again of his wife, whichever should be the longer period, pay certain annuities, and the costs and expenses of management of his estate, and should pay the ultimate residue of the rents and profits to his wife during her widowhood. Full powers of management were conferred upon the trustees by the will. Testator died in 1907. Upon a summons by the widow to determine whether she was a tenant for life, or had the powers of a tenant for life, under Settled Land Acts (repealed) in respect of the real estate settled by the will: *Held* she was a person entitled to the income of land under a trust for payment thereof to her during her life, or until forfeiture of her interest therein on her remarriage, and as such had the powers of a tenant for life under Settled Land Act 1882 (c 38) s 58(1)(ix) (repealed).

(2) The word "forfeiture" in Settled Land Act 1882 (c 38) s 58(1)(ix) (repealed) had to be construed to include cesser, or determination on

bankruptcy, alienation, remarrying, or any other event.

Re Sumner's Settled Estates [1911] 1 Ch 315; 80 LJ Ch 257; 103 LT 897; 55 Sol Jo 155; sub nom *Re Sumner, Ellison v Sumner* (1911) 27 TLR 173

ANNOTATION **Distd** Re Astor, Astor v Adams (1921) 91 LJ Ch 277

1865 Interest under intestacy

Re Llanover (Baroness), Herbert v Ram no 1866 post

1866 Terminable life interest

Testatrix devised her freehold hereditaments to the use of her trustees, giving them large powers of management, and directing them to pay certain annuities and other periodic sums out of rents and profits. During the successive lives of plaintiff and two other persons, but not for more than twenty years after testatrix's death, the trustees were to apply the surplus rents in the discharge of incumbrances on the estates thereinbefore devised, or in the purchase of other estates to be held on like trusts.

Subject to and after the determination or failure of the several directions thereinbefore contained the trustees were to stand possessed of the hereditaments in trust for F's daughters successively according to seniority in tail male, with a like remainder to E's daughters. No such daughters were yet *in esse*.

After the determination or failure of the directions and trusts thereinbefore contained, the trustees were to settled the hereditaments to successive uses for lives and in tail for ultimate remaindermen, but without any ultimate limitation of the fee. There were ultimate remaindermen for lives and in tail male *in esse*.

In *Re Llanover (Baroness), Herbert v Freshfield* (2) (see PERPETUITIES vol 37(1) (reissue) no 960), *Farwell J*, held that the direction to apply the surplus rents in the purchase of other estates must be deemed to be struck out by Accumulations Act 1892 (c 58) (repealed), and the accumulation trust must be read as limited to the discharge of incumbrances.

On a subsequent motion to vary the minutes he formally declared that when and so soon as the accumulations should be sufficient to discharge the incumbrances the accumulation trust would become a trust for the purchase of land only and consequently void under Accumulations Act 1892 (c 58) (repealed), and that from that time, and so long as the surplus rents should by law remain undisposed of, they would belong, and be payable by the trustees as received, to plaintiff as heiress at law. The accumulations were not yet sufficient to discharge the incumbrances: *Held* (1) on the construction of the will, subject to the accumulation trust for discharge of incumbrances, the surplus rents would be payable to a daughter of F or E as tenant in tail male, but that until the birth of such a daughter, and subject to any such daughter's interest, the surplus rents subject to the accumulation trust were payable by the trustees to plaintiff as heiress-at-law during the lives of F and E, after whose deaths, subject to any daughter's estate in tail male, the ultimate remainders would come into possession; (2) having regard to the nature and extent of her interest as heiress-at-law, plaintiff had not at the present time the powers of a life tenant either under Settled Land Act 1882 (c 38) s 58(1)(vi) and (ix) (repealed).

(3) *Semble*: Settled Land Act 1882 (c 38) s 58(1)(vi) (repealed) did not apply to a person merely entitled to receive surplus rents from trustees who were in possession and managing the estates, and 58(1)(ix) (repealed) did not apply (*a*) to a terminable life interest, or (*b*) to any interest taken under an intestacy, though comprised in the subject of the settlement under s 2(2) (repealed).

Re Llanover (Baroness), Herbert v Ram [1907] 1 Ch 635; 76 LJ Ch 427; 97 LT 286

ANNOTATIONS As to (2) **Distd** Re Sumner's SE [1911] 1 Ch 315; Re Astor, Astor v Adams (1921) 91 LJ Ch 277; Re Llanover SE [1926] Ch 626. As to (3) **Distd** Re Sumner's SE [1911] 1 Ch 315

1867 Income undisposed of — Arising in absence of trust

Re Llanover (Baroness), Herbert v Ram no 1866 ante

1868 Income undisposed of — Received as part of residue — Not as income of property

Re Astor, Astor v Astor no 1822 ante

1869 Income undisposed of — Received as part of residue — Not as income of property

Re Alston-Roberts-West's Settled Estates [1928] WN 41

ANNOTATION **Apld** Re Gallenga Will Trusts, Wood v Gallenga [1938] 1 All ER 106

1870 Income undisposed of — "Implied or constructive" trust — Resulting trust

Where the income of land devised to trustees is undisposed of during certain lives and results in possession to testator's adult heir during those lives, that heir takes that income under an "implied or constructive" trust for payment thereof to him during those lives within Settled Land Act 1925 (c 18) s 20(1)(viii), read with the definition of trust in s 117(1)(xii), and has consequently the powers of a life tenant.

Re Llanover Settled Estates [1926] Ch 626; [1926] All ER 631; 95 LJ Ch 419; 135 LT 363

1871 Income undisposed of — "Implied or constructive" trust — Resulting trust

Re Alston-Roberts-West's Settled Estates no 1869 ante

1872 Meaning of "forfeiture"

Re Sumner's Settled Estates no 1864 ante

1873 Right to part of income — Remainder to be capital money

Under indentures of settlement and appointment made in 1906 and 1918 respectively, land became settled upon trust to pay two-third parts of the net income thereof to T during his life, and the other one-third part of such net income was directed to be held upon the trusts and subject to the powers upon and subject to which capital money arising under the Settled Land Acts from freehold hereditaments forming part of the settled estate would be held; that was to say, in trust, after the death of T for his first and other sons in tail. During the life of T all the powers conferred by the Settled Land Acts on a tenant for life in possession of settled land were declared to be exercisable by the trustee in relation to the settled estate: *Held* T was not entitled to the income of the settled estate during his life subject to a trust for accumulation of income within Settled Land Act 1925 (c 18) s 20(1)(viii); and, accordingly, he had not the powers of a tenant for life, but the trustees of the settlement had such powers by virtue of the terms of the Settlement and s 23(1) of that Act.

In my judgment there is a substantial distinction between a case where a person is entitled to the whole income of settled land, subject to an overriding trend for the accumulation of income, and a case where a person is entitled only to a certain portion of the income, and the remainder of the income is to be held and dealt with as capital money (*Lawrence J*).

Re Frewen [1926] Ch 580; 95 LJ Ch 297; 134 LT 747; 70 Sol Jo 650

ANNOTATION **Consd** Re Robins, Holland v Gillam [1928] Ch 721

1874 Income during fixed term — If beneficiary so long live

Under a settlement, dated 13 September 1906, lands stood limited, in the events which happened, to the use of trustees for a term of ninety-nine years, if C should so long live, upon trust to pay the rents and profits thereof to C during the remainder of her life, and, subject to the term and the trusts thereof, to the use of W during his life, with remainders over: *Held* C was a person entitled to the income of the settled land during her life, until the determination of her interest by means of the expiration of the term and, consequently, she was a person having the powers of a tenant for life, within Settled Land Act 1925 (c 18) s 20(1)(vii).

Re Waleran Settled Estates [1927] 1 Ch 522; 96 LJ Ch 209; 136 LT 605; 70 Sol Jo 1242

1875 "Immediate binding trust for sale" — Must overreach all prior equitable charges — So as to affect whole subject-matter of settlement

(1) Land is not "subject to an immediate binding trust for sale" within Settled Land Act 1925 (c 18) s 20(1)(viii), unless the trust for sale is exercisable so as to overreach all prior equitable charges, with the result that the whole subject-matter of the settlement is subject to the trust for sale.

(2) Under testator's will T became entitled as tenant in tail of the settled land subject only to a jointure rentcharge of £1,500 appointed by deceased tenant for life to his widow under a power in the will. In 1923 T disentailed, and by a conveyance conveyed the settled land, subject to the jointure, to trustees upon trust for sale, with power to postpone, and to stand possessed of the net proceeds of sale and the rents and profits until sale upon the trusts of a settlement of even date. Under this settlement the income of the proceeds of sale and the rents and profits until sale were applicable in paying life annuities of £5,000 to T, £1,000 to her husband, £3,500 to the jointrees, and in paying the balance to T during her life. In 1924 and 1925 two orders were made under Settled Land Act 1884 (c 18) s 7 (repealed), which together gave T power to exercise all the powers of a tenant for life under Settled Land Acts 1884 to 1890 (repealed): *Held* the settled land was subject to a compound settlement consisting of the will, the disentailing deed, the conveyance and the settlement, and T had the powers of a tenant for life of the compound settlement conferred on her by Settled Land Act 1925 (c 18) s 20(1)(viii), as the land was not "subject to an immediate binding trust for sale" and was entitled to have a vesting deed executed in her favour pursuant to Sch 2 para 1; (3) on the falling in of the jointure T would by virtue of Law of Property Act 1925 (c 20) s 29(4), become entitled to exercise the powers conferred by the orders made under Settled Land Act 1884 (c 18) s 7 (repealed), but must exercise them in the names and on behalf of the trustees for sale.

Re Leigh's Settled Estates [1926] Ch 852; [1926] All ER 688; 95 LJ Ch 511; 136 LT 395; 70 Sol Jo 758

ANNOTATION As to (1) **Distd & Dbtd** Re Parker's SE, Parker v Parker (1927) 71 Sol Jo 981

1876 Income of "land" — Life interests in undivided moieties

Under the will of Lord S, immediately before the coming into operation of Law of Property Act 1925 (c 20), the entirety of his Lancashire estate was limited to trustees for a term of one thousand years with powers to sell or exchange. In the meantime, and subject thereto, H and G were each entitled to a life

interest in an undivided moiety of the estate. During the existence of the term the trustees were entitled to the rents and profits of the estate, which were to be applied in paying off incumbrances: *Held* (1) Paragraph 1 of Pt IV of the First Schedule to the Law of Property Act 1925 (c 20), applied to land held in undivided shares vested in possession only when two elements were present, namely, the absence of any antecedent freehold estate, and present immediate beneficial enjoyment by possession, physical or notional, and therefore did not apply to this case; (2) H and G were not "a person entitled to the income of 'land' " who had the powers of a tenant for life under Settled Land Act 1925 (c 18) s 20(1)(viii), because, undivided shares in land being excluded from the definition of "land" in that Act, it was impossible for two undivided moieties of land to constitute "land" within the section; and, as the entirety of the estate was settled by the will, and there was no tenant for life, or person having the powers of a tenant for life, the trustees of the will had the powers of a tenant for life, and the fee simple was vested in them under paras 5 and 6(*c*) of Pt 2 of the First Schedule to the Law of Property Act 1925 (c 20), and Settled Land Act 1925 (c 18) s 23(1)(*b*); (3) the powers of sale and exchange and other powers given to the trustees by the will remained exercisable by them.

Re Stamford and Warrington (Earl), Payne v Grey [1927] 2 Ch 217; [1927] All ER 469; 96 LJ Ch 461; 137 LT 633; 71 Sol Jo 620

ANNOTATION As to (2) **Distd** Re Stevens & Dunsby's Contract [1928] WN 187

1877 Income of "land" — Trust for accumulation of income for payment of mortgages
Re Stevens & Dunsby's Contract [1928] WN 187

K Person beneficially entitled in fee simple subject to subsisting charge

LAW See Halsbury's Laws (4th edn) vol 42 para 760

1878 Person entitled in fee simple on failure of contingency — Gift to person contingently on attaining twenty-one
Re Astor, Astor v Astor no 1822 ante

1879 Fee simple subject to rentcharge — Purchased by company — After disentail by tenant in tail
Re Carnarvon's (Earl) Chesterfield Settled Estates, Re Carnarvon's (Earl) Highclere Settled Estates no 1031 ante

L Trustees of settlement

LAW See Halsbury's Laws (4th edn) vol 42 para 760

1880 Trustees appointed by settlor — For purpose of Settled Land Acts 1882 to 1890 (repealed) — With powers of tenant for life
Re Bird, Watson v Nunes no 1009 ante

1881 Trustees of will — Interest of tenant for life not "land" — Undivided moieties
Re Stamford & Warrington (Earl), Payne v Grey no 1876 ante

1882 Trustees of will — Trust for payment of allowance
Re Alston-Roberts-West's Settled Estates no 1869 ante

1883 Limitation in trust for charity
Re Higgs, Symonds v Rhodes [1927] WN 316

1884 Settled Land Act 1925 (c 18) s 24 — Tenant bankrupt — Refusal to exercise powers
The tenant for life in possession of an agricultural estate became bankrupt and ceased to have any substantial interest in the land. He repudiated his title as tenant for life, neglected the management of the property and refused to let farms which had become vacant, so that they became derelict. He also refused to sell or let land requisitioned by the War Department: *Held* he had unreasonably refused to exercise his powers of leasing and sale under Settled Land Act 1925 (c 18), and therefore the court made an order under s 24(1) of the Act vesting all leasing powers, and the power of sale of requisitioned land in the Public Trustee as trustee of the settlement, and for delivery to the trustee of all documents of title relating to the settled land.

To give the court jurisdiction to make such an order mere neglect or failure on the part of the tenant for life to exercise his powers is not sufficient; a definite refusal to do so must be proved.
Re Thornhill's Settlement [1941] Ch 24; [1940] 4 All ER 249; 111 LJ Ch 5; 164 LT 190; 57 TLR 76; 84 Sol Jo 633, CA

ii ENFORCEMENT OF EQUITABLE INTERESTS

LAW See Halsbury's Laws (4th edn) vol 42 para 765 et seq

iii RIGHT TO POSSESSION

1 Discretion of court

LAW See Halsbury's Laws (4th edn) vol 42 para 768 et seq

1885 Legal tenant for life

Whether or not legal tenants for life, whose legal estate is subject to a term of years in trustees, there being trusts, for management and payment of incumbrances, ought to be let into possession is a question for the court to decide in the exercise of its discretion, and having regard to all the circumstances and in particular the best way of dealing with the property. Such tenants for life are not entitled as of rights to be let into possession.

Re Stamford & Warrington (Earl), Payne v Grey [1925] Ch 162; 94 LJ Ch 294; 133 LT 337; 69 Sol Jo 194; on appeal [1925] Ch 589, CA

1886 Exercise of discretion — Terms imposed — Undertaking for protection of estate

(1) The court has a judicial discretion as to giving possession upon proper terms, to an equitable tenant for life, and the Settled Land Acts (repealed) afford additional ground for exercising this discretion in favour of the person having such extensive statutory powers.

(2) A married woman, restrained from anticipation under a settlement [of real estate to a rentcharge] by way of trust for sale, which conferred wide powers of management upon the trustees until sale, was held entitled, upon proper undertakings for the protection of the estate and the trustees being given, to be let into possession of the settled land, and to exercise all the powers conferred by the Acts (repealed) on a tenant for life, except the power of sale and exchange; but as no complaint was made against the conduct of the trustees she was directed to pay the costs of the application.

(3) The owner of the rentcharge was not a necessary party to the application.

Re Bagot's Settlement, Bagot v Kittoe [1894] 1 Ch 177; 63 LJ Ch 515; 70 LT 229; 42 WR 170; 38 Sol Jo 80; 8 R 41

ANNOTATIONS As to (1) **Consd** Re Richardson, Richardson v Richardson [1900] 2 Ch 778. As to (2) **Folld** Re Money Kyrle, Money Kyrle v Money Kyrle (1900) 69 LJ Ch 780 **Distd** Re McCarthy (bkpt), Ex p trustee of bkpt v McCarthy [1975] 2 All ER 867

1887 Exercise of discretion

Re Newen, Newen v Barnes no 1905 post

1888 Assignee in bankruptcy of equitable tenant for life

Re Hunt, Pollard v Greake (1901) 45 Sol Jo 652, CA

1889 Exercise of discretion — Terms imposed — Undertaking for protection of estate

Re Bagot's Settlement, Bagot v Kittoe no 1886 ante

1890 Exercise of discretion — Terms imposed — Undertaking for protection of estate

Land which was subject to mortgages was settled, subject to a term for securing incumbrances, to the use, in the events which happened, of A for life, with remainders over. The trusts of the term provided that so long as the mortgages remained unpaid the trustees should receive the rents and profits and manage the premises and keep down the interest of the mortgage debts and certain rentcharges created by the settlement, that they should then pay to the tenant for life for the time being subject to the term an annuity of £600 a year, and should apply the residue of the rents and profits towards the payment of the principal moneys charged by the mortgages and there was a proviso for the cesser of the term upon the discharge of the mortgage debts. The settlement conferred on the trustees an immediate power of sale and exchange, but no power of leasing. The court having held that A was a person having the powers of a tenant for life under Settled Land Act 1882 (c 38) (repealed), ordered him to be let into possession upon his undertaking to perform the trusts of the terms and give him the custody of the title deeds.

Re Richardson, Richardson v Richardson [1900] 2 Ch 778; 69 LJ Ch 804

ANNOTATIONS **Folld** Re Money Kyrle's Settlmt, Money Kyrle v Money Kyrle [1900] 2 Ch 839; Re Wilkinson, Lloyd v Steel (1901) 85 LT 43 **Distd** Re Llanover, Herbert v Ram [1907] 1 Ch 635 **Apld** Re Stamford & Warrington, Payne v Grey (1925) 94 LJ Ch 294

1891 Exercise of discretion — Terms imposed — Undertaking for protection of estate — Form of undertaking

Testator gave his annual ground rents, secured on two estates, to trustees upon trust to collect and apply the same in reduction of a mortgage debt thereon, and subject thereto upon trust as to two-fifths of the annual income for J for life, as to other two-fifths for P for life, and as to the remaining one-fifth for L for life; and he directed that on the decease of either J, P or L his or her share of the ground rents should go to his or her children, and testator empowered his trustees to sell the ground rents, pay off the mortgage debt, invest the residuary proceeds of sale, and stand possessed thereof upon the trust declared respecting the annual ground rents should they remain unsold. Testator died in 1891. J had three, and P one, infant children entitled to the ground rents in remainder. The trustees considered it advisable in the interest of all the beneficiaries to retain the ground rents and apply the income in reduction of the mortgage debt thereon, which by January 1901, was reduced to less than half. The mortgage debt became vested in the surviving trustee of the

will. Upon a summons taken out by the tenants for life against the surviving trustee and infant remaindermen: *Held* the tenants for life were entitled to immediate possession of the ground rents and to sell them to pay off the mortgage debt and also to delivery up of the documents of title held by the surviving trustee, as trustee, relating to the ground rents.

It is in accordance with the settled practice of the courts and with the decision of *Re Richardson, Richardson v Richardson* (no 1890 ante) that they should be let into immediate possession on giving a proper undertaking that what remains to be done for the benefit of persons other than the tenants for life shall be duly performed. The undertaking must be the same as in the case of *Re Money Kyrle's Settlement, Money Kyrle v Money Kyrle* (no 1894 post) to pay all outgoings in respect of the ground rents and to keep down the interest on all charges and incumbrances thereon or any part thereof and to account to the trustee for all receipts and payment (*Cozens-Hardy J*).
Re Wilkinson, Lloyd v Steel (1901) 85 LT 43

ANNOTATION **Consd** Re Stamford & Warrington, Payne v Grey (1925) 94 LJ Ch 294

1892 Exercise of discretion — Terms imposed — Whether security ordered

Reversion of goods after a life given to S, the possessor for life, decreed to give security to deliver the goods or value after her death.
Bracken v Bently (1637) 1 Rep Ch 110; 21 ER 522

1893 Exercise of discretion — Terms imposed — Whether security ordered — Administration action

It is not now the practice, upon an order on further consideration in an administration action in ordinary cases, to require the tenant for life to give security before being let into possession of settled land and heirlooms, but he is only required to sign an inventory of the latter.
Temple v Thring (1887) 56 LJ Ch 767; 56 LT 283

1894 Exercise of discretion — Terms imposed — Whether security ordered — To pay income to trustees

A portion of family estates was subject to a term, created in 1868, that trustees manage and apply the net income in paying off mortgages, on which large sums were still due. The court put the tenant for life into possession of the land subject to the term, he giving security to pay the net income over to the trustees.
Re Money Kyrle's Settlement, Money Kyrle v Money Kyrle [1900] 2 Ch 839; 69 LJ Ch 780; 83 LT 74; 49 WR 44

ANNOTATIONS **Folld** Re Wilkinson, Lloyd v Steel (1901) 85 LT 42 **Distd** Re Llanover, Herbert v Ram [1907] 1 Ch 635 **Consd** Re Stamford & Warrington, Payne v Grey (1925) 94 LJ Ch 294

1895 Exercise of discretion — Terms imposed — Security for protection of trustees — Leasehold property subject to onerous covenant

Re Newen, Newen v Barnes no 1905 post

1896 Exercise of discretion — Terms imposed — Security for protection of trustees — Court dissatisfied with applicant's means

Re Hunt, Pollard v Greake (1901) 45 Sol Jo 652, CA

1897 Exercise of discretion — Effect of Settled Acts (repealed)

Testator, who died in 1883, devised his real estate to the use of his trustees, upon trust, as to part thereof, after the attainment of twenty-one by his grandson, to pay the rents and profits to him during his life, or until he should become bankrupt, or assign, charge or incumber the same, and he gave his trustees powers of maintaining, managing, and improving his real estate, and of lease, sale, and exchange. The grandson applied to be given possession of the real estate, and for custody of the title deeds: *Held* (1) the Settled Land Acts (repealed) raised a presumption in favour of possession by an equitable tenant for life which did not before exist, and the grandson's application should be granted upon his giving a sufficient undertaking for the preservation of the property.

(2) Form of order.

Re Wythes, West v Wythes [1893] 2 Ch 369; 62 LJ Ch 663; 68 LT 520; 41 WR 375; 9 TLR 327; 37 Sol Jo 327; 3 R 433

ANNOTATIONS As to (2) **Folld** Re Bagot's Settlmt, Bagot v Kittoe (1893) 63 LJ Ch 515; Re Money Kyrle, Money Kyrle v Money Kyrle (1900) 69 LJ Ch 780; Re Phillimore, Phillimore v Miles (1904) 52 WR 682

1898 Exercise of discretion — Effect of Settled Land Acts (repealed)

Re Bagot's Settlement, Bagot v Kittoe no 1886 ante

Scottish, Irish and Commonwealth Cases

1899 Essential repairs — Jurisdiction to grant application — Principle of salvage applied

Where the trustees of a settlement are not trustees for sale and have no power of sale or management and where the limitations are equitable, the court will, as a last resort if no other way be open, apply the principle of salvage in order to sanction the expenditure out of capital of the money necessary for doing such repairs, constituting permanent improvements as are essential to the preservation of the settled property. The court will authorise a mortgage of the settled property for the purpose of raising such money.
Re Johnson's Settlement [1944] IR 529 (IR)

LAW See Halsbury's Laws (4th edn) vol 42 para 768 et seq

1900 Where trusts to keep down charges

Devise of real estates to trustees, for a term of twenty-one years, and subject thereto, and to the trusts thereof, to A for life, with liberty to cut timber, etc, for buildings and repairs only; remainder to B for life, with like liberty, etc; remainder to the sons of B successively in tail; and, after like remainders, to C and D and their sons respectively, remainder to E for life, with like liberty, etc; remainder to the sons of E successively in tail, with divers remainders over; remainder to testator's own right heirs, with the declaration that the trustees of the term should receive the rents and profits of the estates, cut, fell and sell the timber at mature growth in due succession, and yearly, until testator's debts and pecuniary legacies should be paid, thereout pay, (*a*) a certain annuity, and also a yearly rentcharge of £1,000, to the person entitled to the estates expectant on the determination of the term; (*b*) the expenses of the trust; (*c*) his funeral expenses; and (*d*) the pecuniary legacies and annuities given by his will, or so much as his personal estate should not pay; and after such payment, or the raising of a fund sufficient for the same, to permit the person entitled to the estates expectant on the term to enter into possession thereof, subject to such annuities as should then remain charged, and the term then to cease. Testator empowered the tenants for life, and the respective devisees in possession, to exchange part of the devised lands for others of greater or equal value, and authorised his executors to preserve the wood, so as to continue a succession in the falls thereof, and he empowered them during and after the term, until some person was entitled to the estates in tail, or for some greater estate, to enter and cut timber at mature growth for sale, and to apply the proceeds in payment of his funeral expenses, debts and legacies, until the trusts of the term should be satisfied; and then, with the consent of the devisees in possession, to invest the surplus in the purchase of other lands in fee, to be settled to the same uses as the devised estates. Testator died in 1803. The personal estate sufficed to pay his debts and pecuniary legacies, but not to provide for the annuities. B then the first tenant for life on the death of testator, entered into possession of the estate, and so continued during his life. B died in 1837 without issue, whereupon E, the next surviving tenant for life, entered into possession. In a suit instituted in 1842, by the first son of E as tenant in tail expectant on the decease of E, against the representatives of the trustees, and the executors of B deceased tenant for life: *Held* (1) plaintiff, as such tenant in tail expectant, was not entitled to relief in equity, on the ground that the exchange effected by B of certain of the devised estates for other estates was not a due exercise of the power of exchange; for, if the exchange was not warranted by the power, the legal estate in the devised premises did not pass by the conveyance.

(2) I do not mean to express any doubt but that when all the above charges had been satisfied, and the settled estates were thereby cleared of all charge except annuities, the arrears of which were paid, the person for the time being entitled in possession to the settled estate subject to the term would be entitled during the residue of the term to the beneficial receipt of the rents and profits of the estates, keeping down the annuities (*Wigram V-C*).

Ferrand v Wilson (1845) 4 Hare 344; 15 LJ Ch 41; 9 Jur 860; 67 ER 680

ANNOTATION As to (1) **Consd** Langdale v Briggs (1856) 8 De GM&G 391

1901 Where trust to pay debts — On discharge of receiver

Hoskins v Campbell, Gibbon v Campbell [1869] WN 569

1902 Where trust to pay debts — On discharge of receiver

Testator, who died in 1844, devised to trustees a moiety of his real estates upon trusts for his son for life, with remainder to his grandson for life and his sons in tail, and to pay all his debts and sums of money as he should owe at the time of his decease, whether by way of mortgage bond, or otherwise, including a sum of £8,000 charged upon the estates; and he directed that the rents and profits of the estates should be received by the trustees and be applied in liquidation of the debts until the whole, including the £8,000, should be paid; that no person to whom any estate for life or in tail was limited should be entitled to the rents and profits until the estates were totally disincumbered and clear of debts; and that the trustees should invest the moneys which might come to their hands upon good security at interest until the same should be applied in payments under the trusts. A receiver had been appointed. The whole of the debts had been paid, excepting the £8,000, by sales of parts of the estates under orders of the court, and there was an accumulation fund in court sufficient to pay the £8,000: *Held* the receiver must be discharged, and the tenant for life be let into possession of the estates.

Tewart v Lawson (1874) LR 18 Eq 490; 43 LJ Ch 673; 22 WR 822

ANNOTATIONS **Folld** Norton v Johnstone (1885) 30 Ch D 649 **Apld** Re Green, Baldock v Green (1888) 40 Ch D 610; Re Heathcote, Heathcote v Trench [1904] 1 Ch 816 **Distd** Re Webster, Thompson v Thompson (1910)

102 LT 905 **Apld** Re Brandon, Samuels v Brandon (1932) 49 TLR 48

1903 Where trust to pay debts — Accumulation of rents to pay debts — Accumulation sufficient for payment

Testator devised his real estates to the use of plaintiff for life, with an ultimate remainder to A in fee, and provided that the trustees should receive the rents, and, after paying thereout the interest on the mortgages affecting the estates, should accumulate the residue "until the amount of such accumulation should be sufficient to discharge the principal of the mortgages." Testator directed that, as soon as the accumulations should be sufficient to pay off the mortgages, the trustees should forthwith pay off the same. Testator declared that plaintiff, or other the person for the time being entitled for life or in tail to the estates under the limitations of the will, should not be entitled to receive any part of the rents until the mortgages had been paid off. After testator's death the part of the estates which was subject to a mortgage was sold by the mortgagees under their power of sale, in effect, at the request of plaintiff and with the sanction of the court. The proceeds of sale were not enough to pay off the whole of the mortgage debt, and the balance was paid out of the accumulation of rents. A part of the accumulated fund remained: *Held* the tenant for life was entitled, to be let into possession of the estates remaining unsold, and to have the surplus of the accumulated fund paid to him.

Norton v Johnstone (1885) 30 Ch D 649; 55 LJ Ch 22; 34 WR 13

ANNOTATIONS **Distd** Re Webster, Thompson v Thompson (1910) 102 LT 905 **Apld** Re Brandon, Samuels v Brandon (1932) 49 TLR 48

1904 Female tenant for life

A bare trustee, who, under Fines & Recoveries Act 1833 (c 74) s 31 (repealed), was protector of a settlement, could insist on retaining the legal estate, only so long as the purposes of the trust existed—that was, so long as, according to the rules of this court, he was required to be a trustee.

Therefore, when there was a devise of lands to trustees upon trust for testator's daughter during her life, for her separate use, without power of anticipation, with remainder to the use of her children as tenants in common in tail, with remainders over: *Held* testator's daughter, having become *discoverte* and being *sui juris*, could compel a conveyance by the trustees of their legal estate.

Buttanshaw v Martin (1859) John 89; 33 LTOS 300; 70 ER 351; sub nom

Burtanshaw v Martin (1859) 5 Jur NS 647

1905 Female tenant for life

(1) The power of the court to make an order allowing an equitable tenant for life to take possession of settled property is discretionary and will only be made upon proper undertakings. The order on an application for the purpose must contain terms protecting the trustees especially where the property is subject, as in the case of leaseholds, to onerous covenants. (2) The application may be made by originating summons, which must be served upon the trustees, and upon the mortgagees, if any, of the interest of the tenant for life, though not, under ordinary circumstances, upon the reversioner. (3) Where the tenant for life has mortgaged his interest, the order letting him into possession does not carry with it the right to the custody of the title deeds; these the mortgagee can insist on being retained by the trustees.

(4) A female equitable tenant for life is not necessarily disqualified from being let into possession.

Re Newen, Newen v Barnes [1894] 2 Ch 297; 63 LJ Ch 763; 70 LT 653; 58 JP 767; 43 WR 58; 8 R 309

1906 Form of application to court — Originating summons

Re Newen, Newen v Barnes no 1905 ante

1907 Who are necessary parties

Re Bagot's Settlement, Bagot v Kittoe no 1886 ante

1908 Who are necessary parties

Re Newen, Newen v Barnes no 1905 ante

1909 Costs of application

Re Bagot's Settlement, Bagot v Kittoe no 1886 ante

3 Custody of title deeds

A In general

LAW See Halsbury's Laws (4th edn) vol 42 para 769

1910 Pending suit — Custody most convenient to court

Testator devised his real estate in strict settlement, giving to trustees a power of sale and exchange, to be exercised with the consent of the person entitled in possession, if of full age; and he bequeathed his residuary personalty to the trustees upon the trusts declared concerning the moneys to arise from sale under the power. Shortly after the death of testator a decree was made at the suit of the first tenant for life, then an infant, for the execution of the trusts of will. Parts of the estates were sold under the powers, and the money paid into court, and a large fund was there applicable to the purchase of real estates. After the tenant for life came of age inquiries were directed as to the investment of part of the funds in real estate, and as to propriety of applying to Parliament for a

private estate Act, which inquiries were still being prosecuted. Shortly after this the tenant for life applied to the court that the trustees might be ordered to deliver to her the title deeds of the estates, subject to the limitations of the will, which application was refused: *Held* as a suit affecting the estates was being prosecuted, the custody of the deeds did not depend on the question who had the legal right to them, but on the question what custody was most convenient for the purposes of the suit; and the Court of Appeal would not interfere with the discretion of the Vice-Chancellor on the subject.

Stanford v Roberts (1871) 6 Ch App 307; 19 WR 552, LJJ

ANNOTATIONS **Consd** Leathes v Leathes (1877) 5 Ch D 221; Re Ind, Coope, Fisher v The Co (1909) 26 TLR 11

1911 Right of tenant in tail to possession — As against trustees of a term to raise portions

F and W, as solicitors for the tenant for life, held the title deeds which afterwards passed into the possession of W and C, their successors. The tenant for life died, and the estate then stood limited, first, to F and W for 500 years to secure a sum of £2,000, with remainder to trustees for 600 years to secure a jointure and portions, with remainder to A in tail. A being an infant, a suit was instituted on his behalf, in which the £2,000 was raised on the security of the term. Upon that occasion F and W covenanted with the mortgagees to produce the title deeds from time to time, and not to part with them; but they were relievable from the covenant on certain terms. A receiver was appointed in the suit, and the court directed the costs of the solicitors of the suit to remain charges upon the estate at interest. W and C were solicitors in the suit for A. A upon coming of age, presented a petition for the delivery of the title deeds: *Held* (1) independently of the covenant W and C held the deeds for A and not for the termors, but the covenant having been entered into for the benefit of the infant, F and W were not bound to part with the deeds, until released from their covenant; (2) W was not entitled to hold the deeds for the trustees of the term of 600 years, or for any costs other than those of seeing himself properly released from the covenant, and he had no right to require them to be delivered to the receiver in the cause.

Hotham v Somerville (1842) 5 Beav 360; 6 Jur 861; 49 ER 617

1912 Deeds relating to two estates — In custody of solicitors of former owner of both — Claim by owner of one — Deeds deposited in court

The owner in fee of an estate gave her title deeds into the possession of her solicitors. She afterwards settled the estate, and under the limitations of the settlement part of the estate became vested, after her death, in plaintiffs, and the remainder in the heir-at-law of the settlor. The heir-at-law could not be found. The solicitors refused to deliver up the deeds to plaintiffs: *Held* plaintiffs could not recover possession of the deeds from the solicitors without the concurrence of the heir; but the deeds must be deposited in court, plaintiffs having liberty to inspect and make copies of them.

Wright v Robotham (1886) 33 Ch D 106; 55 LJ Ch 791; 55 LT 241; 34 WR 668, CA

1913 Gift to class on attaining twenty-one — Right of member attaining twenty-one

Testator devised freehold premises upon trusts after his daughter's decease for her children attaining twenty-one or marrying in equal shares. At the death of testator's daughter one child had attained twenty-one and three were infants: *Held* the child who had attained twenty-one had the powers of a tenant for life under Settled Land Act 1882 (c 38) s 58(1)(ii) (repealed), as having an estate in fee simple in possession with an executory limitation or disposition over in the event of other members of the class obtaining vested interests in the shares of the premises which had not for the time being vested in the other children of testator's daughter and was entitled to the possession of the title deeds.

Re Walmsley's Settled Estates (1911) 105 LT 332; 55 Sol Jo 600

B Tenant for life

LAW See Halsbury's Laws (4th edn) vol 42 para 769

1914 Whether deeds ordered to be deposited in court

Every remainderman has a right to come into this court, and pray the aid thereof to compel persons to bring in the deeds and evidences relating to the estate (*Lord Macclesfield C*).

Reeves v Reeves (1724) 9 Mod Rep 128; 88 ER 358, LC

1915 Whether deeds ordered to be deposited in court

His lordship refused to direct the deeds and writings to be deposited in court, because plaintiff's interest in the real was too remote to warrant it, and is never done but in the case of a remainderman, whose interest in expectant on a mere tenancy for life.

Ivie v Ivie (1738) 1 Atk 429; 26 ER 274, LC

1916 Whether deeds ordered to be deposited in court

A remainderman in tail or a reversioner in fee may come into this court to have the title deeds secured

for their benefit though an estate for life is standing out.

Smith v Cooke (1746) 3 Atk 378; 26 ER 1018, LC

1917 Whether deeds ordered to be deposited in court

A son, remainderman in tail under a settlement made by a grandfather in which the father is tenant for life, without impeachment of waste, prefers a bill to have the title deeds brought into court; *Lord Hardwicke* refused to direct it, and said some third person, and secure place, agreed upon by the parties, would be a much properer depository than a master.

Pyncent v Pyncent (1747) 3 Atk 571; 26 ER 1129, LC

ANNOTATION **Dbtd** Leathes v Leathes (1877) 3 Ch D 221

1918 Whether deeds ordered to be deposited in court

Testator charged annuities exclusively on his real estate, the legal estate of which he devised to trustees, upon trust to pay the rents to or permit the same to be received by one for life, with remainders over. On testator's death, the tenant for life took possession of the estate and title deeds, and he kept down the annuities, but cut some timber. The trustees acquiesced for four years, but afterwards proceeded by action to recover the deeds and to receive the rents. The court by motion, restrained the proceedings, on the tenant for life undertaking to keep down the annuities, not to grant leases or cut timber without the consent of the trustees, and bringing the deeds into court.

Denton v Denton (1844) 7 Beav 388; 3 LTOS 98; 8 Jur 388; 49 ER 1115

1919 Where deeds deposited in court — Right of tenant for life to delivery out

Webb v Webb no 1927 post

1920 Where deeds deposited in court — Right of tenant for life to delivery out

Hicks v Hicks (1785) 2 Dick 650; 21 ER 425

1921 Where deeds deposited in court — Right of tenant for life to delivery out

Title deeds delivered out of court upon the application of the trustees and the tenant for life.

Duncombe v Mayer (1803) 8 Ves 320; 32 ER 377, LC

1922 Where deeds deposited in court — Right of tenant for life to delivery out

Deeds brought into court by the executor under the common order for production of documents made in a creditor's suit, will, after the debts are paid, be ordered to be delivered out to the party by whom they were deposited; and the court refused to order such deeds to be delivered to plaintiff in the cause, although he was the tenant for life of the estate comprised in the deeds.

Plunkett v Lewis (1847) 6 Hare 65; 67 ER 1084

1923 Where deeds deposited in court — Right of tenant for life to delivery out

(1) The court will not interfere in cases of permissive waste by tenant for life.

(2) The rule of the court is settled that as between father and son the court never interferes with regard to the possession of title deeds but leaves them to the father as tenant for life. But with regard to strangers tenant for life and remaindermen the court interferes to have the title deeds secured. Here the case is much stronger than the ordinary case. The deeds are in court and it is asked that they should be delivered out. The reversioner has no connection with the person who is tenant for life and the conclusion I have come to is that the title deeds will remain in court (*Wood V-C*).

Warren v Rudall, Ex p Godfrey (1860) 1 John&H 1; 29 LJ Ch 543; 2 LT 693; Jur NS 395; 8 WR 331; 70 ER 637

ANNOTATIONS As to (2) **Consd** Taylor v Sparrow (1863) 4 Giff 703 **Dbtd** Leathes v Leathes (1877) 3 Ch D 211

1924 As against jointress

Ford v Peering no 1928 post

1925 Tenant for life entitled to custody as against remainderman

If tenant for life have a deed, whereby the reversion and inheritance is in another, he may at law detain the deed against the reversioner (*Lord Nottingham C*).

Banbury v Briscoe (1680) 2 Cas in Ch 42; 22 ER 837, LC

1926 Tenant for life entitled to custody as against remainderman

Equity will oblige tenant for life to deliver deeds to the heir confirming the life estate; but if there are any mesne remainders in tail, as long as there is a possibility of issue the court will not order them to be taken out of the hands of the tenant for life.

Joy v Joy (undated) 2 Eq Cas Abr 284; 22 ER 239

1927 Tenant for life entitled to custody as against remainderman

By the decree, the estates, or a sufficient part, were directed to be sold, and all deeds and writings relating to the estates, to be produced before the master; the deeds were accordingly left with the master: part of the estates were afterwards sold, and the incumbrances being discharged, the tenant for life of the estates, applied the above day to have the deeds and writings delivered to him,

which, upon hearing an affidavit of notice read, the Lords Commissioners ordered.
Webb v Webb (1757) 1 Dick 298; 21 ER 283; subsequent proceedings, sub nom
Webb v Lymington (Lord), Webb v Webb (1757) 1 Eden 8

1928 Tenant for life entitled to custody as against remainderman
Primâ facie title deeds are property in the custody of the tenant for life. May be taken from a jointress upon her jointure being confirmed.
Ford v Peering (1789) 1 Ves 72; 30 ER 236, LC

1929 Tenant for life entitled to custody as against remainderman
Title deeds are incident to the possession under a freehold title.
Strode v Blackburne (1796) 3 Ves 222; 30 ER 979, LC

ANNOTATION **Consd** Clayton v Clayton [1930] 2 Ch 12

1930 Tenant for life entitled to custody as against remainderman
Garrod v Moor (1846) 8 LTOS 270

1931 Tenant for life entitled to custody as against remainderman
The legal tenant for life is entitled to the custody of the title deeds, and they will not be ordered to be deposited in court, merely because the tenant for life is heir-at-law, and claims the immediate reversion against the residuary devisee.
Garner v Hannyngton (1856) 22 Beav 627; 52 ER 1250

ANNOTATION **Apld** Leathes v Leathes (1877) 5 Ch D 221

1932 Tenant for life entitled to custody as against remainderman
(1) The general rule of law is, that the party who is entitled to the land is entitled to the possession of the deeds (*Channell B*).

(2) If a tenant for life had parted with the title deeds, professing to convey the entire estate, the right of the remainderman to the deeds would attach when his right to the land attached (*Channell B*).
Plant v Cotterill (1860) 5 H&N 430; 29 LJ Ex 198; 2 LT 20; 8 WR 281; 157 ER 1249

1933 Tenant for life entitled to custody as against remainderman
Defendant who claims under a contingent remainderman, is not entitled to the possession of titles deeds, as against plaintiff who is tenant for life in possession.
Allwood v Heywood (1863) 1 H&C 745; 1 New Rep 289; 32 LJ Ex 153; 7 LT 640; 9 Jur NS 108; 11 WR 291; 158 ER 1084

ANNOTATION **Apld** Leathes v Leathes (1877) 5 Ch D 221

1934 Tenant for life entitled to custody as against remainderman
A legal tenant for life of freeholds is entitled to the custody of the title deeds, and the court will not interfere as between a tenant for life and remainderman, except where there is danger to the safety of the deeds if left in the hands of the tenant for life, or where the court requires the deeds for the purpose of carrying out trusts relating to the property. On an application by a tenant for life in remainder of settled estates for the title deeds to be deposited in court: *Held* the tenant for life in possession was entitled to their custody.
Leathes v Leathes (1877) 5 Ch D 221; 46 LJ Ch 562; 36 LT 646; 25 WR 492

1935 Tenant for life entitled to custody as against remainderman
Re Beddoe, Downes v Cottam [1893] 1 Ch 547; 62 LJ Ch 233; 68 LT 595; 41 WR 177; 37 Sol Jo 99; 2 R 223, CA

ANNOTATION **Expld** Dagnell and another v JL Freedman & Co (a firm) and others [1993] 2 All ER 162

1936 When court will interfere — Danger to safety of deeds
Leathes v Leathes no 1934 ante

1937 When court will interfere — Trusts to be carried out
Leathes v Leathes no 1934 ante

1938 Whether tenant for life entitled to possession as against trustee
Testator devised the residue of his real estate to plaintiffs and their heirs, upon trust to permit and suffer his sisters-in-law S and M to receive and take the rents and profits for life, without power of anticipation, and in case either should die or marry, then the one surviving and remaining unmarried to receive the whole income; but in case both should marry, then upon trust to sell and distribute the proceeds in manner thereinafter mentioned, as if they had both died; and from and after the decease of them, S and M, or both of them marrying, then testator directed plaintiffs to stand possessed of the trust funds, upon trust to divide same amongst his nephews and nieces equally. The tenants for life were empowered to renew leases for terms of years in the names of the trustees. S died in the lifetime of testator: *Held* M, the legal tenant of life, having possession of the title deeds, was entitled to retain them as against plaintiffs the trustees.
Taylor v Sparrow (1863) 4 Giff 703; 9 LT 438; 9 Jur NS 1226; 66 ER 889

1939 Where estate charged — Right of tenant for life to custody — Subject to undertaking for safe custody and production

An equitable tenant for life of a settled estate declared entitled to the custody of the title deeds upon undertaking not to part with them without the consent of the trustees, and to produce them to the trustees upon all reasonable occasions.

Re Burnaby's Settled Estates (1889) 42 Ch D 621; 58 LJ Ch 664; 61 LT 22

ANNOTATION **Apld** Re Wythes, West v Wythes [1893] 2 Ch 369

1940 Where estate charged — Right of tenant for life to custody — Subject to undertaking for safe custody and production

An equitable tenant for life who was absolutely entitled to the property, subject only to a jointure in favour of his mother: *Held* entitled to have the documents of title handed over to him by the trustees, on his giving an undertaking not to part with them pending the settlement of the duties payable on the decease of deceased tenant for life, which duties he was the person ultimately liable to pay.

Re Dodd, Dodd v Dodd (1918) 62 Sol Jo 451

1941 Where estate charged — Right of tenant for life to custody — Subject to undertaking for safe custody and production — Form of order

Re Wythes, West v Wythes no 1897 ante

1942 Where estate charged — Right of tenant for life to custody — Subject to undertaking for safe custody and production — Form of order

Re Paddon, Staincliffe v Adlam [1909] WN 162

1943 Where estate charged — Right of tenant for life to custody — Subject to undertaking to account for rents

Re Money Kyrle's Settlement, Money Kyrle v Money Kyrle no 1894 ante

1944 Where estate charged — Right of trustees to custody

Re Newen, Newen v Barnes no 1904 ante

1945 Mortgagee in possession of deeds — Not obliged to deliver them up

Mortgagee gets a settlement into his hands by indirect means, yet shall not be obliged to deliver it up.

Siddon v Charnells (1731) Bunb 298; 145 ER 680

1946 Deeds brought into court by tenant for life — Not delivered out without consent of mortgagee — Deeds previously taken out of jurisdiction

A suit was instituted for raising portions out of a settled estate. Pending the suit the tenant for life took a number of the leases to Paris. He afterwards, under an order of the court, brought the whole of the title deeds and leases into court for the purposes of the suit. The purposes of the suit having been satisfied, and the portions raised by mortgage, he applied to have the title deeds and leases given up to him, which application was opposed by the mortgagees: *Held* as the tenant for life had, on a former occasion, taken some of the deeds abroad, the delivery of them to him ought not to be ordered without the consent of the mortgagees.

Jenner v Morris (1866) 1 Ch App 603; 14 WR 1003, LJJ

ANNOTATION **Consd** Leathes v Leathes (1877) 5 Ch D 221

C Trustees

LAW See Halsbury's Laws (4th edn) vol 42 para 769

CROSS REFERENCES See no 1914 et seq ante (right as against tenant for life); INFANTS vol 28(3) (2nd reissue) no 1305 (where infant tenant in tail in possession); REAL PROPERTY vol 38 (reissue) no 4114 et seq (trustees generally)

1947 Right as against heir

Plaintiff, as heir-at-law of C, sued defendant to recover possession of a title deed under the following circumstances: by a conveyance of 12 November 1862, certain freehold property was conveyed to C in fee. On 13 July 1865, C, by an ante-nuptial settlement of that date, in consideration of his intended marriage with defendant's sister, charged the property with the payment, after his death, of a year annuity of £12 to her during her life, and secured same by a grant of the property to defendant, as trustee for his sister, for a term of 100 years, with the usual powers of distress and entry, etc, in case the quarterly payments of the annuity being in arrears. Upon the execution of the settlement C handed the deed of conveyance of 12 November 1862, to defendant, and said to him "You shall have the deed of the house to hold in your own possession for the safety of your sister," and at the same time a written acknowledgment of the receipt of the conveyance, and an undertaking to deliver it up to C or his assigns, on the fulfilment of the trusts of the settlement, was signed by the defendant.

The marriage took place, and on C's subsequent death, in December 1875, plaintiff, as his eldest son and heir-at-law, brought an action on the county court against defendant to recover possession of the conveyance of 12 November 1862: *Held* defendant, as trustee of the settlement, was entitled to retain possession of the deed of conveyance in question during the continuance of the trusts of the settlement

on the ground that it was delivered to him by C, the settlor, as a further security for the payment of the annuity, and the possession of it enabled him the better to perform the trusts of the settlement with the execution of which he was charged.

Corin v Thomas (1881) 46 LT 916, DC

1948 Right as against co-trustee

In the absence of special circumstances, a trustee is not entitled to have title deeds and non-negotiable securities removed from the custody of a co-trustee and placed at the bank, in a box accessible only to the trustees jointly.

Re Sisson's Settlement, Jones v Trappes [1903] 1 Ch 262; 72 LJ Ch 212; 87 LT 743; 51 WR 411

1949 Trustees entitled to lien on land

Testator gave real and personal property in trust to accumulate rents and profits during the minority of H who was to be, and in fact was, let into possession on attaining twenty-one as tenant for life. A private Act authorised land to be purchased by the court at the instance of a tenant for life of full age, and to be paid out of the personalty. The moneys so paid were to be deemed a debt from the real to the personal estate which debt was to be held by the trustees as part of the personalty and secured by a lien on the purchased land. Subject to such lien the purchased land was to be settled on the trusts of the will: *Held* as to land so purchased, the trustees, so long as their lien existed, were entitled to the custody of the title deeds.

Wheeler v Tootell (1903) 51 WR 693; 47 Sol Jo 710

1950 Trustees with duties to perform

A testator died, having by his will bequeathed settled legacies and having thereby also by legal limitations settled freeholds which in the events which happened became vested free from incumbrances and charges in plaintiff. From time to time there had been appointments of new trustees of testator's will for the purposes of the Settled Land Acts and other purposes, including three by deeds of 1902, 1904, and 1915. In 1924 plaintiff had been appointed Settled Land Act trustee of testator's will, jointly with the then trustees thereof, the appointment being limited to the freeholds. At the date when the freeholds became vested absolutely in the plaintiff, the trusts of some of the settled legacies were still on foot. In an action by plaintiff claiming the custody of the appointments of 1902, 1904, and 1915, as forming part of his title to the freeholds: *Held* trustees who have duties to perform in relation to their trusts may retain title deeds lawfully in their possession as trustees.

Clayton v Clayton [1930] 2 Ch 12; [1930] All ER Rep 735; 99 LJ Ch 498; 143 LT 696

ANNOTATION **Consd** Lewis v Plunket [1937] Ch 306

1951 After trust exhausted

By an ante-nuptial settlement lands of the wife were released to the use of the relessees to uses and their heirs during the joint lives of the husband and wife, and the life of the survivor, on certain trusts, with a limitation to the use of the wife in fee, in the event, which happened, of there being no issue of the marriage. After the death of the husband, who survived the wife, the surviving relessee to uses, with a tenant in possession of the land under a lease from the husband, made a feoffment, and levied a fine to the use of himself in fee: *Held* a court of equity might entertain a suit instituted by the heir-at-law of the wife against the relessee to uses to recover possession of the land and the title deeds.

Semble: the surviving relessee to uses after the determination of his own legal estate had no rightful title to the custody of the title deeds, and could not be considered as holding them as a trustee for the reversioner.

Reece v Trye (1847) 1 De G&Sm 273; 12 Jur 689; 63 ER 1065

1952 Order to deliver up draft

A judge at chambers having made an order requiring an attorney to deliver up to the husband, who had paid for it, the draft of a marriage settlement under which he, the attorney, was a trustee. The court refused to set aside the order.

Ex p Holdsworth (1838) 4 Bing NC 386; 6 Scott 170; 1 Arn 189; 7 LJCP 225; 132 ER 836

D Remainderman and reversioner

LAW See Halsbury's Laws (4th edn) vol 42 para 769

1953 Remainderman — When right attaches

Plant v Cotterill no 1932 ante

1954 Reversioner — Lands leased by tenant for life — Right to deeds on death of tenant for life

A tenant for life leases under a power, and the lessee mortgages the land. On the death of the tenant for life, the reversioner is entitled to the title deeds of the estate.

Easton v London (1863) 33 LJ Ex 34; 9 LT 843n; 12 WR 53

4 Insurance by tenant for life

LAW See Halsbury's Laws (4th edn) vol 42 para 772

1955 Tenant for life not bound to insure

A, on retiring from his partnership business, entered into an agreement with the continuing partners, dated in April 1894, by which it was agreed (*inter*

alia) that his capital in the firm should be taken as ascertained at the sum of £15,772, and should be considered as money lent by him to the continuing partners at 5 per cent per annum, and such capital was to be paid in August 1904. The continuing partners might, however, pay it at any time or times in one or more sum or sums. They were to produce annually to A a balance sheet of the business and all the books and documents in relation thereto, and permit him to examine the stock of the business. In certain specified events testator was to be entitled to demand and recover immediate payment of the sum of £15,772, or so much thereof as remained owing.

In September 1894, A died, having by his will, dated in February 1890, given his residuary estate upon trust for certain persons for life with remainders over: *Held* there ought to be no restriction on the discretion of the trustee of the will as to how often there should be audits and stock takings of the business; and as the audits and stock takings were for the benefit of the whole estate, the object of them being to ensure the safety of the £15,772, the expenses thereof represented part of the "costs, charges and expenses properly incurred" by the trustee in the performance of his duty, and ought therefore to be paid out of the capital of the estate and not out of the income.

It is said that the case is like one of insurance where the tenant for life pays the premiums; but the difference between the two cases is this, that in the case of insurance the payment is a voluntary one made by the tenant for life out of his own income without any obligation on his part to do so at all. Here the payment is one which the trustee, for the benefit of the tenant for life as well as of the remaindermen, may properly insure (*Smith LJ*).

Re Bennett, Jones v Bennett [1896] 1 Ch 778; 65 LJ Ch 422; 74 LT 157; 44 WR 419; 40 Sol Jo 335, CA

ANNOTATIONS **Apld** Re Sherry, Sherry v Sherry [1913] 2 Ch 508 **Folld** Carver v Duncan (Inspector of Taxes); Bosanquet v Allen (Inspector of Taxes) [1985] 2 All ER 645

1956 Tenant for life not bound to insure

Testator devised his mansion house, outbuildings, and farms in W to three trustees upon trust "after payment thereout of all necessary expenses" to pay the balance of the rents and profits to his widow for life and then to his son for life with remainders over. The widow and the son were two of testator's executors and trustees.

The premises were insured against fire at testator's death for much less than their value.

On an originating summons by the third trustee against the first tenant for life and remaindermen asking the direction of the court as to adequately insuring the devised premises out of income: *Held* neither under the trusts of the will as coming under the head of "necessary expenses" nor as a statutory obligation under Trustee Act 1893 (c 53) s 18(1) (repealed), ought the trustees to have maintained the fire insurance upon the premises devised in trust at the expense of the tenant for life.

Re McEacharn, Gambles v McEacharn (1911) 103 LT 900; 55 Sol Jo 204

1957 Except by express obligation — Covenant in lease

Re Betty, Betty v A-G no 3676 post

1958 Except by express obligation — Covenant in lease

Re Gjers, Cooper v Gjers no 3677 post

1959 Whether tenant for life or remainderman entitled to insurance moneys — Moneys subscribed for purpose of rebuilding

A sum of £96 paid to guardian of an infant tenant in tail for rebuilding a copyhold tenement that had been burnt down, but which never had been so applied during the infant's life: *Held* to belong to the succeeding remainderman in tail, subject to a deduction of interest upon a larger sum at which the loss was computed.

Rook v Worth (1750) 1 Ves Sen 460; 27 ER 1142, LC

ANNOTATION **Consd** Warwicker v Bretnall (1882) 23 Ch D 188

1960 Whether tenant for life or remainderman entitled to insurance moneys — Intention of tenant for life to benefit estate

J tenant for life, remainder to W for life remainder to J in fee. During life of J houses on the estate insured by him were burnt down, and insurance money paid to J which was placed in the funds in his name. J by his will devised the estate to R in fee, and his personal estate to W. W applied part of the insurance money in repairing a house upon the estate. The insurance money unapplied remained standing in J's name. W by his will, stated the circumstances, as to the fund so standing in his brother's name, and bequeathed the residue of his personal property: *Held* the insurance money unapplied was subject to the uses of the settlement, and passed to R the devisee of J.

Norris v Harrison (1817) 2 Madd 268; 56 ER 333

ANNOTATION **Expld** Rayner v Preston (1881) 18 Ch D 1

1961 Whether tenant for life or remainderman entitled to insurance moneys — Intention of tenant for life to benefit estate — What amounts to expression of intention — Moneys invested in name of trustees

The fact that, pending a decision by the tenant for life as to whether he will expend the insurance fund in rebuilding the premises, the money had been

invested in the names of the trustees of the settlement during a period of fourteen years: *Held* not, under the circumstances, to amount to an abandonment of the life tenant's right to the fund or a gift of it by him to the trustees for the benefit of the corpus of the settlement fund.

Gaussen v Whatman (1905) 93 LT 101

ANNOTATION **Distd** Re Quicke's Trusts, Poltimore v Quicke (1907) 77 LJ Ch 523

1962 Whether tenant for life or remainderman entitled to insurance moneys

The remainder man is entitled to the benefit of a policy effected by the tenant for life.

Garden v Ingram (1852) 23 LJ Ch 478; 20 LTOS 17, LC

1963 Whether tenant for life or remainderman entitled to insurance moneys

By the decree in the cause it had been declared that L was tenant in tail in possession of certain real estates in the pleadings mentioned. A receiver of these estates had been appointed by the court, with a direction to pay certain fire insurances on the mansion house, stables, and other buildings, and he had also been directed to pay the surplus moneys arising from the rents, etc, to the account of L. A portion of the buildings having been burnt down: *Held* the tenant in tail was entitled to the moneys arising from the insurances on them.

Seymour v Vernon (1852) 21 LJ Ch 433; 19 LTOS 244; 16 Jur 189

ANNOTATIONS **Folld** Warwicker v Bretnall (1882) 23 Ch D 188; Gaussen v Whatman (1905) 93 LT 101

1964 Whether tenant for life or remainderman entitled to insurance moneys

During the infancy of a tenant in tail of freehold estates devised in strict settlement, part of which consisted of a corn mill let on lease, the rents were received by his mother on his behalf and she thereout paid the premiums necessary for keeping up a policy which had been effected in her name for insuring the mill against fire. The will contained no provision for fire insurance. The mill having been burnt down, and it not being considered for the benefit of any person interested in the settled estates that it should be rebuilt: *Held* the insurance moneys belonged to the infant tenant in tail as his personal estate and were not to be treated as real estate for the benefit of all persons interested in the settled estates.

Warwicker v Bretnall (1882) 23 Ch D 188; 31 WR 520

ANNOTATION **Consd** Gaussen v Whatman (1905) 93 LT 101

1965 Whether tenant for life or remainderman entitled to insurance moneys — Insurance of settled chattels

During the minority of a life tenant of settled estates in D, the trustees, acting under the powers of Conveyancing & Law of Property Act 1881 (c 41) s 42 (repealed) and Trustee Act 1893 (c 11) s 18 (repealed), insured (*a*) the mansion house and (*b*) certain settled chattels and furniture against fire. The policies were taken in the names of the trustees, and the premiums were paid out of income. The house and chattels were for the most part destroyed by fire, and the trustees recovered £7,000 on the house policy and £1,244 on the chattel policy. The trustees, the infant life tenant, aged twenty, and the remaindermen all desired the house to be rebuilt and refurnished, but the infant life tenant, who was not bound to insure, claimed that, as the premiums had been paid out of his income, the policy moneys in the hands of the trustees were his, and he was entitled to a charge for any amount expended: *Held* (1) under Fires Prevention (Metropolis) Act 1774 (c 78) s 83, the remaindermen were entitled to have the £7,000 recovered on the house policy applied in rebuilding, and the infant life tenant was not entitled to a charge; (2) the infant life tenant was entitled to the £1,244 recovered on the chattel policy, to which Fires Prevention (Metropolis) Act 1774 (c 78) s 83, did not apply.

Re Quicke's Trusts, Poltimore v Quicke [1908] 1 Ch 887; 77 LJ Ch 523; 98 LT 610; 24 TLR 23

1966 Whether tenant for life or remainderman entitled to insurance moneys — Insurance of settled chattels

"When a life tenant is under an obligation to insure or trustees have power to insure, whether the insurance is of real estate or chattels, I think that if there are successive interests in the property the insurance is for the benefit of the persons successively entitled and does not belong to any one of them." In the case of a voluntary insurance to a tenant for life, apart from Fires Prevention (Metropolis) Act 1774 (c 78), I think the tenant for life is also entitled to the proceeds of insurance against fire, and that would also be so in the case of chattels (*Neville J*).

Re Bladon, Dando v Porter [1911] 2 Ch 350; 105 LT 367; on appeal [1912] 1 Ch 45, CA

1967 Whether tenant for life or remainderman entitled to insurance moneys — Effect of Fires Prevention (Metropolis) Act 1774 (c 78) s 83

Re Quicke's Trusts, Poltimore v Quicke no 1965 ante

1968 Whether tenant for life or remainderman entitled to insurance moneys — Tenant for life under obligation to insure

Re Bladon, Dando v Porter no 1966 ante

1969 Whether evidence sufficient to establish title

The funds in a marriage settlement made on 18 October 1873, comprised a policy of assurance for £500 on the life of the husband. On 9 June 1880, the husband died. On 8 December 1880, the widow and the only child of the marriage (a son, who was then an infant) began an action for the execution of the trusts of the settlement, the trustees of the settlement being defendants. On 5 March 1881, the court ordered that the insurance company should have leave to pay the sum assured into court. On 20 November 1942, the widow died, and the son later took out this summons for payment out of the sum to him as the only child of the marriage. He could prove the pedigree events supporting his claim, but could not produce the settlement or a copy or draft of it. He gave evidence, however, of searches which had been made in the records and papers of the solicitors who had acted for the plaintiffs in 1880 and of their successors to 1943, and that many papers had been lost or destroyed. He also relied on the contents of the note made by the chief clerk in 1881 setting out a considerable part of the terms of the settlement which provided that the trust funds should be held for the widow for life and after the death of the survivor of her and her husband for the child or children of the marriage: *Held* it being accepted that the terms of the settlement were in the form outlined in the chief clerk's note, and the fund having become distributable by reason of the death of the tenant for life, the son had established his title to the relief asked and was entitled to an order for payment out.

Hansell v Spink [1943] Ch 396; 113 LJ Ch 49

Scottish, Irish and Commonwealth Cases

1970 Tenant for life not bound to insure

In default of special obligation there is no duty on a tenant for life to insure either house or furniture.

Re Dawes, Perpetual Executors & Trustees Assocn of Australia Ltd v Dawes [1954] VLR 76; [1954] ALR 174 (AUS)

1971 Tenant for life not bound to insure

Re Kingham (Deceased), Kingham v Kingham [1897] 1 IR 170 (IR)

1972 Power of trustee to effect hail insurance

Where it is a prudent and proper precaution to adopt, a trustee has power to effect hail insurance, although there is no statutory provision authorising him to do so.

Re Seibel Estate [1931] 2 WWR 581 (CAN)

7 Statutory powers

i CHARACTERISTICS

1 Fiduciary

LAW See Halsbury's Laws (4th edn) vol 42 para 773

CROSS REFERENCES See nos 1994 et seq, 2013 et seq ante; nos 2291, 2292, 2460 et seq post (exercise of power of leasing)

1973 Exercise to be in interests of parties concerned

Re Radnor's (Earl) Will Trusts no 2494 post

1974 Exercise to be in interests of parties concerned

The Costessey Hall estates were settled by a deed of 26 January 1874, under which Lord Stafford was tenant for life in possession. By the will of the late Lord Stafford he bequeathed certain pictures upon trust to permit the same to be used and enjoyed by the person who under the settlement of 1874 should for the time being be entitled to the Costessey Hall estates, to be held as heirlooms for the successive owners of the hall, but not to vest absolutely in any tenant in tail male by purchase who should not attain the age of twenty-one years or die under that age leaving issue male. Testator died in 1884. One of the pictures bequeathed as heirlooms had been recently sold for a large sum of money. The money was paid to the trustees of the will and invested by them in Consols. The judge held that the settlement was a compound settlement, and he appointed the trustees of the will to be trustees for the purposes of the Settled Land Acts (repealed) of the settlement of the heirlooms and the proceeds of sale thereof created by the deed of 1874 and the will. The heirlooms were now vested in an infant female tenant in tail in remainder. The tenant for life asked that the trustees of the compound settlement should apply £15,000, part of the proceeds of sale of the picture, in discharge of a mortgage on land settled by the deed of 1874: *Held* (1) the effect of the order of the judge was that both the land settled by the deed 1874 and the heirlooms must be treated as if they had been settled by the same document; (2) the words "land" in s 37 (repealed), and "settled land" in Settled Land Act 1882 (c 38) s 21 (ii) (repealed), meant the land by reference to the limitations of which the heirlooms were settled by the will; (3) the slight difference in the limitations of the deed and the will, and the fact that the heirlooms were vested in the tenant in tail, were not sufficient ground for distinguishing *Re Marlborough's (Duke) Settlement, Marlborough (Duke) v Marjoribanks* (no

2135 post); (4) the investment in Consols by the trustees before they were appointed trustees of the compound settlement did not prevent the desired application of the money; (5) the tenant for life, although a trustee under s 53 (repealed), was not committing a breach of trust, and the money ought to be applied in the discharge of the mortgage.

(6) I do not think that I can say that the tenant for life is not entitled to regard as more important, in the interests of all the persons, including himself, who are now or may hereafter become entitled to the estate, the freeing of those estates from the incumbrance in question, rather than the keeping of this money invested or dealing with it in some other form (*Warrington J*).

Re Stafford's (Lord) Settlement & Will, Gerard v Stafford [1904] 2 Ch 72; 73 LJ Ch 560; 91 LT 229; 52 WR 536; previous proceedings sub nom

Re Staffords (Lord) Settled Estates (1903) 20 TLR 61

1975 Exercise to be in interests of parties concerned

Where under Settled Land Act 1882 (c 38) s 26 [repealed], a tenant for life submits for approval to the trustees of the settlement a scheme for the execution of an improvement, the duty of the trustees is confined to seeing (*a*) that the improvement proposed is an improvement authorised by the Act [repealed], namely, that it is for the benefit of some land comprised in the settlement; (*b*) that the scheme for the execution of the improvement is a proper one for carrying out the particular improvement; (*c*) that in submitting the scheme to the trustees the tenant for life is acting *bonâ fide* and on competent skilled advice. The trustees are not concerned with the general policy pursued by the tenant for life in improving the property, nor, in a case where there is capital money in hand, with the amount already spent on improvements.

There is a further consideration which the trustees in considering a scheme must bear in mind, namely, whether or not the tenant for life is proposing something which is outside his position as a tenant for life acting in regard to the interests of all parties entitled under the settlement, and deemed to be in the position of and to have the duties and liabilities of a trustee (*Warrington J*).

Re Egmont's (Earl) Settled Estates, Lefroy v Egmont (Earl) [1906] 2 Ch 151; 75 LJ Ch 649; 95 LT 187; 54 WR 504; 22 TLR 430

1976 Exercise to be in interests of parties concerned

Re Rodes, Sanders v Hobson no 2539 post

1977 Exercise to be in interests of parties concerned

At the direction of a tenant, on whom land was settled on trust for him during his life with remainders over, capital moneys were applied by the trustees of the settlement in recouping to him the cost of authorised improvements which he had executed and for which he had paid. The improvements were such that the trustees were not bound and had no discretion to require that part of the cost should be borne by income of the settled property. The tenant for life became entitled to certain income tax allowances or reliefs in respect of improvements. The trustees claimed that he was accountable to them for these allowances and reliefs on the ground that, in exercising his powers under Settled Land Act 1925 (c 18) s 75(2), to direct the investment of capital moneys pursuant to s 73(1) para (iii) and para (iv) in payment for the improvements he was, by virtue of s 107(1) of the Act, acting as trustee for all the beneficiaries under the settlement: *Held* since the tenant for life was entitled under the settlement to the whole income and enjoyment of the settled property during his life, and not merely to the income less the amount of certain tax allowances or reliefs, he was under no obligation to account to the trustees for sums recovered by him by way of income tax allowance or relief referable to his expenditure on improvements to the settled land, notwithstanding that the expenditure had been recouped to him by the trustees of the settlement at his direction.

Re Pelly, Ransome v Pelly [1957] Ch 1; [1956] 2 All ER 326; 100 Sol Jo 379, CA

1978 Exercise to be in interests of parties concerned

Re Boston's (Lord) Will Trusts, Ingils v Boston (Lord) no 3319 post

1979 Exercise to be in interests of parties concerned — Incumbrances

The conveyance by the tenant for life under s 20 [Settled Land Act 1882 (c 38) [repealed]] can only pass the estates subject to any charge by mortgage . . . or otherwise of his life estate, which has been made by the tenant for life for the purpose of raising money . . . The tenant for life can only convey under the Act so as not to affect the charges on the estate, including those charges or incumbrances on the life estate which have been created by himself. When, therefore, his life estate is incumbered up to the hilt, he can only sell that which is practically a reversion, not an estate in possession (*North J*).

Re Sebright's Settled Estates (1886) 33 Ch D 429; 55 LT 354; affd 33 Ch D 442, CA

ANNOTATIONS **Consd** Cardigan v Curzon-Howe (1888) 40 Ch D 338; Re Dickin & Kelsall's Contract [1908] 1 Ch 218

1980 Exercise to be in interests of parties concerned — Incumbrances — Annuitant

Settled land was all charged by the settlement with the payment of certain annuities; part of the settled land was subject to a mortgage created prior to the settlement; the tenant for life proposed to raise £40,000 to pay off this mortgage by means of a mortgage of all the land, which would override and take priority of the annuities; the selling value of the whole of the settled land was £80,000; a sale at that price would be far more beneficial to the annuitants than the proposed mortgage. The annuitants applied to the court for an injunction to restrain the tenant for life from mortgaging the settled land so as to create a first charge over that part thereof which was not subject to the existing mortgage: *Held* the tenant for life had power to so mortgage the whole of the settled land in order to pay off an incumbrance upon a part thereof; but as the exercise of that power would, in this case, be unjust to the annuitants whose interests he was bound to consider, the court would interfere to prevent him from exercising that power, though he was acting *bonâ fide*.

Hampden v Buckinghamshire (Earl) [1893] 2 Ch 531; 62 LJ Ch 643; 68 LT 695; 41 WR 516; 37 Sol Jo 455; 2 R 419, CA

ANNOTATIONS **Apld** Re Richardson, Richardson v Richardson [1900] 2 Ch 778; Re Hunt's SE, Bulteel v Lawdeshayne [1905] 2 Ch 418 **Consd** Re Charteris, Charteris v Biddulph [1917] 2 Ch 379

1981 Exercise to be in interests of parties concerned — Remaindermen

Hatten v Russell no 2206 post

1982 Exercise to be in interests of parties concerned — Remaindermen

Re Richardson, Richardson v Richardson no 2208 post

1983 Exercise to be in interests of parties concerned — Remaindermen

Re Hope's Settled Estates no 2498 post

1984 Exercise to be in interests of parties concerned — Remaindermen

Re Westminster's (Duke) Settled Estates, Westminster (Duke) v Shaftesbury (Earl) no 2126 post

1985 Exercise to be in interests of parties concerned — Discretion of tenant for life to prevail in case of doubt

The powers conferred by Settled Land Act 1882 (c 38) (repealed), upon a tenant for life were, pursuant to s 53 (repealed), to be exercised with a due regard to the interests of all parties entitled under the settlement, and the discretion vested in him by the Act (repealed) as to the application of capital moneys must not have been so exercised as unduly to prejudice such parties, but where it was a matter of doubt, then the discretion of the tenant for life, if fairly exercised, ought to have prevailed. Four estates, A, B, C, and D, were devised by the same will in trust for the same tenant for life. After her death estates A, B, and C were devised to different persons in strict settlement, and a long term of years were created in estate D, subject to which such estate was devised as to one moiety to the uses of estate A, and as to the other moiety to the uses of estate B. The trusts of the term were for the payment off of the incumbrances on all four estates in the order in which they were devised. Upon an application by the tenant for life: *Held* (1) notwithstanding the interposition of the term of years, estate B and one moiety of estate D constituted one settled estate within the meaning of the Settled Land Act (repealed); and the capital moneys arising from the moiety of estate D were applicable for improvements on estate B; it appearing that this application of the moneys, though it might delay, would not endanger the payment of the incumbrances on the other estates; (2) the costs as between solicitor and client of the solicitor and surveyor of the tenant for life for preparing and carrying out the necessary schemes for such improvements were costs incidental to the application and were payable out of the capital moneys arising from estate B and the moiety of estate D.

Re Stamford's (Lord) Settled Estates (1889) 43 Ch D 84; 58 LJ Ch 849; 61 LT 504; 38 WR 317

1986 Exercise to be for benefit of settled land

Bruce (Lord Henry) v Ailesbury (Marquess) no 2071 post

1987 Exercise to be for benefit of settled land — Motive of tenant for life immaterial — Intention to benefit wife

Sutherland (Dowager Duchess) v Sutherland (Duke) no 2291 post

1988 Exercise to be for benefit of settled land — Personal views of tenant for life immaterial — Objection to sale of intoxicants

Re Somers (Earl), Cocks v Somerset (1895) 11 TLR 567; 39 Sol Jo 705

1989 Exercise to be for benefit of settled land — Incidental benefit to tenant for life no objection

Re Hare, Leycester-Penrhyn v Leycester-Penrhyn (1908) 43 L Jo 659

1990 Fiduciary position of tenant for life

Lloyd-Jones v Clark-Lloyd no 2293 post

1991 Fiduciary position of tenant for life
Re Lord Boston's Will Trusts, Inglis v Boston no 3319 post

1992 Fiduciary position of tenant for life — According to the settlement
Re Lacon's Settlement, Lacon v Lacon no 2049 post

Scottish, Irish and Commonwealth Cases

1993 Exercise to be in interests of parties concerned
A tenant for life in the exercise of his powers under Settled Land Act 1928 (Victoria) is, by reason of s 107 of the Act, in the same position as an ordinary trustee and is subject to the very wide power of the court to control trustees in the exercise of their duties. including the power of the court under s 92(2) of the Act to "make such order or give such directions respecting the matter as the court thinks fit." The court will intervene to prevent a tenant for life exercising a discretionary power in any way which is wrong or unreasonable. Where a tenant for life, being under a misconception of fact, capriciously refused to grant a further lease of settled land to remaindermen and it appeared that they had been in possession of the land for a long time and had improved it, that there was no reason for excluding them, but good reason for their continuing in occupation and they would lose their home and otherwise suffer financially by not doing so, and that it was in the interests of the settled land itself that they should have a further lease, the court restrained the tenant for life from exercising his power of leasing the land in favour of a stranger without first giving the remaindermen an opportunity of obtaining a lease on like terms.
Chimside v Chimside [1947] VLR 183; [1947] AR 225 (AUS)

2 Inalienable

LAW See Halsbury's Laws (4th edn) vol 42 paras 773 et seq, 775

1994 General rule
Re Sebright's Settled Estates no 2074 post

1995 General rule
Re Mundy & Roper's Contract no 1172 ante

1996 Effect of assignment of life interest
Re Sebright's Settled Estates no 2074 post

1997 Effect of assignment of life interest — Consent of assignee of value — Right of purchaser to require evidence
Re Du Cane & Nettlefold's Contract no 1066 ante

1998 Effect of assignment of life interest — Consent of assignee of value — What amounts to consent — Assignee becoming purchaser
Re Kingsley & Holder's Contract (1903) 115 LT Jo 201

1999 Effect of assignment of life interest — Consent of assignee of value — Cannot be required to join
Re Dickin & Kelsall's Contract no 2546 post

2000 Effect of assignment of life interest — Exercise of leasing powers
Lonsdale (Earl) v Lowther no 2604 post

2001 Effect of assignment of life interest — Share of interest — Merger of share in remainder
Although a life tenant of real estate has assigned a share of his life estate to a remainderman, so as to merge that share, he can still make a title to the entire settled estate with the consent of his assignee.
Re Barlow's Contract [1903] 1 Ch 382; 172 LJ Ch 214; 88 LT 84; 51 WR 399

2002 Effect of assignment of life interest — With "intent" to extinguish — Settled Land Act 1925 (c 18) s 105 — To what assignors applicable — Any person in whom life estate vested
Held the operation of Settled Land Act 1925 (c 18) s 105(1), is not confined to the case of an assurance by the tenant for life himself of his estate, but extends to an assurance by any person in whom the life estate is vested including a trustee in bankruptcy of the tenant for life. The "intent" referred to in the section was the intent of the assignor.

Where therefore a tenant for life was bankrupt, and his trustee in bankruptcy sold and assured the estate for life to the tenant in tail in remainder, but the tenant for life refused to execute a vesting deed in his favour: *Held* the tenant in tail was entitled to a vesting order under Settled Land Act 1925 (c 18) s 12(1)(*a*).
Re Shawdon Estates Settlement [1930] 2 Ch 1; 99 LJ Ch 189; 142 LT 566; 74 Sol Jo 215; [1929] B&CR 152, CA

2003 Effect of assignment of life interest — With "intent" to extinguish — Settled Land Act 1925 (c 18) s 105 — To what assignors applicable — Trustee in bankruptcy of tenant for life
Re Shawdon Estates Settlement no 2002 ante

2004 Effect of assignment of life interest — With "intent" to extinguish — Settled Land Act 1925 (c 18) s 105 — Whose intent referred to — Assignor
Re Shawdon Estates Settlement no 2002 ante

2005 Effect of assignment of life interest — With "intent" to extinguish — Settled Land

Act 1925 (c 18) s 105 — Person next entitled in remainder or reversion

By his will date 1 August 1896 testator settled his estates on certain limitations which, immediately before 19 December 1959, were to P for life with remainder to his first and other sons in seniority in tail male, with remainder to H for life, with remainder to his first and other sons in seniority in tail male with remainder to P in tail with remainders over. The will provided that the person of full age for the time being entitled to the possession or to the receipt of the rents and profits of the settled estates should have power to appoint new trustees of the will. On 19 December 1959, P executed a deed of disentail and assignment and on 21 December 1959 he executed a deed of appointment, as a result of which the beneficial interests in the settled estates were: (i) to P for life; (ii) his sons in tail; (iii) H for life; (iv) his sons in tail male; (v) Lord G for life; and (vi) his sons is seniority in tail. By a deed dated 22 December 1959 calling itself "the Assignment" and expressed to be supplemental to the above mentioned instruments, in consideration of the sum of £15,000 H "grants, assigns and releases" his reversionary life interest in the estates to trustees to the intent that it should merge and be extinguished for the benefit of the persons other than H from time to time beneficially interested in the estates in all respects (except for the possibility of male issue of H) as if H had died immediately after the execution of the deed. P died on 10 July 1965 without having married and having no issue, and, as a result of his death and the deed of assignment, the beneficial interests remaining were: (1) the first and other sons of H in tail male; (ii) Lord G for life; (iii) his sons in seniority in tail with remainders over. H was then eighty years old and although married, had no children and it was unlikely he would ever have a son. The effect of the assignment was that on the death of P Lord G became tenant for life in possession, his interest being defeasible on the birth of a son to H. On a summons to determine whether, on the true construction of Settled Land Act 1925 (c 18) s 105 and the deed of 22 December 1959, the powers of the tenant for life were exercisable by H or Lord G and which of them on the construction of Settled Land Act 1925 (c 18) ss 105, 106 had the power to appoint new trustees: *Held* (1) on the true construction of the words "to the person next entitled in remainder or reversion under the settlement" in Settled Land Act 1925 (c 18) s 105(1), Lord G did not qualify as the person next entitled because the subsection did not apply where there was an intervening limitation which might still take effect, as in this case, and therefore, the powers of the tenant for life were still exercisable by H; (2) the power in the will to appoint new trustees did not fall within the terms of "any power . . . relating to the settled land" in Settled Land Act (c 18) s 108(2), so as to vest the power in H, but was vested in Lord G as being the person at the present time entitled to the receipt of the rents and profits.

Re Maryon-Wilson's Settlmts (or Instruments), Blofeld v Maryon-Wilson [1971] Ch 789; [1969] 3 All ER 558; [1969] 3 WLR 575; 113 Sol Jo 795

ANNOTATION **Apld** Western Bank Ltd v Schindler [1976] 2 All ER 393

2006 Effect of resettlement — Powers under original settlement

Re Mundy & Roper's Contract no 1172 ante

2007 Effect of resettlement — Powers under original settlement

Re Trafford's Settled Estates no 1050 ante

2008 Arrangement by way of compromise — Disposition of interests — Right to make not restricted

Testator gave his wife the use of his residence, W, so long as she should desire to make it her permanent place of residence and should remain his widow, and directed that his estate pay all rates, taxes, and outgoings in respect of the house and keep it in repair. He left his residuary real and personal estate upon trust for sale and conversion, and then for his children and their issue; the income of the shares of daughters to be paid to them during coverture without anticipation, and the capital of those shares to be divided after the daughters' death amongst their children. He directed his trustees to postpone the sale of W, and to develop it as they thought fit. The judge decided that the widow had the powers of a tenant for life under Settled Land Act 1882 (c 38) (repealed), and would not forfeit the benefits given by the will if she sold or leased the property. It was proposed that she and the trustees should enter into a compromise whereby she should release to them her claims in respect of W in consideration of an annual payment of £275 during widowhood—a sum less than the estimated value of her interests under the will: *Held* under Settled Land Act 1882 (c 38) s 51(1) (repealed), the condition as to residence was void only so far as it tended to prevent the exercise of the powers of the tenant for life; there was nothing to prevent the widow from releasing her beneficial interests in the manner proposed; if she did so she would forfeit those interests by ceasing to reside, but would receive the value to them in the shape of the annuity of £275; no question of improper investment arose, as the real result of the transaction would be to relieve testator's estate from part of the payments to which it was subject; and the compromise was for the benefit of

all parties, was within the power of the trustees, and ought to be sanctioned.

Re Trenchard, Trenchard v Trenchard [1902] 1 Ch 378; [1900–3] All ER 289; 71 LJ Ch 178; 86 LT 196; 50 WR 226; 46 Sol Jo 231

ANNOTATIONS **Consd** Re Simpson, Clarke v Simpson [1913] 1 Ch 277; Re Patten, Westminster Bank v Carlyon [1929] 2 Ch 276; Re Forster's Settlement, Michelmore v Byatt [1954] 3 All ER 714

2009 Statutory owner — Settled Land Act 1925 (c 18) s 117(1)(xxvi) — Not within prohibition

Re Craven Settled Estates no 1796 ante

2010 Statutory owner — Settled Land Act 1925 (c 18) s 117(1)(xxvi) — Not within power of Settled Land Act 1925 (c 18) s 20

Re Craven Settled Estates no 1796 ante

2011 Statutory owner — Settled Land Act 1925 (c 18) s 117(1)(xxvi) — Effect of release under Law of Property Act 1925 (c 20) s 155

Re Craven Settled Estates no 1796 ante

Scottish, Irish and Commonwealth Cases

2012 Effect of assignment of life interest

Where the first tenant for life of settled lands has assigned his life estate to the second tenant for life under the settlement, so that the life estate of the former has become merged in that of the latter the power of sale conferred on a tenant for life by Settled Land Act can be exercised by the second tenant for life, notwithstanding the provisions of Settled Land Acts 1882 s 50.

Re Bruen's Estate [1911] 1 IR 76 (IR)

3 Prohibition against exercise void

LAW See Halsbury's Laws (4th edn) vol 42 para 780

2013 Extent of statutory prohibition

Re Hazle's Settled Estates no 1824 ante

2014 Extent of statutory prohibition

Re Atkinson, Atkinson v Bruce no 1860 ante

2015 Provision tending to induce tenant not to exercise statutory power

By his will the testator settled B manor estate. He then gave to his trustees the sum of £50,000, defined as "the maintenance fund," upon trust to apply the income thereof as the trustees should think fit towards the payment of certain outgoings of B manor estate and "to pay any part of the said income not in their opinion required for the aforesaid purpose" to the tenant for life. On the sale of B manor house, or on the expiration of a period limited so as to avoid infringement of the rule against perpetuity (whichever should be the earlier date), the maintenance fund was to fall into the residue, which was disposed of under the will. The testator died in 1939. The tenant for life sold B manor estate under the powers conferred on him by the Settled Land Act 1925 (c 18). The question to be determined was whether the income of the maintenance fund continued to be payable to the tenant for life, by reason of s 106 of the 1925 Act (c 18), or whether the fund had fallen into the testator's residuary estate according to the expressed intention of the testator that it should do so: *Held* since the provision tended to induce the tenant for life not to exercise his statutory power of sale, the Settled Land Act 1925 (c 18) s 106, applied. The land having already been sold, the income of the fund would continue to be payable to the tenant for life during the remainder of his life.

Re Herbert, Herbert v Bicester (Lord)
[1946] 1 All ER 421; 175 LT 227; 90 Sol Jo 210

2016 Extent of statutory prohibition

A settlor, by a settlement (the Bodnant settlement) dated 15 September 1921, settled the Bodnant estate (except Bodnant Hall and the gardens, pleasure grounds and demesnes usually occupied therewith) on trusts for A for life with remainder to his issue. By a further settlement, dated 22 February 1926, the settlor directed the trustees to hold certain shares on trust for sale and to invest the proceeds and to hold the shares and investments on the trusts of the Bodnant settlement, but provided that, if the gardens at Bodnant should be settled on, or acquired by the trustees on, the trusts of the Bodnant settlement, then "during so much of the lives of the children and grandchildren of the settlor living at the date of this indenture and the lives and life of the survivors and survivor of them and the period of twenty-one years from the death of such survivor as the said gardens at Bodnant shall be and remain settled as aforesaid or shall remain vested in the trustees or trustee (which portion of the said period of lives and years is hereinafter referred to as 'the prescribed period') the trustees or trustee shall with the consent of the person or persons for the time being beneficially entitled to the possession or receipt of the rents and profits of the freehold hereditaments settled by the Bodnant settlement of 1921 apply the income of the premises hereby settled and of the investments and property from time to time representing the same (all of which are together hereinafter referred to as 'the settled fund') in or towards securing and assisting and developing the use of the said gardens at Bodnant for the cultivation of plants and flowers of home and foreign countries of botanical and horticultural interest . . ." It was further declared that as from the expiration of the prescribed period the settled fund should be held on other specified trusts. On 4 January 1933, the

settlor died, and by her will directed that Bodnant Hall and the gardens, pleasure grounds and demesnes forming part of the Bodnant estate not settled by the Bodnant settlement should be held on substantially the same trusts as were declared by the Bodnant settlement. On 11 November 1949, the tenant for life sold five-sixths of the gardens to the National Trust: *Held* on the sale of the National Trust of the greater part of the gardens at Bodnant it could no longer be said that "the said gardens at Bodnant" remained settled on the trusts of the Bodnant settlement within the meaning of the settlement of 1926, and the "prescribed period" then ceased; as Settled Land Act 1925 (c 18) s 106(1)(*b*), did not operate to render void directions which determined provisions which were neither for the benefit of any *cestui que trust* not in strictness ancillary to the enjoyment by the *cestui que trust* of the trust property, the provisions terminating the prescribed period in which the event had happened were not void; and, therefore, the shares should be held on the trusts operative on the cesser of the prescribed period.

Re Aberconway's Settlement Trusts, McLaren v Aberconway (Baron) [1953] Ch 647; [1953] 2 All ER 350; 97 Sol Jo 454, CA

ANNOTATION **Consd** Re Denley's Trust Deed, Holman v HH Martyn & Co [1968] 3 All ER 65

2017 Restriction on power of sale — Settlement by private Act — Power of trustees' restriction — Power of life tenant unaffected

Re Chaytor's Settled Estate Act no 2133 post

2018 Restriction on power of letting

Testator by his will, dated 22 November 1927, directed his trustees to retain £3,000 and to apply the interest yearly in payment of the taxes, rates and repairs of his freehold house, and he desired that his aunt should "have the use of it and my furniture free of cost for her occupation during her life or so long as she may require them, but without the power to sub-let the same or any part thereof. On the termination of her occupation, the house is to be sold," and from the proceeds, added to the above £3,000, certain specific legacies were given. He also directed that when the house had been sold, his nephew, GP, should have the furniture: *Held* (1) the provision forbidding the tenant for life to sub-let was void under Settled Land Act 1925 (c 18) s 106(1), and the provision requiring the house to be sold and the gift over of the proceeds of sale upon the termination of her occupation was also avoided by that sub-section, so far as that provision would operate in the event of her exercising any of her powers as tenant for life; (2) the gift over of the £3,000 was a provision which tended to induce her to abstain from exercising her powers of leasing as a tenant for life, and was void, therefore, in so far as it had that tendency; and that it should be read to take effect only upon her ceasing to reside for any reason other than the exercise of her powers of leasing as a tenant for life; (3) in the event of her selling the house she would not be entitled to be paid any part of the income of the £3,000; (4) she was entitled to the furniture during her life or until she ceased to occupy the house for any reason other than the exercise of her powers as tenant for life.

Re Patten, Westminster Bank v Carlyon [1929] 2 Ch 276; [1929] All ER 416; 98 LJ Ch 419; 141 LT 295; 45 TLR 504

ANNOTATIONS **Folld** Re Burden, Mitchell v Trustees of St Luke's Hostel [1948] Ch 160 **Apprvd** Re Aberconway's Settlement Trusts, McLaren v Aberconway [1953] 2 All ER 350

2019 Condition requiring residence of life tenant — No bar to powers — Sale

Testator devised real estate to the use of his son F so long as he should reside in the dwelling-house, or upon some part of the devised estate, for not less than three calendar months in each year after he should become entitled to the actual possession thereof. After the death of F, if he should have complied with the above condition, the estate was given among his children as he should appoint. In default of appointment, or if F should fail to comply with the condition, on the determination of his estate therein it was given to the use of trustees for sale. The only house on the estate in which F could reside was very large, and could not be inhabited properly without an annual outlay of more than twice the annual income derived from the estate. An opportunity arose for selling a part of the estate for a purpose which, if carried into effect, would render the mansion house, if unsold, uninhabitable: *Held* (1) F had the powers of a tenant for life under Settled Land Act 1882 (c 38) (repealed), including the power to sell the estate; (2) the condition requiring residence was within s 51 (repealed) of the Act, and void; (3) leave should be given to sell the mansion house.

Re Paget's Settled Estates (1885) 30 Ch D 161; 55 LJ Ch 42; 53 LT 90; 33 WR 898; 1 TLR 567

ANNOTATIONS As to (1) **Apld** Re Eastman's Settlmt (1898) 43 Sol Jo 114. As to (2) **Consd** Re Haynes, Kemp v Haynes (1887) 37 Ch D 306 **Folld** Re Dalrymple, Bircham v Springfield (1901) 49 WR 627 "The report of that case is, perhaps, not strictly accurate, as one would imagine there must have been some words, giving F a life estate"

2020 Condition requiring residence of life tenant — No bar to powers — Sale

By his will dated 4 January 1918, the testator bequeathed his leasehold house, garden and grounds, W Court, together with the fixtures and fittings and

all his furniture, pictures (except some), china, plate, linen, grand piano, and all chattels and other effects therein, to his trustees upon trust to permit his sister, E, to reside there after his death, if she should wish to do so, and to have the use and enjoyment, thereof during her life free of rent or other payment and he gave to his sister the use and enjoyment of his said house, garden, and grounds, and everything contained therein, for her life accordingly, and he directed his trustees after her death or during her life if she should not wish to reside or continue to reside there to sell the same (except certain articles therein), with power to postpone such sale as they might think proper, and divide the proceeds between certain charities. He died on 26 June 1918, and the lady entered into possession thereof immediately. In 1925 she went abroad temporarily for the benefit of her health, the place being left in charge of servants, and she paid the Schedule A tax. In 1926, owing to severe illness, she was prevented from returning to England, and the house was let by her from time to time, and she still paid Schedule A tax thereon. In 1927 she sold the house as tenant for life or a person having the powers of a tenant for life, and shortly after the contents, other than the excepted articles, were sold by the trustees. On a summons taken out by the trustees asking whether she had any, and, if any, what interest in the proceeds of sale of the leasehold property and the income thereof: *Held* on the evidence, it must be deemed that those powers were properly exercised by her. The power of sale in the trustees never arose, nor did they purport to exercise it. She had not therefore forfeited her interest in the proceeds of sale of the leasehold property or the income thereof.

Re Acklom, Oakeshott v Hawkins [1929] 1 Ch 195; 98 LJ Ch 44; 140 LT 192; sub nom

Re Adelom, Oakshott v Hawkins (1929) 72 Sol Jo 810

2021 Condition requiring residence of life tenant — No bar to powers — Sale

Under the will of a testator who died in 1879, the C estate stood limited to the use of his grandson O for an estate in tail, with remainder to the use of testator's daughter VW, her heirs and assigns. VW, who died in 1919, by her will devised the estate to which she was so entitled in remainder, to the use of certain persons successively in strict settlement subject to a condition that if the person who should so become entitled to that estate as tenant for life or tenant in tail should fail to reside at C House for a certain part of every year, the estate of such person therein should cease and determine. Testatrix then bequeathed her residuary estate upon trust for her nephew O for life and directed that, after his death, in case the C Estate or the greater part in value thereof should not then devolve upon the limitations of her will, a sum of £10,000 should be raised out of her residuary estate and held upon trust for certain charitable purposes, and that the remainder should be upon trust for the persons therein named. The main question was whether, in the event of O (who was tenant in tail in possession and also the heir-at-law and sole next of kin of testatrix and had no intention of disentailing the estate) exercising his power of sale over the estate under Settled Land Act 1925 (c 18), the residuary estate of testatrix would fall to be administered under the trusts declared by her will concerning the same: *Held* (1) in the event aforesaid, upon the proper construction of testatrix's will, the C Estate would not on the death of O devolve upon the limitations of the will, with the result that the condition upon which the disposition of her residuary estate depended would be fulfilled; (2) as the effect of that disposition would be to prevent the residuary estate from passing, as upon an intestacy, to O as sole next of kin of the testatrix, it would necessarily tend to induce him to abstain from exercising his power of sale under Settled Land Act 1925 (c 18), within s 106 of that Act; and, accordingly, the residuary estate would, subject to O's life interest therein, pass to him as upon an intestacy, by reason of the invalidity of the disposition thereof contained in testatrix's will.

Re Orlebar, Orlebar v Orlebar [1936] Ch 147; 105 LJ Ch 92; 154 LT 293; [1935] All ER Rep 502

2022 Condition requiring residence of life tenant — No bar to powers — Letting

A gift by a husband of his house to trustees in trust to allow his wife to reside in it rent free, she paying for repairs, insurance, etc, "and from and after the decease or second marriage of my said wife or her ceasing to reside at the said dwelling-house," the same to fall into residue, did not prevent the wife from evacuating the house and exercising her power of leasing as tenant for life under Settled Land Acts (repealed) and receiving the rents received from such letting for her own use and benefit during her widowhood.

Re Freme (Deceased), Samuel v Freme (1912) 56 Sol Jo 362

2023 Condition requiring residence of life tenant — Validity

Re Paget's Settled Estates no 2019 ante

2024 Condition requiring residence of life tenant — Validity — Valid except as restraint on exercise of powers

A tenant for life under a will broke the terms of a condition of residence on pain of forfeiture contained in the will: *Held* no sale having been made,

the forfeiture took effect, notwithstanding Settled Land Act 1882 (c 38) s 51 (repealed).
Re Haynes, Kemp v Haynes (1887) 37 Ch D 306; 57 LJ Ch 519; 58 LT 14; 36 WR 321; 4 TLR 168

ANNOTATIONS **NF** Re Dalrymple, Bircham v Springfield (1901) 49 WR 627 **Folld** Re Trenchard, Trenchard v Trenchard [1902] 1 Ch 378

2025 Condition requiring residence of life tenant — Validity — Valid except as restraint on exercise of powers
Re Trenchard, Trenchard v Trenchard no 2008 ante

2026 Condition requiring residence of life tenant — Reduction of annuity on residence ceasing
Re Eastman's Settled Estates (1898) 68 LJ Ch 122n; 43 Sol Jo 114

ANNOTATIONS **Folld** Re St Donats SE (1898) 79 LT 542; Re Carne's SE [1899] 1 Ch 324 **Apld** Re Trenchard, Ward v Trenchard (1900) 16 TLR 525; Re Llanover's Will, Herbert v Freshfield [1902] 2 Ch 679 **Expld** Re Trenchard, Trenchard v Trenchard [1902] 1 Ch 378 **Distd** Re Burden, Mitchell v St Luke's Hostel Trustees [1948] Ch 160

2027 Condition requiring residence of life tenant — Reduction of annuity on residence ceasing — Additional allowance for outgoings
Re Simpson, Clarke v Simpson no 2125 post

2028 Condition requiring residence of life tenant — Reduction of annuity on residence ceasing — Additional allowance for outgoings
A testatrix who died in September 1939, by her will settled two houses on respective tenants for life, with remainder in each case to the same charity. She directed that if the life tenant should cease to reside in the house, the life interest should determine and the gift to the charity should be accelerated, she also directed her trustees to set apart two sums of £1,000 each and to hold the same during the lifetime of the respective tenants for life upon trust to pay rates, property tax and the cost of all necessary repairs during the respective lives of the tenants for life, and after their deaths to hold any unexpended part and the interest thereon for the said charity: *Held* (1) the sum of £1,000 was not provided in either case for the personal benefit of the tenant for life but solely to enable her to reside there free from the expense of outgoings and therefore if the tenant for life exercise her statutory power of sale she did not lose any benefit the retention of which would be an inducement not to exercise those powers; (2) in the event of the tenant for life exercising her power of sale any unexpended surplus of the £1,000 would pass immediately to the charity, and no part of the income thereof would fall into residue; the words "after her death" in the material clause of the will being read "subject to her interest."
Re Burden, Mitchell v St Luke's Hostel Trustees [1948] Ch 160; [1948] 1 All ER 31; [1948] LJR 631; 92 Sol Jo 72

2029 Effect of gift over — Of personalty
There is no jurisdiction *ex post facto* to sanction the sale of heirlooms. Where heirlooms had been sold to advantage without an order, the court directed the trustees not to take steps to recover them.

Personal estate was bequeathed on trust to apply the income in keeping up a sea wall and ornamental grounds on settled real estate and on trust to pay the balance of the income to the tenant for life of the real estate during lives in being and twenty-one years, with a proviso that, if the tenant for life should become disentitled to the possession or income of the real estate, the settled personal estate should sink into the residue: *Held* this proviso was void under Settled Land Act 1882 (c 38) s 51 (repealed), and the tenant for life who had sold the real estate was still entitled to the income of the personal estate.
Re Ames, Ames v Ames [1893] 2 Ch 479; 62 LJ Ch 685; 68 LT 787; 41 WR 505; 37 Sol Jo 423; 3 R 558

ANNOTATIONS **Folld** Re Herbert, Herbert v Bicester (Lord) [1946] 1 All ER 421 **Distd** Re Burden, Mitchell v St Luke's Hostel Trustees [1948] Ch 160

2030 Effect of gift over — Of settled land
Testator settled real estate. His widow died in 1869, having bequeathed personal estate to be held on trust for the person entitled to the enjoyment of the settled real estate, with a proviso that in case of sale of the real estate, either during the life of a person then in being, or within twenty-one years from her death, her trust property should go over: *Held* in case of sale of the real estate under Settled Land Acts (repealed) the gift over was ineffectual.
Re Smith, Grose-Smith v Bridger [1899] 1 Ch 331; 68 LJ Ch 198; 80 LT 218; 47 WR 357

ANNOTATION **Consd** Re Herbert, Herbert v Bicester (Lord) [1946] 1 All ER 421

2031 Effect of gift over — Of proceeds of settled land
Re Patten, Westminster Bank v Carlyon no 2018 ante

2032 Effect of gift over — Reduction of share of life tenant
S by her will devised certain freeholds to trustees upon trust for T for life, subject to a condition of residence, and in case T should cease to reside there, then on trust to sell and invest the proceeds and pay one-third of the income thereof to T for life, and the remaining two-thirds to other persons therein

mentioned: *Held* the provision was such as to induce the tenant for life to abstain from exercising his powers under Settled Land Act 1882 (c 38) s 51 (repealed), and was void.

Re Dalrymple, Bircham v Springfield (1901) 49 WR 627; 45 Sol Jo 555

2033 Effect of gift over — Settled property to fall into residue

Re Trenchard, Trenchard v Trenchard no 2008 ante

2034 Effect of gift over — Settled property to fall into residue

Re Griffiths, Heastey v Griffiths (1910) 130 LT Jo 106

2035 Effect of gift over — Settled property to fall into residue

Re Freme (Deceased), Samuel v Freme no 2022 ante

2036 Effect of gift over

Re Richardson, Richardson v Richardson no 2208 post

Scottish, Irish and Commonwealth Cases

2037 Condition requiring residence of life tenant — No bar to powers — Sale

Re Adair & Settled Land Act [1909] 1 IR 311 (IR)

2038 Effect of gift over — Of personalty

Testatrix gave to AB the use of her house in D during her life, as a residence, with a proviso, that in the event of AB ceasing to reside in it it should form part of her residuary estate. She also gave to AB the income of a sum of £10,000, for life, or so long as she made the house her principal residence, with a like gift over in the event of her ceasing to make the house her principal residence: *Held* in the event of a sale of the house by AB under the Settled Land Acts, the gift over of the £10,000 was void under Settled Land Act 1852 s 51.

Re Fitzgerald, Brereton v Day [1902] 1 IR 162 (IR)

ii PRELIMINARIES TO EXERCISE OF STATUTORY POWERS

1 Notice to, and receipt of, trustees

LAW See Halsbury's Laws (4th edn) vol 42 para 781 et seq

2039 Necessity for — Appointment of trustees to receive notice

Where a tenant for life was a lunatic, and his committee desired to exercise the powers of leasing given by Settled Land Act 1882 (c 38) (repealed), and no trustees of the settlement were in existence, new trustees had to be appointed for the purposes of the Act (repealed).

Re Taylor (1883) 52 LJ Ch 728; 49 LT 420; 31 WR 596, CA

2040 Necessity for — Appointment of trustees to receive notice

Wheelwright v Walker no 1741 ante

2041 Necessity for — Appointment of trustees to receive notice

Re Bentley, Wade v Wilson no 1858 ante

2042 Necessity for — Appointment of trustees to receive notice

Re Monson's (Lord) Settled Estates [1898] 1 Ch 427; 67 LJ Ch 176; 78 LT 225; 46 WR 330; 14 TLR 247; 42 Sol Jo 289

ANNOTATION **Consd** Re Coull's SE [1905] 1 Ch 712

2043 Form of notice — Sufficiency of general notice of intention

The notice to be given under Settled Land Act 1882 (c 38) s 45 (repealed) by the tenant for life of settled land to the trustees of the settlement for the purposes of the Act, when he was intending to make a sale or lease, must have been not a merely general notice of an intention to sell or lease all or any part of the estate at any time after the expiration of one month from the date of the notice as and when a proper opportunity should from time to time occur, but a notice of a specific sale or lease which was contemplated at the time when the notice was given.

Re Ray's Settled Estates (1884) 25 Ch D 464; 53 LJ Ch 205; 50 LT 80; 32 WR 458

2044 Time for notice — Sale

(1) On a sale by tenant for life under Settled Land Act 1882 (c 38) (repealed), a notice to the trustees given less than a month before the contract, but more than a month before the day fixed for completion, held a sufficient compliance with s 45 (repealed).

On the reading of the section [repealed] it is quite plain that a distinction is drawn, between the making of the sale and the making of a contract for sale; and if the notice therefore required by the section [repealed] is given before either one of those two things—assuming that they are two things, then the notice will be good (*Chitty J*).

(2) The giving of the notice is a matter between the tenant for life and the trustees, and one with which the purchaser is not concerned (*Chitty J*).

Marlborough (Duke) v Sartoris (1886) 32 Ch D 616; 56 LJ Ch 70; 55 LT 506; 35 WR 55; 2 TLR 644

ANNOTATION As to (2) **Consd** Mogridge v Clapp [1892] 3 Ch 382

2045 Defect in respect of notice — Title not destroyed — Purchaser not concerned

Marlborough (Duke) v Sartoris no 2044 ante

2046 Defect in respect of notice — Title not destroyed — Purchaser not concerned — No trustees appointed

Hatten v Russell no 2206 post

2047 Defect in respect of notice — Title not destroyed — Purchaser not concerned — No trustees appointed

In October 1884, H, purporting to demise as absolute owner, which he believed himself to be, granted a building lease of certain land to plaintiff for the term of ninety-nine years. Plaintiff made no inquiry as to H's title, but assumed that he was the absolute owner of the land demised. Defendant afterwards agreed to purchase the lease of the demised land from plaintiff; but, on investigating the title, he discovered that the land had, under a will, belonged to H's deceased wife, and that H was only tenant by the curtesy. A tenant by the curtesy had, under Settled Land Act 1882 (c 38) s 58(1)(viii) (repealed), all the powers of a tenant for life; but the lease, though complying with the enabling sections of the Settled Land Acts (repealed), contained no reference thereto; and at its date there were no trustees of the will, to whom the notices, required by Settled Land Act 1882 (c 38) s 45 (repealed), in the case of a lease by a tenant for life, could be given. Defendant then refused to complete, upon the ground that the lease was invalid or, if not, that plaintiff's title was so questionable that it ought not to be forced upon a purchaser. In an action by plaintiff for specific performance of the agreement: *Held* (1) the lease could, and did, operate under Settled Land Act 1882 (c 38) (repealed), to convey the land within the meaning of s 20(2) (repealed); (2) as to the absence of trustees of the settlement and the want of the notices required by s 45 (repealed), plaintiff having dealt with the lessor in good faith, was protected by s 45(3) (repealed) and, accordingly, the lease was a valid lease, although there were no trustees, and plaintiff was entitled to specific performance of the agreement.

(3) The doctrine of constructive notice ought not to be applied so as to invalidate the titles of persons dealing *bonâ fide* with tenants for life when exercising their powers under the Settled Land Acts (repealed).

Mogridge v Clapp [1892] 3 Ch 382; 61 LJ Ch 534; 67 LT 100; 40 WR 663; 8 TLR 631; 36 Sol Jo 554, CA

ANNOTATIONS As to (2) **Distd** Chandler v Bradley [1897] 1 Ch 315; Re Fisher & Grazebrook's Contract [1898] 2 Ch 660 **Apld** Re Pennant's Will Trusts, Pennant v Ryland [1969] 2 All ER 862 **Consd** Re Morgarn's Lease, Jones v Norsesowicz [1971] 2 All ER 235

2048 Application to raise capital out of settled property — Jurisdiction of court — Settled Land and Trustee Acts (Court's General Powers) Act 1943 (c 25)

An application was made under Settled Land Act 1925 (c 18) s 64, as amended by Settled Land & Trustees Acts (Court's General Powers) Act 1943 (c 25) s 1(1), that the trustees of certain settled property might raise £10,000 out of capital to enable the tenant for life to continue to live in the mansion house: *Held* the jurisdiction conferred on the court by s 64 was not restricted by s 1(1) of the Act of 1943; the proposed transaction was for the benefit of the settled land and the persons interested under the settlement; and the application should be granted.

Re Scarisbrick Re-settlement Estates [1944] Ch 229; [1944] 1 All ER 404; 113 LJ Ch 148; 170 LT 245; 60 TLR 263; 88 Sol Jo 127

2049 Repayments of cost of improvements — Contributions by lessees

Re Hesketh, Saunders v Bilby-Hesketh (1900) 45 Sol Jo 11

2050 Damages — In respect of damages to heirlooms

Re Walton, Miller v Walton (1900) 44 Sol Jo 645

2051 Damages — In respect of breaches of repairing covenant — Leases by previous life tenant

Where a tenant for life without impeachment of waste recovers damages from a lessee for dilapidations to the mansion house and buildings arising from breaches of repairing covenants in a lease granted by a previous tenant for life under the statutory power, the damages are not capital moneys payable to the trustees of the settlement or into court, but must be taken to represent the damages which the tenant for life has sustained, and may accordingly be kept by him and used for such purposes as he may think fit.

Re Lacon's Settlement, Lacon v Lacon [1911] 2 Ch 17; 80 LJ Ch 610; 104 LT 840; 27 TLR 485; 55 Sol Jo 551, CA

ANNOTATIONS **Distd** Re Pyke, Birnstingl v Birnstingl [1912] 1 Ch 770 **Folld** Re Dealtry, Davenport v Dealtry (1913) 108 LT 832 **Consd** Re Williams' Settlmt, Williams Wynn v Williams [1922] 2 Ch 750

2052 Fund for discharge of incumbrances — Mineral rents accumulated by special direction — Incumbrances discharged by other moneys

Re Wharncliffe's Trusts, Wharncliffe (Earl) v Wortley (1904) 48 Sol Jo 176, CA

2053 Forfeited deposits — On abortive sale

Where a tenant for life sold land, under Settled Land Act (repealed) by public auction, and a deposit was paid by the purchaser, but it was subsequently discovered that the purchaser had not the funds to

complete the purchase, and the purchaser signed an agreement, whereby, in consideration for his release from the contract, he undertook to forfeit the deposit and pay the auctioneer's fees: *Held* the deposit so forfeited came within Settled Land Act 1882 (c 38) s 31(1)(ii) (repealed), and was accordingly capital money and not income of the tenant for life.

Re Ward's Settled Estate (1919) 63 Sol Jo 319

2054 Proceeds of sale of land held under trusts for sale

The trust deed of a charity placed the entire management and control of its property, which, whether land or investments, was all revenue, in the hands of a sole trustee, in whom it was vested with full power to sell and give receipts for the purchase-money: *Held* (1) the trustee could sell the lands under his trust deed and give a receipt for the purchase-money without resorting to his life tenant powers under Settled Land Act 1925 (c 18) s 29, at all; (2) in any case the proceeds of sale would remain revenue and would not become capital moneys arising under the Act, for both these reasons Settled Land Act 1925 (c 18) s 94(1), had no application.

Re Booth & Southend-on-Sea Estates Co's Contract [1927] 1 Ch 579; 96 LJ Ch 272; 43 TLR 334; sub nom *Booth v Southend-on-Sea Estate Co's Contract* (1927) 137 LT 122

Scottish, Irish and Commonwealth Cases

2055 Necessity for

One month's notice of the intention to make an agreement for a lease must be given to the trustees of the settlement for the purposes of Settled Land Acts, in order that the agreement might bind the persons entitled in remainder.

Hughes v Fanagan (1891) 30 LR IR 111 (IR)

2 Leave of the court or consent of trustees

A Generally

LAW See Halsbury's Laws (4th edn) vol 42 para 785 et seq

2056 Settlement by way of trust for sale — Order under Settled Land Act 1884 (c 18) s 7 (repealed) — Before commencement of Law of Property Act 1925 (c 20)

Re Cecil's (Lady Francis) Settled Estates [1926] WN 262

2057 Settlement by way of trust for sale — Order under Settled Land Act 1884 (c 18) s 7 (repealed) — Before commencement of Law of Property Act 1925 (c 20) — Exercise in name of trustees

Re Leigh's Settled Estates no 1875 ante

2058 Consent of trustees — Who may consent — Trustees entitled to assignee's interest

The assignee for value of a life tenant's estate died, having devised that estate *pur autre vie* to trustees during the life of P, aged eleven, with legal remainders over in strict settlement. The original life tenant or *cestui que vie* was aged forty, so that the legal remainders in the estate *pur autre vie* were very unlikely to come into possession. The trustees who were in possession of the settled estates under this devise had full powers of management till P attained twenty-five and for his whole life if he previously incumbered, but otherwise on attaining twenty-five he took a life interest with possession till he incumbered. The original tenant contracted to sell part of the settled estates under the powers preserved to him by Settled Land Act 1882 (c 38) s 50 (repealed): *Held* in the special circumstances the consent of the trustees was a sufficient consent within the section on behalf of the estate of the assignee for value.

Re Mountgarret & Moore's Contract [1915] 1 Ch 443; 84 LJ Ch 398; 112 LT 939; 31 TLR 189; 59 Sol Jo 382

2059 Settled Land Act 1925 (c 18) s 64 — When applicable

Re Symons, Symons-Jeune v Bunbury no 1054 ante

2060 Settled Land Act 1925 (c 18) s 64 — When applicable

A tenant for life of settled land being desirous of paying off debts incurred by him in the upkeep of the estate, prepared a scheme and applied under Settled Land Act 1925 (c 18) s 64, asking the court to sanction the raising of the necessary amount by sale or mortgage of part of the settled land. The judge in Chambers refused the application, holding that he had no jurisdiction, as the scheme was not for the benefit of the settled land: *Held* on appeal, the court had jurisdiction, inasmuch as the section was wide in its terms and applied not only to the settled land but also to persons interested under the settlement. The scheme being for the benefit of persons interested under the settlement, the appeal must be allowed and effect given to the scheme.

Re White-Popham Settled Estates [1936] Ch 725; [1936] 2 All ER 1486; 105 LJ Ch 368; 155 LT 553; 80 Sol Jo 816, CA

ANNOTATION **Apld** Re Mount Edgcumbe Settled Estates [1950] 2 All ER 242

2061 Settled Land Act 1925 (c 18) s 64 — When applicable

A testator directed his trustees to allow all the chattels and effects not otherwise specifically disposed of by him to devolve and be enjoyed as heirlooms along with the settled estates thereinafter devised in settlement. In 1941, the mansion house forming part of those estates and nearly all the chattels in it were almost totally destroyed by enemy action. The War Damage Commission admitted a claim in respect of chattels insured under the private chattels scheme, and the trustees for the purposes of the Settled Land Act of the settlement duly received from them the sum of £10,000. A summons was taken out to determine whether this sum might be applied in the purchase of furniture or other chattels suitable to equip the mansion house: *Held* as and when the house was rebuilt, a sum not exceeding £10,000 might be expended in the purchase of such furniture and chattels for the mansion house as the trustees (other than the tenant for life) should consider suitable to retain as heirlooms under the settlement created by testator.

Re Mount Edgcumbe (Earl) [1950] Ch 615; [1950] 2 All ER 242; 66 (pt 1) TLR 1174; 94 Sol Jo 369

2062 "Transaction" — What amounts to

By a settlement, dated 15 October 1923, the trust fund was to be held, in three equal shares, for the benefit of the settlor and her two brothers. Under the trusts relating to her share, the settlor took a protected life interest in the income of the share which was held on trust after her death for her children. Subject to these trusts the settlor had a general power of appointment, exercisable by will or codicil, over her share, and, in default of and subject to any such appointment, the share, on the settlor's death, was to acquire to the other shares which were settled on similar trusts, *mutatis mutandis*, for the settlor's brothers. The trust fund included certain land which was vested in the trustees of the settlement on trust for sale. The settlor was now over sixty-three years of age and had not married. She applied to the court, under Law of Property Act 1925 (c 20) s 28(1), and Settled Land Act 1925 (c 18) s 64, for an order authorising the trustees to give effect to a scheme whereby she would receive half the capital of her share absolutely and would release her general power of appointment over the other half: *Held* (1) the power conferred by Settled Land Act 1925 (c 18) s 64(1), on a tenant for life to effect under an order of the court a transaction (not otherwise authorised by the settlement) if in the opinion of the court it were for the benefit of the persons interested under the settlement was among the powers conferred on trustees for sale of land by Law of Property Act 1925 (c 20) s 28(1); (2) the scheme was a "transaction" within the terms of Settled Land Act 1925 (c 18) s 64(2); in the opinion of the court the transaction was one which would be for the benefit of the persons interested under the settlement and, accordingly, the court would authorise it under s 64(1).

Re Simmons' Trusts, Simmons v Public Trustee [1956] Ch 125; [1955] 3 All ER 818; 220 LT 355

2063 Transaction affecting settled land — Of national artistic and historical importance — Whether court having jurisdiction to authorise proposed conveyance

In 1705 Queen Anne granted certain land ('the estates'), to the first Duke of Marlborough in fee simple as a reward for his victory at Blenheim. Under an Act of Parliament passed in 1706 the estates, which included Blenheim Palace, passed to his daughter and thereafter to her male issue in tail male severally in succession with remainders over. The 1706 Act contained an entrenching provision to the effect that no person in whom the estates should be vested had power 'by Fine or Recovery, or any other Act, Assurance or Conveyance in the Law, to hinder, bar, or disinherit . . . the Person . . . upon whom [the estates were] vested or limited, from holding or enjoying the same . . .' The legal effect of the 1706 Act was that the duke for the time being was an ordinary tenant in tail and able to dispose of the income from the entailed property during his life. Since the enactment of the Settled Land Act 1882 and its successors the duke for the time being had the powers of a tenant for life under those Acts in respect of the estates. The first defendant, the eleventh duke, was thus the tenant in tail in possession and had all the powers of a tenant for life under the Settled Land Act 1925. The second defendant, the Marquis of Blandford, was the duke's eldest son and tenant in tail in remainder and on the death of his father would be entitled to all the powers of a tenant for life under the 1925 Act. Blenheim Palace was a stately home of national artistic and historical importance, maintained in part with income generated by members of the public who visited it. The plaintiffs, who were the trustees of the settlement constituted, inter alia, by the 1706 Act ('the settlement'), decided that the marquis, by reason of his irresponsible and unbusinesslike habits, was not capable of managing the estates. The trustees prepared a scheme providing for the proper management of the estates under which, inter alia, the duke would create a new settlement and would execute, without consideration, a conveyance of substantially all the land comprised in the settlement to the trustees of the new settlement to be held by them on trust for sale to hold the net proceeds of sale and the net rents and profits until sale on the trusts of the new trust and subject thereto

upon the trusts of the settlement. Such a scheme would affect the marquis, inter alia, by imposing protective trusts on his life interest, reducing his right to the proceeds of sale of timber, and depriving him of the benefits of being a tenant for life under the 1925 Act with the right to live in and manage Blenheim Palace. The trustees applied to court for an order authorising the conveyance under s 64 of the 1925 Act, which provided that 'Any transaction affecting or concerning the settled land . . . which in the opinion of the court would be for the benefit of the settled land . . . or the persons interested under the settlement, may, under an order of the court, be effected by a tenant for life, if it is one which could have been validly effected by an absolute owner' and that 'transaction' included 'any sale . . . exchange, assurance, grant, lease, surrender, reconveyance, release, reservation, or other disposition'. On the trial of a preliminary issue whether the court had jurisdiction under s 64 of the 1925 Act to authorise the duke to execute the conveyance without the consent of the marquis, the marquis contended (i) that the court did not have such jurisdiction because, inter alia, a 'transaction' for the purposes of s 64(2) was to be given a restricted interpretation and did not cover the unilateral act of imposing on the land a trust for sale and thereby freeing not only the land but also the tenant for life and the trustees from the 1925 Act; (ii) that s 64 did not enable the beneficial interest of a person who was sui juris to be varied without his consent; and (iii) alternatively, that the entrenching section covered the proposed conveyance and so precluded the court from having jurisdiction to authorise the scheme: *Held* —(1) There was no necessity for 'transaction' in s 64(2) to be given a restricted interpretation, as its application was already restricted in that a transaction could only be carried out if the court considered that it was for the benefit of the land or the beneficiaries. If that condition was satisfied then there was every reason for giving the word 'transaction' the widest meaning it could reasonably bear. The proposed conveyance was a transaction under s 64(2) as it was a transfer of property which was an 'assurance . . . or other disposition'. Those words did not imply that the transaction had to be bilateral, nor that a gratuitous transaction should be limited to the investment of capital moneys. Further, the reason for or purpose of the transfer was immaterial.

(2) The court's jurisdiction under s 64 of the 1925 Act applied to transactions which varied the beneficial interests of those who could not consent to the proposal because they were not sui juris or were unborn or unascertained but there was nothing in s 64 to limit the jurisdiction to the interests of such beneficiaries alone. The court therefore had power to approve a transaction which varied the beneficial interest of an ascertained beneficiary of full age and capacity even without his consent, although that was qualified by the requirement that such variation had to be for the benefit of the settled land or all the beneficiaries under the settlement. In that way the person whose beneficial interest was affected would receive some countervailing advantage. On the facts, therefore, subject to the effect of the entrenching section, the court had jurisdiction under s 64 to approve the proposed conveyance.

(3) The proposed conveyance was clearly contrary to the entrenching section in that to impose protective trusts on the marquis's life interest and to reduce his right to the proceeds of sale of timber were both 'hindrances' under that section; moreover, by subjecting the estates to a trust for sale the marquis was excluded from his rights under the 1925 Act in respect of the estates. However, s 58(1)(i) of the Settled Land Act 1882, re-enacted in s 20(1)(i) of the 1925 Act, overrode the entrenching section in that it conferred the powers of a tenant for life under that Act, including the power of sale, on a tenant in tail. Notwithstanding the entrenching section, therefore, the court had jurisdiction to approve the proposed conveyance although whether it would be for the benefit of the estates or any of the persons interested under the settlement had still to be decided.

Hambro and others v Duke of Marlborough and others [1994] Ch 158; [1994] 3 All ER 332; [1994] 3 WLR 341; [1994] 24 LS Gaz R 47

B Cutting or sale of timber

LAW See Halsbury's Laws (4th edn) vol 42 para 787

C Lease, sale or exchange of mansion house

LAW See Halsbury's Laws (4th edn) vol 42 para 787 et seq

2064 Lease — Including lease of easement — Or lease of part

Sutherland (Dowager Duchess) v Sutherland (Duke) no 2291 post

2065 Lease — Including lease of easement

(1) Settled Land Act 1890 (c 69) s 10 (repealed), which precluded the life tenant (*inter alia*) from leasing "the principal mansion house, if any, on any settled land, and the pleasure grounds and park and lands, if any, usually occupied therewith" without the consent of the trustees or an order of the court, applied to a park not usually occupied with the principal mansion house, the words "usually occupied

therewith" referring merely to the words "lands, if any," immediately preceding them.

Settled Land Act 1980 (c 69) s 10 (repealed) also applied to the lease of an easement over the same property.

In *Sutherland (Dowager Duchess) v Sutherland (Duke)* (no 2291 post) it was argued that s 10 [of Settled Land Act 1890 (c 69) (repealed)] did not apply to a lease of an easement over the principal mansion house park and lands; but *Romer J*, said: In my judgment, though s 10 (repealed) does not repeat the words in s 6 (repealed) [the leasing section] of Settled Land Act 1882 (c 38), or any part thereof, or any easement, right or privilege of any kind, over or in relation to the same, it has the same operation and effect as if the words had been repeated (*Swinfen Eady J*).

(2) The word "park" as used in Settled Land Acts (repealed), was not confined to an ancient legal park, but included an ordinary private park.

Pease v Courtney [1904] 2 Ch 503; 73 LJ Ch 760; 91 LT 341; 53 WR 75; 20 TLR 653; 48 Sol Jo 622

2066 Park — Not confined to legal definition — Ordinary private part

Pease v Courtney no 2065 ante

2067 Two estates in one settlement — Each estate with mansion house

The consent of the trustees of the settlement, required by Settled Land Act 1890 (c 69) s 10(2) (repealed), to be given to the sale or lease of the principal mansion house on any settled land, need not have been communicated to the parties.

Two estates, each of which included a mansion house, were settled by the same instruments, to the same uses. The tenant for life acting under the powers of Settled Land Acts (repealed), leased one of the mansion houses to his wife. The evidence showed that the lease was advantageous to all the parties entitled under the settlement. Each of the trustees of the settlement, with full knowledge of the facts relating to the proposed lease, approved of it as being for the benefit of the estate, but neither of them gave any formal consent thereto, each being advised that the house in question was not the principal mansion house on the settled land: *Held* (1) on the evidence, it was not the principal mansion house; (2) if any consent to the lease was required the trustees had given their consent.

Gilbey v Rush [1906] 1 Ch 11; 75 LJ Ch 32; 93 LT 616; 54 WR 71; 22 TLR 23; 50 Sol Jo 26

ANNOTATION As to (1) **Consd** Re Feversham Settled Estate [1938] 2 All ER 210

2068 Two estates in one settlement — Each estate with mansion house — Building converted into school

Two estates, the BP estate, in Kent, and the CH estate, in Essex, each having its own principal mansion house, were settled by the same settlement upon the same trusts. The tenant for life had definitely adopted CH as his residence. The BP estate was a building estate, and its development as such, which had already commenced at the date of the settlement, was subsequently continued until the character of the surrounding neighbourhood had become altered to such an extent as to render a house of the size and pretensions of BH quite out of place and very difficult to let. Ultimately, with the sanction of the court, BH and 18 acres of pleasure grounds and park were let on a twenty-one years' lease to a schoolmaster, £200 being first expended out of capital moneys in making the hall suitable for the purposes of a school. The remainder of the pleasure grounds and park, which had originally comprised about 103 acres, was cut up and laid out under a building scheme and a considerable portion sold or let on building leases: *Held* in the circumstances, BH had ceased to be the principal mansion house on any settled land, and the hall and the pleasure grounds and park and lands usually occupied therewith were no longer subject to the restrictions imposed by Settled Land Act 1890 (c 69) s 10 (repealed).

Re Wythes' Settled Estates [1908] 1 Ch 593; 77 LJ Ch 319; 98 LT 277; sub nom *Re Wythes, West v Wythes* (1908) 24 TLR 251

ANNOTATION **Consd** Re Feversham Settled Estate [1938] 2 All ER 210

2069 Consent of trustees — Necessity for communication to parties

Gilbey v Rush no 2067 ante

2070 Consent of trustees — What amounts to

Gilbey v Rush no 2067 ante

2071 Exercise of discretion by court — General rule

(1) In the Settled Land Acts 1882 and 1890 (repealed), the paramount object of the Legislature was the well-being of settled land.

An estate including an old family mansion house became vested under a settlement in a tenant for life, a young man who had mortgaged his life estate to a money-lender who had brought an action for foreclosure. The tenant for life, who was too poor to reside on the estate, had contracted under Settled Land Acts (repealed) to sell the whole for a good price to a wealthy purchaser, and petitioned under Settled Land Act 1890 (c 69) s 10 (repealed), for the sanction of the court to the sale of the mansion house

and demesne lands. The remaindermen opposed the petition, desiring that the mansion house and demesne lands should remain in the family: *Held* the court in the exercise of its discretion under Settled Land Acts (repealed) must have regard to the well-being of the land and the interests of the persons from whose industrial occupation the rents and profits were derived, as well as to the interest of those entitled under the settlement; and to refuse the sanction in such a case would be to defeat the object of the Legislature.

The question arises under the restriction as to the mansion house and the lands, pleasure grounds and parts usually occupied therewith. It scarcely requires argument to show that if the commercial interest is alone to be considered the withdrawing from the sale of the mansion house and pleasure grounds usually occupied therewith, in this particular case, would have a very serious depreciatory effect upon the sale of the remainder. The 7,000 acres by themselves, or the odd 33,000 acres by themselves, certainly would not be likely to realise, if sold separately, the gross sum which would be obtained by selling both as one estate. But the question your lordships have to determine is whether, under the circumstances of this particular case, consent should be given to the sale of the whole (*Lord Halsbury C*).

(2) I am not certain that any public considerations intervene when the question of the sale of heirlooms arises (*Lord Halsbury C*).

Bruce (Lord) v Ailesbury (Marquess) [1892] AC 356; 62 LJ Ch 95; 67 LT 490; 57 JP 164; 41 WR 318; 8 TLR 787; 36 Sol Jo 711; 1 R 37, HL; affg SC sub nom

Re Ailesbury's (Marquis) Settled Estates [1892] 1 Ch 506; 61 LJ Ch 116; 65 LT 330; 40 WR 243; 82 TLR 157; 36 Sol Jo 123, CA

ANNOTATIONS As to (1) **Consd** Sutherland v Sutherland [1893] 3 Ch 169 **Apld** Re Richardson, Richardson v Richardson [1900] 2 Ch 778 **Consd** Re Aldam's SE [1902] 2 Ch 46

2072 Condition as to provision for heirlooms

Where testator bequeathed to his trustees certain chattels and directed that the same should be considered, "as annexed to his mansion house Woodthorpe Hall, near Sheffield, as heirlooms, and be held in trust for the persons for the time being entitled to the mansion house," on summons under Settled Land Act 1882 (c 38) s 15 (repealed), the court made an order for sale of the mansion house, but ordered the summons to be amended by including the heirlooms, and ordered an inventory of the heirlooms, and an affidavit verifying the inventory to be produced, and the matter to be mentioned again in the presence of counsel for the trustees.

On the directions of the court being complied with, and the matter being mentioned again, the court made an order for sale of the heirlooms with liberty for the tenant for life to bid at the sale, the cost to come out of the proceeds.

Re Brown's Will (1884) 27 Ch D 179; 53 LJ Ch 921; 51 LT 156; 32 WR 894

2073 Consent of mortgagees refused

Re Beechwood Mansion House & Park (1886) 2 TLR 907, CA

2074 Consent of mortgagees refused — Life interest mortgaged to full value

(1) The court, in the exercise of the discretion given by Settled Land Act 1882 (c 38) s 15 [repealed] in respect to ordering a sale of the mansion house and park on the settled land where the trustees of the settlement do not consent, will not, where the tenant for life has mortgaged his life interest to its full value, make the order on his application without full information as to the proposed sale and the consent of the mortgagees.

(2) A tenant for life cannot divest himself of the powers conferred by the Act (repealed), but he may by assignment for value incapacitate himself from exercising those powers as against the assignee for value (*Lopes LJ*).

Re Sebright's Settled Estates (1886) 33 Ch D 429; 56 LJ Ch 169; 55 LT 570; 35 WR 49, CA

2075 Family seat — Sale directed by testator on death of life tenant

W, by will, after giving certain chattels in K mansion house to be enjoyed by his eldest son as heirlooms during his life, devised the K mansion house and all other his real estate to trustees upon trust out of the rents and profits to pay certain annuities to his daughters, and subject thereto to pay the rents and profits to his son during his life, and after his death to sell the same and divide the proceeds as therein mentioned. The son desired to sell the mansion house with the rest of the estate under the powers given him by Settled Land Acts (repealed). The trustees refused their consent: *Held* the mansion house not being a family seat, and testator having himself directed its sale at the death of the tenant for life, the case was not within the reasons for the exception of the mansion house from the full power of sale given by Settled Land Acts (repealed) to the tenant for life, and he ought to be allowed to sell at his discretion.

Re Wortham's Settled Estates (1896) 75 LT 293

2076 Condition of residence — Tending to restrain exercise of powers

Re Paget's Settled Estates no 2019 ante

D Power to compromise

LAW See Halsbury's Laws (4th edn) vol 42 para 789

CROSS REFERENCE See TRUSTS vol 48 (reissue) no 5380 et seq (power of trustees to compromise)

Scottish, Irish and Commonwealth Cases

2077 What court will consider — Benefit to parties concerned

Re Pender's Settled Estate (1889) 15 VLR 474 (AUS)

2078 What court will consider — Benefit to parties concerned

On petition for leave to sell under Settled Estate Act, the court will consider the interest of all parties concerned, especially of infants, and will not necessarily refuse the petition because a number of those interested are opposed to it.

Ex p Bellamy (1890) 11 NSW Eq 187; 7 NSWWN 13 (AUS)

2079 What court will consider — Benefit to parties concerned

Re Redman's Settled Estate (1890) 11 NSW Eq 324 (AUS)

2080 What court will consider — Benefit to parties concerned

Re Cooper's Trusts (1901) 1 SRNSW (Eq) 234; 18 NSWWN 292 (AUS)

2081 What court will consider — Benefit to parties concerned

Re Lawry's Settled Estate (1918) 19 SRNSW 1; 36 NSWWN 9 (AUS)

2082 What court will consider — Benefit to parties concerned

Re Cornell (1905) 5 OWR 60; 9 OLR 128 (CAN)

2083 What court will consider — Benefit to parties concerned

Re Howard (1911) 16 WLR 246; 16 BCR 48 (CAN)

2084 What court will consider — Benefit to parties concerned

Re Ely's (Marquis) Estate [1905] 1 LR 413; 38 ILT 49 (IR)

2085 What court will consider — Benefit to parties concerned

Re Barker's Will (1903) 32 NZLR 359 (NZ)

2086 What court will consider — Benefit to parties concerned

The consent of the court given to a sale of settled land by the tenants for life thereof, where the property was in a valuable position in Wellington, the houses built on it were old, and if pulled down would have to be rebuilt in brick, whilst if they were allowed to remain the tenants for life would receive a very small income considering the value of the land.

Re Buck's Settled Estate (1904) 23 NZLR 899 (NZ)

2087 Application for leave to mortgage

This was an application by the trustees of a settled estate, under RSO 1897 (c 71), for leave to mortgage the estate for the purpose of building, the existing buildings having been destroyed by fire. The settlement contained a clause that the trustees might "sell, but not mortgage, the trust property or any part thereof": *Held* this clause of the settlement was not an express declaration that the lands should not be mortgaged within Settled Estates Act s 37; and merely meant that the power of sale given to the trustee was not to be construed as including a power to mortgage.

Re Curry & Watson's Settlement (1904) 24 CLT 291; 7 OLR 701; 3 OWR 776 (CAN)

2088 Consent of trustees — Who may consent

Re Benjamin (Deceased) [1920] VLR 393 (AUS)

2089 Leave of court — Necessity for

Re Dublin, Wicklow & Wexford Ry Co, Ex p Tottenham (1885) 13 LR Ir 479 (IR)

2090 Leave of court — To allow exchange of lands

Settled Land Act 1908 s 70 is confined to a case where a tenant for life owns land which he desires to exchange for the settled land and does not include a case where the desires to exchange the settled land for land owned by another person. It is therefore doubtful whether the court has jurisdiction to sanction this exchange of settled land for other land owned by the tenant for life; and, even assuming that the court has such jurisdiction, it ought not to exercise it in favour of an exchange which involves an investment of the trust funds in a purchase of a speculative nature.

Re Potter's Trust (1914) 33 NZLR 1472 (NZ)

2091 Condition of residence

A principal mansion house and demesne in the county of Dublin were settled upon the same trusts as lands in the counties of Mayo and Sligo, with a condition of forfeiture on non-residence in selling of, or letting of said mansion house and demesne, which attached both to them, and to the other lands settled: *Held* they were a "principal mansion house" and demesne within Settled Land Act 1882 s 15; the condition of forfeiture was void for the purposes of that Act; and the court, on the facts, would authorise a temporary letting of them to be made.

Re Thompson's Will (1888) 21 LR Ir 109 (IR)

3 Applications to the court

LAW See Halsbury's Laws (4th edn) vol 42 para 790 et seq

2092 Joint tenants for life — Disagreement as to exercise — Powers of court

Where joint tenants for life under Settled Land Act 1925 (c 18) disagree as to the exercise of the power of sale vested in them the power cannot be exercised and the court will not, in the absence of bad faith, order a sale under s 93 of the Act.

Barker v Addiscott [1969] 3 All ER 685; sub nom *Re 90 Thornhill Rd, Tolworth, Surrey, Barker v Addiscott* [1970] Ch 261; [1969] 3 WLR 570; 113 Sol Jo 548

iii POWER TO EFFECT IMPROVEMENTS

LAW See Halsbury's Laws (4th edn) vol 42 para 793

2093 By limited company — For shares in company

Where the evidence is clear that, under the circumstances of the case, to allow a scheme, whereby a company is to execute improvements within Settled Land Act, is more beneficial to the estate than expending capital moneys thereon, the court may sanction the scheme, although one of the terms is a sale of part of the settled land, necessary to enable the company to carry out the improvements, in consideration of fully paid up shares in the company.

Re Orwell Park Estate (1894) 8 R 521

2094 Power of tenant for life to cut timber — "Timber not planted or left standing for shelter or ornament"

In an action to restrain the cutting of timber on the ground of equitable waste, the question to be decided is whether the timber was in fact planted or left for ornament or shelter, not whether it is ornamental or useful for shelter, but the court will accept the evidence of competent persons, founded on inference from the present appearance and condition of the timber, as some evidence that it was so planted or left.

I quite accept the argument which was put forward on behalf of defendants that although the issue is ultimately for the court to determine whether the timber has or has not been left for shelter or ornament, that issue is not determined by saying whether in the opinion of the court the timber is ornamental or not. That is not the issue. If the timber has been planted or left by the owners of the estate for the time being for shelter or for ornament, that is protected under the rule which protects ornamental timber, even though the opinion of persons at the present day may be that the timber in its position is not in fact ornamental (*Swinfen Eady J*).

Weld-Blundell v Wolseley [1903] 2 Ch 664; 73 LJ Ch 45; 89 LT 59; 51 WR 635; 47 Sol Jo 653

iv POWERS IN RESPECT OF CAPITAL MONEY

1 In general

LAW See Halsbury's Laws (4th edn) vol 42 para 794

2 What money to be laid out in purchase of land

LAW See Halsbury's Laws (4th edn) vol 42 para 795

2095 Money in hands of trustees for investment — Power to invest in land

(1) Under Settled Land Act 1882 (c 38) s 33 (repealed), the tenant for life had the same powers over money in the hands of trustees liable to be laid out in the purchase of land to be made subject to the settlement as he would have had over the land itself, and the section (repealed) gave the tenant for life an option to direct how the money should be applied or invested as capital money under the Settled Land Acts (repealed).

(2) *Semble*: s 33 (repealed) only applied to money subject to a trust to be laid out in land, and not to money subject to a discretionary power to be so laid out.

Re Gee, Pearson Gee v Pearson (1895) 64 LJ Ch 606; 11 TLR 431; 39 Sol Jo 539

2096 Money in hands of trustees for investment — Power to invest in land

Personal property held by trustees with power to invest in land was liable to be laid out in the purchase of land within the Settled Land Act 1882 (c 38) ss 32, 33 (repealed).

Re Soltau's Trust [1898] 2 Ch 629; 68 LJ Ch 39; 79 LT 335

2097 Money in hands of trustees for investment — Power to invest in land — Particular land

Money which the trustees of a settlement were empowered to invest, at the request of the tenant for life, in the purchase of particular land was money which was "liable to be laid out in the purchase of land" within Settled Land Act 1882 (c 38) s 33 (repealed).

Where by a settlement, which comprised a moiety of certain freeholds, the trustees were empowered, at the request of the tenant for life, to invest money comprised in the settlement in the purchase of the other or unsettled moiety of the freeholds: *Held* the case came within Settled Land Act 1882 (c 38) s 33 (repealed), and money in the hands of the trustees might be invested, as capital money, in the purchase by them, jointly with the owner of the unsettled moiety, of land convenient to be held together with the freeholds.

Re Hill, Hill v Pilcher [1896] 1 Ch 962; 65 LJ Ch 511; 74 LT 460; 44 WR 573

2098 Money in hands of trustees for investment — Absolute trust to invest

Re Gee, Pearson Gee v Pearson no 2095 ante

2099 Money in court — Compulsory purchase — Lands belonging to charity

Lands belonging absolutely to a charity were taken by a public body, and the purchase-money paid into

court under the Lands Clauses Consolidation Act 1845 (c 18): *Held* the purchase-money could be dealt with under Settled Land Act 1882 (c 38) s 32 (repealed), as "money liable to be laid out in the purchase of land to be made subject to a settlement".

Re Byron's Charity (1883) 23 Ch D 171; 53 LJ Ch 152; 48 LT 515; 31 WR 517

ANNOTATION **Consd** Ex p Castle Bytham, Ex p Mid Ry [1895] 1 Ch 348

2100 Money in court — Compulsory purchase — Glebe lands

Ex p Castle Bytham (Vicar), Ex p Midland Ry Co no 1004 ante

2101 Proceeds of sale under Settled Estates Act 1877 (c 18) (repealed)

By an order under Settled Estates Act 1877 (c 18) (repealed), contracts for the sale of settled land were confirmed, and trustees were appointed to receive the proceeds, and were directed to apply same "to some one or more of the purposes mentioned in Settled Estates Act 1877 (c 18) s 34 [repealed]," and in the meantime to invest same in Consols. The proceeds were received and invested in Consols, but no step was taken to apply them to any of the purposes of s 34 (repealed). On the application of the tenant for life under Settled Land Act 1882 (c 38) (repealed): *Held* the trustees might, under ss 21 and 33 (repealed) of that Act, realise the Consols, and invest the proceeds in railway debenture stocks.

Re Tennant (1889) 40 Ch D 594; 58 LJ Ch 457; 60 LT 488; 37 WR 542; 5 TLR 316

2102 Repayment of costs of improvement — Sinking fund

By a settlement of family estates, made in 1877, the trustees were empowered by the direction of the tenant for life, to raise money by mortgage of the settled lands, to be applied by him for the purpose of improvements thereon similar in the main to those authorised by Settled Land Act 1882 (c 38) (repealed), and the annual rents of the settled lands were charged with the payment to the trustees, for twenty-five years from the raising of the money, of an annual sum equal to one twenty-fifth of the money paid to the tenant for life, who was to be bound to pay such annual sum, and to keep down the interest on the charge. Under the power of the settlement money had been raised for improvements by direction of the tenant for life, and he had made certain annual payments towards the sinking fund created by the settlement: *Held* the money standing to the credit of the sinking fund was capital money under Settled Land Act 1882 (c 38) s 33 (repealed), and applicable as such.

Re Sudbury & Poynton Estates, Vernon v Vernon [1893] 3 Ch 74; 62 LJ Ch 539; 68 LT 707; 41 WR 585; 37 Sol Jo 424; 3 R 561

2103 Insurance moneys — Damage to mansion house

By a lease dated 14 October 1948, plaintiffs became the lessees of a mansion house with grounds, where they established and maintained an hotel. The lease contained a full repairing covenant on the part of plaintiffs, which proved very onerous. After negotiations, that lease was superseded by another lease dated 10 February 1961, granted to plaintiffs by the first defendant under her power as tenant for life under Settled Land Act 1925 (c 18). Under that lease, plaintiffs were to pay, in addition to the rent, a yearly insurance rent equal to the premium for keeping the property insured against comprehensive risks by the lessor and an additional rent towards the cost of making good any one major damage occurring to the mansion house. The lessor covenanted to keep the exterior parts and the main structure of the mansion house in good tenantable order and to keep the mansion house adequately insured against comprehensive risks. There was no policy of insurance under the new lease against comprehensive risks, but the property was insured under a fire policy taken out in 1956 and revised in 1959, the total sum insured on the advice of the insurance company being £29,172. Plaintiffs paid the insurance premiums, were informed of the amount insured, and raised no objection about the adequacy of the cover. On 22 February 1961, the main portion of the mansion house was completely gutted by fire and damage was done to a wing. The insurance company apportioned £20,250 of the sum insured to the buildings destroyed and damaged but that amount was not sufficient to make good the damage. The insurance moneys were paid to the first defendant and to the second defendant (a trustee) as trustees for the purposes of the Settled Land Act 1925 (c 18). By letter dated 12 July 1961, to the first defendant's agents the question of liability to reinstate the part of the premises damaged, but not destroyed, was raised. Plaintiffs claimed (1) against the first defendant damages for failing adequately to insure the premises, and (2) against both defendants a declaration that they were bound to expend the moneys received from the insurers towards the rebuilding and restoration of the hotel: *Held* (1) plaintiff's claim for damages against the first defendant failed because the first defendant, when insuring the property, had taken proper advice (*viz*, the advice of the insurance company) and had followed it, and thus had fulfilled her

obligation under the lease to insure adequately; (2) defendants were bound to use the money received by them under the policy as far as it would go towards reinstatement of the property, since, on the true construction of the lease, the landlord's obligation to insure, done as it was at the tenant's expense, was an obligation intended to enure for the benefit of both the landlord and the tenants; (3) the declaration giving effect to (2) above would be granted against the independent trustee as well as against the first defendant (who was also the tenant for life), since the independent trustee must be taken to have had notice of the lease; (4) before, but not after, receipt of the letter of 12 July 1961, the first defendant could not properly assent to the application of the insurance money in the ordinary course as capital moneys under the settlement, and accordingly the declaration giving effect to (2) above would be qualified by excepting payments properly made as expenditure of capital moneys under Settled Land Act 1925 (c 18), before 12 July 1961.

Mumford Hotels Ltd v Wheler [1964] Ch 117; [1963] 3 All ER 250; [1963] 3 WLR 735; 107 Sol Jo 810

ANNOTATION **Apld** Mark Rowlands Ltd v Berni Inns Ltd [1985] 3 All ER 473

3 Money in court liable under statute to be laid out in purchase of land

LAW See Halsbury's Laws (4th edn) vol 42 para 796

CROSS REFERENCES See CHARITIES vol 8(1) (2nd reissue) no 4637; COMPULSORY ACQUISITION OF LAND vol 11(1) (2nd reissue) no 2585 et seq (purchase-money on compulsory purchase)

2104 Payment out to trustees — Notice to remainderman of proposed investments — Whether imposed as condition

Where funds of large amount were in court, representing the proceeds of sale of settled lands which were vested in a tenant in tail who was restrained by statute from alienating, the funds were, on the application of the tenant in tail, ordered to be paid out to trustees appointed for the purposes of Settled Land Acts 1882 and 1884 (repealed); but the court declined to direct the trustees to give notice of any intended investments to the tenant in tail next in remainder.

Re Bolton Estates Act 1863 (1885) 52 LT 728

2105 Payment out to trustees — Fund over one thousand pounds not arising under Settled Land Acts (repealed) — Form of application — Settled Land Act Rules 1882 r 2 (revoked)

An application for payment out of court to Settled Land Act trustees of a fund exceeding £1,000, which had not arisen under Settled Land Act 1882 (c 38) (repealed), but had been derived from another source and was liable to be laid out in the purchase of land to be made subject to the settlement, might be made by petition instead of by summons in chambers under above rule (revoked).

Re Torry Hill Estate, Pemberton v Pemberton [1909] 1 Ch 468; 78 LJ Ch 373; 100 LT 433

2106 Payment out to trustees — Beneficiary resident abroad — Transmission of capital moneys

L was entitled to a share of certain land in Wales, and by his will he devised the interest on the principal of all money received by his executors from Wales to his wife for life, and after her death, then his son was to have the whole of the money on attaining twenty-one. L died domiciled in America, and his wife and son, who was a minor, were resident there. Trustees were appointed under the Settled Land Act (repealed) of the share of L in the land, and with the consent of the other beneficiaries it was sold. Application was made that L's share might be transmitted to his executors in America to be re-invested there: *Held* the court had no power to allow the money to be sent to America, and, if necessary, trustees must be appointed under the Act (repealed) to receive it in that country.

Re Lloyd, Edwards v Lloyd (1886) 54 LT 643

Scottish, Irish and Commonwealth Cases

2107 Payment out to trustees

Lands in settlement having been purchased compulsorily under statutory powers, an order was made to transfer the funds in court representing the purchase-money to the trustees of the settlement.

Re Rathmines etc Drainage Act, Ex p Verschoyle (1885) 15 LR Ir 576 (IR)

2108 Sale ordered by court — Order for application

Where a sale of settled estate is ordered by the court, the purchase-money should be paid into the hands of the master in Equity, and a subsequent order obtained for its proper application.

Re McGregor's Settled Estate (1878) 4 VLR (Eq) 1 (AUS)

4 Personalty settled on trusts of capital money

LAW See Halsbury's Laws (4th edn) vol 42 para 797

2109 Direction in settlement — Mere declaration sufficient

Although the legislature can by a simple enactment to that effect, make personalty devolve and pass to a series of persons successively for the same interests as if it had been realty, an individual can only do so by the creation of an imperative trust for the conversion of the personalty into realty and for the settlement of that realty to uses which will secure the devolution or create the estates desired to be created.

A declaration that personalty shall devolve or pass to persons successively as realty, although in cases of doubtful construction it may help the court to construe the instrument as creating an imperative trust for conversion, is not, *per se*, operative, and a bequest of personalty on trust for sale and to hold the net proceeds "upon the trusts and in the manner upon and in which the same would be held and applicable if they had arisen from a sale of" freehold hereditaments by the same will "devised in settlement under Settled Land Act 1882 (c 38)," is not an imperative trust.

Where, therefore, the freeholds referred to had been strictly settled: *Held* a person who had become entitled to an estate tail in them had become entitled on the personalty bequeathed without executing a disentailing assurance.

A mere declaration that personalty shall devolve or pass to persons successively as realty is in itself inoperative, for the whole doctrine of conversion turns on the maxim that equity considers to have been done what ought to have been done pursuant to the trust; and mere declaration such as I have mentioned creates no obligation as to dealing with the property in one way or another. It is true that such a declaration, in cases where the construction of an instrument is doubtful, may help the court to construe the instrument as creating an imperative trust for conversion and this, I think, is more expecially the case where the express limitations contained in the instrument are limitations appropriate only to real estate, but except on the question of construction, such a declaration as that to which I am referring is, I think, according to the decisions, absolutely nugatory (*Parker J*).

Re Walker, Macintosh-Walker v Walker [1908] 2 Ch 705; 77 LJ Ch 755; 99 LT 469

ANNOTATIONS **Apld** Re Aspinall's SE, Aspinall v Aspinall [1916] 1 Ch 15; Re Twopeny's Settlmt, Monro v Twopeny [1924] 1 Ch 522

2110 Direction in settlement — Mere declaration sufficient

By a settlement dated 18 October 1882, certain freehold property over which E and M had a joint power of appointment, subject to certain interests subsisting under an earlier settlement, and certain freehold property belonging to E solely for his absolute use were brought into strict settlement, and by the same settlement certain funds and securities which were subject to the same joint power of appointment and certain funds and securities belonging to E were settled upon the trusts and in the manner in which the same would be held and applicable if they had arisen from a sale of the said hereditaments and premises hereinbefore granted and settled by E alone under the powers of Settled Land Act 1882 (c 38). On 12 October 1901, S, the first tenant in tail, died intestate. On his death C, as tenant for life, entered into possession of the settled securities and continued in such possession and receipt of income until his death on 6 January 1923. On a summons taken out by the trustees to have it determined whether the funds and investments remaining subject to the trusts of the settlement now formed part of the estate of S: *Held* (1) what settlor had done was to define the duty of the trustees by reference to Settled Land Act 1882 (c 38), and thus to make it optional to them to invest either in personal securities or in land, with the result that the settlement did not impose a paramount obligation on the trustees to invest the funds in real estate which was essential to conversion, there being no such direction it was incompetent to settlor, not having the powers of Parliament, to effect conversion by incorporating Settled Land Act 1882 (c 38) s 22(5) (repealed). (2) The funds formed part of the estate of S the first tenant in tail under the settlement, and were payable to his legal personal representative.

Re Twopeny's Settlement, Moron v Twopeny [1924] 1 Ch 522; 93 LJ Ch 323; 130 LT 816; 68 Sol Jo 402, CA

5 Money received under insurance policy

LAW See Halsbury's Laws (4th edn) vol 42 para 801

2111 Under covenant to insure

By a lease dated 14 October 1948, plaintiffs became the lessees of a mansion house with grounds, where they established and maintained an hotel. The lease contained a full repairing covenant on the part of plaintiffs, which proved very onerous. After negotiations, that lease was superseded by another lease dated 10 February 1961, granted to plaintiffs by the first defendant under her power as tenant for life under Settled Land Act 1925 (c 18). Under that lease, plaintiffs were to pay, in addition to the rent, a yearly insurance rent equal to the premium for keeping the property insured against comprehensive risks by the lessor and an additional rent towards the cost of making good any one major damage occurring to the mansion house. The lessor covenanted to keep

the exterior parts and the main structure of the mansion house in good tenantable order and to keep the mansion house adequately insured against comprehensive risks. There was no policy of insurance under the new lease against comprehensive risks, but the property was insured under a fire policy taken out in 1956 and revised in 1959, the total sum insured on the advice of the insurance company being £29,172. Plaintiffs paid the insurance premiums, were informed of the amount insured, and raised no objection about the adequacy of the cover. On 22 February 1961, the main portion of the mansion house was completely gutted by fire and damage was done to a wing. The insurance company apportioned £20,250 of the sum insured to the buildings destroyed and damaged, but the amount was not sufficient to make good the damage. The insurance moneys were paid to the first defendant and to the second defendant (a trustee) as trustees for the purposes of the Settled Land Act 1925 (c 18). By letter dated 12 July 1961 to the first defendant's agents the question of liability to reinstate the part of the premises damaged, but not destroyed, was raised. Plaintiffs claimed (i) against the first defendant damages for failure adequately to insure the premises, and (ii) against both defendants a declaration that they were bound to expend the moneys received from the insurers towards the rebuilding and restoration of the hotel: *Held* (1) plaintiff's claim for damages against the first defendant failed because the first defendant, when insuring the property, had taken proper advice (*viz*, the advice of the insurance company) and had followed it, and thus had fulfilled her obligation under the lease to insure adequately; (2) defendants were bound to use the money received by them under the policy as far as it would go towards reinstatement of the property, since, on the true construction of the lease, the landlord's obligation to insure, done as it was at the tenants' expense, was an obligation intended to enure for the benefit of both the landlord and the tenants; (3) the declaration giving effect to (2) above would be granted against the independent trustee as well as against the first defendant (who was also the tenant for life), since the independent trustee must be taken to have had notice of the lease; (3) before, but not after, receipt of the letter of 12 July 1961, the first defendant could not properly assent to the application of the insurance money in the ordinary course as capital moneys under the settlement, and accordingly the declaration giving effect to (2) above would be qualified by excepting payments properly made as expenditure of capital moneys under Settled Land Act 1925 (c 18), before 12 July 1961.

Mumford Hotels Ltd v Wheler [1964] Ch 117; [1963] 3 All ER 250; [1963] 3 WLR 735; 107 Sol Jo 810

ANNOTATION **Apld** Mark Rowlands Ltd v Berni Inns Ltd [1985] 3 All ER 473

6 Investment or application by trustees

LAW See Halsbury's Laws (4th edn) vol 42 para 804

2112 Bonâ fide exercise of power — How far controlled by court or trustees — Investment authorised by settlement

The exercise in good faith of the power of direction as to the investment or other application of capital moneys in the hands of the trustees given to the tenant for life by Settled Land Act 1882 (c 38) s 22(2) (repealed), could not be controlled by the trustees or by the court.

Re Colebridge's (Lord) Settlement [1895] 2 Ch 704; 73 LT 206; 44 WR 59; 11 TLR 596; 39 Sol Jo 725; 13 R 767

ANNOTATIONS **Consd** Re Hunt's SE, Bulteel v Lawdeshayne [1905] 2 Ch 418; Re Gladwin's Trust [1919] 1 Ch 232

2113 Bonâ fide exercise of power — How far controlled by court or trustees — Investment authorised by settlement — Proper investigation of title and value of security

Upon a direction under Settled Land Act 1882 (c 38) s 22(2) (repealed), given by the tenant for life to the trustees for the purposes of Settled Land Act (repealed), to invest capital moneys in their hands upon a specified mortgage of real estate, the court declared that the trustees were not bound to invest upon the mortgage unless and until they were satisfied that the direction had been given upon a proper investigation as to title, and upon a proper report as to the value of the proposed security, and upon proper advice as to the form of the mortgage, and on being so satisfied the trustees were bound to make the investment.

Re Hotham, Hotham v Doughty [1902] 2 Ch 575; 71 LJ Ch 789; 87 LT 112; 50 WR 692; 46 Sol Jo 685, CA

ANNOTATION **Apld** Re Peel's SE [1910] 1 Ch 389

2114 Bonâ fide exercise of power — How far controlled by court or trustees — Investment authorised by settlement — Not a suitable investment for trust funds

Re Hunt's Settled Estates, Bulteel v Lawdeshayne no 2119 post

2115 Bonâ fide exercise of power — How far controlled by court or trustees — Investment authorised by settlement — Not a suitable investment for trust funds

Re Gladwin's Trust no 2130 post

2116 Bonâ fide exercise of power — How far controlled by court or trustees — Investigation of title of property proposed to be acquired

Re Theobald (1903) 19 TLR 536

2117 Bonâ fide exercise of power — Special provisions in settlement

By a codicil to his will, a testator, who died on 14 May 1918, created a settlement of certain property consisting of agricultural land and provided: "39. As regards any sale enfranchisement exchange reconveyance surrender partition mortgage charge grant reservation lease (for any term or purpose) or other disposition covenant (restrictive or otherwise) or contract or any purchase or other acquisition of property real or personal or investment or application of capital money as regards any dealing or arrangement with respect to any part of the premises hereby settled or any easement right or privilege over or in respect of the same or of any share therein or any mines minerals or surface which is not hereby or by the Settled Land Acts otherwise authorised such disposition covenant contract acquisition investment application dealing or arrangement may be made or given effect to at any time and from time to time by the tenant for life either with the consent of the trustees or trustee in writing or under an order of the court 40. In giving such consent as aforesaid the trustees or trustee shall consider whether or not the proposed disposition covenant contract acquisition investment application dealing or arrangement will be for the benefit of the premises hereby settled or of the tenant for life or his successors in title but shall not be liable to account in respect of any such consent given in good faith which shall be binding on all persons then or thereafter interested hereunder and the court may make the order if in its opinion an Act of Parliament might be obtaining authorising the transaction were it one which could have been effected without obtaining an Act of Parliament if the premises had not been settled." In 1945 and the succeeding years the tenant for life expended substantial sums on repairs to farms, farm cottages, and market garden cottages, and also on woodmen's cottages, cottages occupied by workmen of the estate building department, and gamekeepers' cottages, and she now sought recoupment of part of the expenditure out of the capital moneys: *Held* (1) on the true construction of clause 39 and clause 40, notwithstanding the disjunctive form of the words "for the benefit of the premises hereby settled or of the tenant for life or of his successors in title" the trustees must confine their consents to cases in which, proceeding with the greatest caution, they considered the matter beneficial to all parties, conducive to the general interest of persons presently or prospectively entitled, and clearly fair, right, and reasonable in all the circumstances but insofar as the matters in respect of which recoupment was sought were not within the relevant statutory provisions, clause 39 and clause 40 could be invoked and consent given by the trustees on proper advice; (2) the word "landlord" in Settled Land Act 1925 (c 18) s 73(1)(iv), had the meaning assigned to that term by Agricultural Holdings Act 1923 (c 9) s 57 (repealed); (3) by virtue of the provisions of Settled Land Act 1925 (c 18), Agriculture Act 1947 (c 48), and Agricultural Holdings Act 1948 (c 63), and, in particular s 73(1)(iv) of the 1925 Act (c 18), s 22(4) of the 1947 Act (c 48), and s 96(1) of the 1948 Act (c 63), the trustees were entitled to apply capital moneys of the settlement in payment (as for an improvement authorised by Settled Land Act 1925 (c 18)) of any money expended or to be expended and costs incurred or to be incurred by the tenant for life in or about the execution on or after 1 January 1945, of such repairs as were specified in para 23 of Schedule 3 to the 1948 Act (c 63), in relation to agricultural land, whether or not the land were comprised in a contract of tenancy and whether or not within the definition of "agricultural land" in s 1 of the 1948 Act (c 63); (4) the trustees were bound under s 75(2) of the 1925 Act (c 18), to comply with the directions of the tenant for life on being satisfied, on proper advice, that the application of the capital moneys was within the relevant provisions of that Act.

Re Northumberland (Duke), Halifax v Northumberland [1951] Ch 202; [1950] 2 All ER 1181; 66 (pt 2) TLR 1045; 94 Sol Jo 805

ANNOTATIONS **Apld** Re Brougham & Vaux's (Lord) Settled Estates [1953] 2 All ER 655 **Distd** Re Wynn, Public Trustee v Newborough [1955] 2 All ER 865; Re Boston's (Lord) Will Trusts, Inglis v Boston (Lord) [1956] 1 All ER 593

2118 Tenant for life trustee for beneficiaries

Re Pelly, Ransome v Pelly no 1977 ante

2119 What is bonâ fide exercise — Fraudulent collusion with interested persons

A tenant for life under Settled Land Act 1882 (c 38) (repealed) directed the trustees of the settlement to invest capital moneys in their hands in the purchase of certain leasehold houses. The trustees procured the report of an independent surveyor showing that the proposed investment, though within the words of the power given by the Act (repealed), was undesirable, and they declined to proceed with the

purchase: *Held* (1) assuming the direction was given *bonâ fide*, the trustees were not bound to act upon it; (2) it was not given *bonâ fide*.
Re Hunt's Settled Estates, Bulteel v Lawdeshayne [1906] 2 Ch 11; 75 LJ Ch 496; 94 LT 747, CA

ANNOTATIONS **Apld** Re Gladwin's Trust [1919] 1 Ch 232; Re Cowley SE [1926] Ch 725

2120 What is bonâ fide exercise — Whether wealth of tenant for life and remainderman apart from settlement considered
Re Gladwin's Trust no 2130 post

2121 Principles governing sanction of court — Relevance of decisions under Lands Clauses Acts
(1) The question whether any particular application of capital money under the Settled Land Acts (repealed) should have been sanctioned by the court must have been determined entirely by the code of rules laid down in Settled Land Acts (repealed), and not by reference to the decisions as to the application of purchase-money under Lands Clauses Act.

(2) A scheme was proposed by a tenant for life for the application of "capital moneys" under the powers of Settled Land Acts (repealed) in the following improvements: (*a*) building additions to the mansion house and improving its architectural appearance; (*b*) building a chapel for Roman Catholic service; (*c*) building new stables, the present stables being inconvenient and insufficient; (*d*) building a house for the residence of the estate agent: *Held* none of the proposed improvements were such as the Acts (repealed) authorised for the application of capital moneys.
Re Gerard's (Lord) Settled Estate [1893] 3 Ch 252; 63 LJ Ch 23; 69 LT 393; 37 Sol Jo 648; 7 R 227; sub nom *Re Gerard's (Lord) Settled Estates, Re Eastwell Park Estate* (1893) 9 TLR 587, CA

ANNOTATIONS As to (2) **Consd** Stanford v Roberts [1901] 1 Ch 440; Re De Crespigny's SE [1914] 1 Ch 227

2122 Realisation of securities to provide capital money
Re Gladwin's Trust no 2130 post

7 Investment or application under direction of the court

LAW See Halsbury's Laws (4th edn) vol 42 para 805

2123 How far exercise of power controlled by court
Re Colebridge's Settlement no 2112 ante

8 Application of purchase money for interest less than fee simple

LAW See Halsbury's Laws (4th edn) vol 42 para 806

2124 Cases under Lands Clauses Consolidation Act 1845 (c 18) s 74 — Authorities on Settled Land Act 1882 (c 38) s 34 (repealed)
Settled Land Act 1882 (c 38) s 34 (repealed), and Lands Clauses Consolidation Act 1845 (c 18) s 74, were similar enactments, so that where the facts were similar, decisions on s 74 were authorities on s 34 (repealed).

As between tenant for life and remainderman, where lands subject to a beneficial lease were sold under Settled Land Act 1882 (c 38) (repealed), the tenant for life would, during the unexpired period of the term, be entitled to so much only of the income of the invested purchase-moneys as equalled the rents under the lease, and the rest of that income had to be accumulated and invested for the benefit of the inheritance until the date when the lease would have expired.
Cottrell v Cottrell (1885) 28 Ch D 628; 54 LJ Ch 417; 52 LT 486; 33 WR 361

ANNOTATION **Apld** Re Westminster's SE, Westminster v Shaftesbury [1921] 1 Ch 585

2125 Proceeds of sale of leaseholds — Provision of annuity to tenant for life — Exhausting proceeds in period of lease
Testator bequeathed a leasehold house to his executors and trustees in trust to permit his wife to occupy the same during her widowhood, with a provision for payment of ground rent, rates, taxes, and outgoings execution of repairs, and performance of covenants out of testator's general estates, it being his intention that his wife should be personally relieved therefrom. The widow resided in the house for fourteen years from testator's death, the outgoings, amounting to £160 a year, being paid by the trustees. She then sold the house as life tenant under Settled Land Act 1882 (c 38) (repealed), and the trustees received the purchase-money: *Held* (1) under Settled Land Act 1882 (c 38) s 34 (repealed), the proceeds of sale must be applied in paying the widow during widowhood such an annuity as would exhaust those proceeds, capital and income, in the remaining eleven years of the lease; (2) the widow was not entitled to be paid £160 a year out of the general estate in lieu of the provision for payment of rent and outgoings, as that provision, being merely an extra benefit conferred on her to enable her to reside in the house, was not a provision tending to induce her to abstain from exercising her statutory power of sale within the meaning of Settled Land Act 1882 (c 38) s 34 (repealed), and consequently came to an end on the sale.
Re Simpson, Clarke v Simpson [1913] 1 Ch 277; 82 LJ Ch 169; 108 LT 317; 57 Sol Jo 302

ANNOTATIONS **Folld** Re Burden Mitchell v St Luke's Hostel, Trustees [1948] Ch 160 **Apprvd** Re Aberconway's Settlement Trusts, McLaren v Aberconway [1953] 2 All ER 350

2126 Capitalisation of increased income — Accumulation at compound interest — How directed

By a settlement dated 15 February 1901, lands which included a large number of freehold reversions subject to building leases were settled in strict settlement and various powers were given to successive tenants for life "in addition to and in aid of the statutory powers." These included a power to "exchange for other manors, lands and hereditaments, . . . all or any of the hereditaments hereby assured," and a power "in case any . . . lessee . . . of any part of the hereditaments, . . . shall be willing to sell or dispose of . . . his subsisting interest, . . . to purchase the same . . . at such price or prices in money or for such other equivalent as" to the tenant for life should seem reasonable, "but so that the terms or interests which shall be purchased or otherwise acquired under the power shall be merged in and consolidated with the freehold and inheritance of the premises." By two deeds of even date the tenant for life conveyed to two persons some of the freehold reversions belonging to the settled estate, and by two further deeds of the same date received in exchange the surrender and merger of leaseholds to which other parts of the settled estate were subject, a sum being paid to the trustees of the settlement by way of parity of exchange which they applied in paying off incumbrances on the estate. The transactions resulted in a large increase of the annual income of the estate. The surrendered leaseholds were at the time of the transaction held upon terms that had less than sixty years to run: *Held* (1) neither the power of exchange given by Settled Land Act 1882 (c 38) s 3(iii) (repealed), nor the power of exchange created by the settlement enabled leaseholds with less than sixty years to run, or any leasehold interests in land already comprised in the settlement, to be taken in exchange, but the transactions could be regarded as cross-sales and purchases, and as such were valid; (2) under s 34 of the Act of 1882 (repealed) an accumulation of part of the increased income resulting from the sale of the freehold reversions must be made during the residue of the terms of the leaseholds to which the conveyed reversions were subject; (3) no accumulation of increased income resulting from the acquisition of the surrendered leaseholds was requisite in view of the special power of acquiring leaseholds for surrender contained in the settlement; (4) assuming all the leaseholds to which the conveyed reversions were subject to have equal unexpired terms, there must be accumulated at compound interest out of the rents of the property comprised in the surrendered leaseholds an amount equal to 4 per cent, interest on the value of the surrendered leaseholds plus the annual benefit to the estate from discharging the incumbrances minus the annual rents of the leaseholds to which the conveyed reversions were subject.
Re Westminster's (Duke) Settled Estates, Westminster (Duke) v Shaftesbury (Earl) [1921] Ch 585; 90 LJ Ch 305; 125 LT 82; sub nom
Re Grosvenor Estates, Westminster (Duke) v Shaftesbury (Earl) (1921) 37 TLR 529

9 Modes of application

A Investment

LAW See Halsbury's Laws (4th edn) vol 42 para 807

CROSS REFERENCES See no 2153 et seq post (purchase of land), no 2124 et seq ante (money paid for lease on reversion)

2127 Investment in debenture stock — Trust for investment in land

Where under a will money was bequeathed to trustees in trust to lay it out in the purchase of land, to be settled in strict settlement, the trustees might invest it in debenture stock in accordance with Settled Land Act 1882 (c 38) s 21 (repealed).
Re Mackenzie's Trusts (1883) 23 Ch D 750; 52 LJ Ch 726; 48 LT 936; 31 WR 948

ANNOTATION **Folld** Re Tennant (1889) 40 Ch D 594

2128 Investment in debenture stock — Investment under Local Loans Act 1875 (c 83) s 27 (repealed)

(1) Testator, having devised his real estate to A for life with remainder to his issue in tail, gave his personal estate to trustees upon trust to convert same into money, and to lay out the produce in the purchase of freehold lands in Ireland to be settled to uses corresponding with the limitations of the real estate. Upon an originating summons by the trustees, one of whom was the tenant for life, for the direction of the court, it appearing that Irish land was at present an unsafe investment: *Held* the trustees might defer purchasing Irish land until they could prudently do so, and might in the meantime invest the personal estate under the powers of Settled Land Act 1882 (c 38) ss 21, 23 (repealed).

(2) Trustees whose powers of investment were dependent on Settled Land Act 1882 (c 38) s 21 (repealed), authorising trustees to invest capital trust money in the debentures or debenture stock of any railway company "having for ten years next before the date of investment paid a dividend on its ordinary stock or shares," might not invest, under the powers

of Local Loans Act 1875 (c 83) s 27 (repealed), in debentures or debenture stock issued by a local authority under that Act (repealed), unless, *quaere* the local authority had for ten years paid a dividend.

Re Maberly, Maberly v Maberly (1886) 33 Ch D 455; 56 LJ Ch 54; 55 LT 164; 34 WR 771; 2 TLR 832

ANNOTATION **Consd** Re Tattersall, Topham v Armitage [1906] 2 Ch 399

2129 Investments on leaseholds — Security bad to knowledge of trustees

Re Hunt's Settled Estates, Bulteel v Lawdeshayne no 2119 ante

2130 Investments on leaseholds — Leasehold residence subject to heavy ground rent

Settled Land Act 1882 (c 38) s 22(2) (repealed), was limited by s 53 (repealed) and did not entitle a life tenant to insist on applying capital money on an investment not advisable for an ordinary trustee of trust funds.

A life tenant directed the trustees of settled real estate to raise £3,500 out of securities worth £9,600, representing the proceeds of sale of the entire real estate and to apply the £3,500 in the purchase of a leasehold residence he had contracted to buy. The lease had eighty-three years to run, but the ground rent was £190. The purchase was advised by the life tenant's valuers but deprecated by the trustees' valuer, and, the remainderman being an infant, the trustees declined to proceed without the court's sanction: *Held* as no ordinary trustee would be justified in making such an investment, the court could not sanction it; and the fact that the life tenant was buying the house for a residence, and both he and the infant remainderman were wealthy persons independently of the settlement, made no difference.

Quaere: whether a life tenant could compel trustees to realise securities on which capital money had been invested under Settled Land Act 1882 (c 38) s 25 (repealed), in order to provide capital money for a purpose specified in some other sub-section (repealed).

Re Gladwin's Trust [1919] 1 Ch 232; 88 LJ Ch 182; 120 LT 475; 63 Sol Jo 265

2131 Right of trustees to choose broker

Upon an investment of capital moneys arising under Settled Land Acts (repealed), the tenant was not entitled to dictate to the trustees of the settlement as to what broker they should employ in the matter. The trustees might select their broker as well as their solicitor.

Re Cleveland's (Duke) Settled Estates [1902] 2 Ch 350; 71 LJ Ch 763; 86 LT 678; 50 WR 508; 18 TLR 610; 46 Sol Jo 514

Scottish, Irish and Commonwealth Cases

2132 Application by trustees for fund for investment — Power of court to refuse

On an application for payment out of a fund in court, proceeds of the sale of certain settled estates for the purpose of investment by petitioners as trustees, they having been appointed the trustees under the will which devised the settled estates, which application was opposed by the official guardian on behalf of the remainderman: *Held* the practice and current of authority were against what was asked by petitioners, and they were not entitled to it as a matter of right, and the application dismissed.

Re Smith's Trusts (No 2) (1889) 18 OR 327 (CAN)

B Discharge of incumbrances

LAW See Halsbury's Laws (4th edn) vol 42 para 807

2133 Incumbrances on part of estates — Capital moneys from another part — Two estates in same settlement

A settlement of land was made in 1853 by a private Act of Parliament. By this Act the estates were vested in the trustees thereby appointed, upon trust by sale or mortgage thereof to raise money for the purpose of discharging certain incumbrances and liabilities. The Act provided that the trustees might from time to time absolutely sell and dispose of all or any part of the estates mentioned in a schedule, provided that the trustees should not sell any of the lands situate in the parishes of C and H, unless it should be absolutely necessary for the purposes of the Act to do so, and in case of such necessity should not sell any of those lands until all the rest of the estates were sold. After Settled Land Act 1882 (c 38) (repealed) had come into operation, the tenant for life entered into a contract to sell some of the lands situate in the parishes of C and H. The whole of the rest of the estates had not then been sold: *Held* (1) the power of sale conferred on the tenant for life by Settled Land Act (repealed) was an absolute power over and above that given to the trustees by private Act, and he was therefore entitled to sell free from the restriction imposed by private Act on the trustees; (2) under Settled Land Act 1882 (c 38) s 2(2) (repealed), the purchase-money could be applied in discharging a mortgage which affected part of the land sold and another mortgage, which affected another part of the settled estate and it was not necessary that the other mortgage should be one affecting the whole of the settled estates.

Re Chaytor's Settled Estate Act (1884) 25 Ch D 651; 53 LJ Ch 312; 50 LT 88; 32 WR 517

2134 Incumbrances on part of estates — Capital moneys from another part — Two estates in same settlement

Testator, who died in 1878, devised his W and S estates to his son J for life, with remainder to such of the children of J as should attain twenty-one, and devised his residuary estate to J absolutely. At the testator's death the W estate was subject to a mortgage in fee; the S estate was unincumbered. J, in 1887, sold part of the S estate under Settled Land Act 1882 (c 38) (repealed), and by his direction the trustees under the Act (repealed) applied the money in part discharge of the mortgage on W. J died intestate in 1888, leaving only infant children. It was decided after his death that the contingent remainders as to the S estate failed, but that as to the W estate they did not. The unsold part of the S estate thus became the absolute property of the eldest son and heir-at-law of J, who then claimed a charge on the W estate for the proceeds of sale which had been applied in part discharge of the mortgage, on the ground that as the S and the W estate did not devolve in the same way, they were different settled estates, and capital money arising from one was not properly applied in paying off an incumbrance on the other: *Held* there was only one settlement and one settled estate, and the application, before the parts of that estate had devolved in different ways, of capital money arising from one part in discharging an incumbrance on another part of the estate was within the powers of the Act (repealed), and J's heir was not entitled to any relief.

Re Freme, Freme v Logan [1894] 1 Ch 1; 63 LJ Ch 139; 69 LT 613; 42 WR 119; 7 R 1, CA

2135 Incumbrances on part of estates — Capital moneys from another part — Proceeds of sale of heirlooms — Vesting absolutely in remainderman if unsold

The money arising by the sale, on the application of the tenant for life with the situation of the court of chattels treated in a settlement as heirlooms, and so far as the rules of law and equity would permit annexed to the settled freehold land may be applied in the discharge of incumbrances affecting the inheritance of the settled land, without keeping such incumbrances on foot for the benefit of the infant remainderman in whom the heirlooms would if unsold, have vested absolutely on his attaining twenty-one.

Re Marlborough's (Duke) Settlement, Marlborough (Duke) v Marjoribanks (1886) 32 Ch D 1; 55 LJ Ch 339; 54 LT 914; 34 WR 377; 2 TLR 323, CA

ANNOTATIONS **Apld** Re Stamford's Estate (1887) 56 LT 484; Re Stafford's Settlmt & Will, Gerard v Stafford [1904] 2 Ch 72

2136 Incumbrances on part of estates — Capital moneys from another part — Proceeds of sale of heirlooms — Vesting absolutely in remainderman if unsold

Re Stafford's (Lord) Settlement & Will, Gerard v Stafford no 1974 ante

2137 Incumbrances on part of estates — Capital moneys from another part — Different settlements with same limitations

Re Monson's (Lord) Settled Estates no 1084 ante

2138 Incumbrances on part of estates — Capital moneys from another part — Different settlements with same limitations

Re Stafford's (Lord) Settlement & Will, Gerard v Stafford no 1974 ante

2139 Incumbrances on part of estates — Capital moneys from another part — Different settlements with same limitations

Re Symons, Symons-Jeune v Bunbury no 1054 ante

2140 Rentcharge — Arrears

Arrears of a jointure rentcharge, which was limited and secured by powers of entry and distress and by a term of years and trusts thereof in the usual way, were an "incumbrance affecting the inheritance of the settled land" within Settled Land Act 1882 (c 38) s 21(ii) (repealed), and might in a proper case, where their discharge would have been the wisest course for all concerned, be discharged by the trustees of the settlement out of capital moneys in their hands, but conditionally upon the tenant for life agreeing that such payment should be without prejudice to the question, should it have arisen, of the ultimate incidence of the liability for the arrears as between himself and the remainderman.

Re Manchester's (Duke) Settlement [1910] 1 Ch 106; 79 LJ Ch 48; 101 LT 892; 26 TLR 5; 53 Sol Jo 868

2141 Annuity — Incumbrance of tithes

By a charter in the reign of James I, a grant was made of certain tithes issuing out of the rectory of St Botolph Without, Aldgate, in the city of London, to persons named in the grant, their heirs and assigns. In 1804, by a marriage settlement, it was provided that an annuity or clear yearly rentcharge of £640 should be issued and be payable out of the tithes in question for the term of one thousand years. The tithes afterwards became vested in the trustees of a will, subject to the annuity created by the settlement. The trustees sold part of the tithes to certain railway companies for the sum of £30,670. The tenant for life under the will contended that the trustees of the will might, under Settled Land Act 1882 (c 38) s 33 (repealed), invest or apply the £30,670 as capital money arising under that Act. By s 21 (repealed) of same statute it was provided that capital money

should be applied, *inter alia*, in discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement. The tenant for life asked that the trustees might be at liberty to apply to the £30,670 in the purchase of the annuity created by the settlement with a view to its discharge: *Held* the annuity created by the settlement was not a rent, because it did not issue out of a corporeal hereditament; but it was an incumbrance on the tithes, and an incumbrance affecting the inheritance within Settled Land Act 1882 (c 38) (repealed), therefore the trustees might be at liberty to purchase the annuity with a view to its discharge.
Re Esdaile, Esdaile v Esdaile (1886) 54 LT 637

2142 Mortgage — Long term
The proceeds of settled land sold by the tenant for life under Settled Land Act 1882 (c 38) (repealed), could be applied in paying off a debt secured by a mortgage of a long term.
Re Frewen, Frewen v James (1888) 38 Ch D 383; 57 LJ Ch 1052; 59 LT 131; 36 WR 840

ANNOTATION **Apld** Re Gisborough's SE [1921] 2 Ch 39

2143 Mortgage — Tenant for life subject to term for securing incumbrances
Re Richardson, Richardson v Richardson no 208 post

2144 Liability to repair highway — Ratione tenurae
Quaere: whether a liability to repair a highway *ratione tenurae* on settled land was an incumbrance within Settled Land Act 1882 (c 38) s 21(ii) (repealed).
Re Stamford & Warrington (Earl), Payne v Grey [1911] 1 Ch 648; 80 LJ Ch 361; 105 LT 12; 75 JP 346; 27 TLR 356; 55 Sol Jo 483; 9 LGR 719

2145 Liability to repair highway — Ratione tenurae
A liability of the owners and occupiers of a settled estate to repair a highway *ratione tenurae* was not an incumbrance which the trustees had power to discharge or redeem out of capital moneys in their hands under Settled Land Act 1882 (c 38) s 21(ii) (repealed).
Re Hodgson's Settled Estate, Altamont v Forsyth [1912] 1 Ch 784; 81 LJ Ch 376; 106 LT 456

2146 Death duties — Estate duty on heirlooms — Succession duty on jointure
In 1889 estates were settled in strict settlement and heirlooms were settled upon trusts to correspond as nearly as might be to the uses of the freeholds. Under that settlement the seventh Earl of Egmont became tenant for life and the eighth became tenant for life in remainder. The seventh Earl died in 1897. Under a power contained in the settlement the eighth Earl granted to his wife a jointure "free from all deductions." H died in 1910. Estate duty and succession duty on the heirlooms were not paid in 1897, and the Crown now claimed the duties and interest thereon. The trustees had in their hands accrued during the lives of the eighth and the present Earl: *Held* the settlement must be treated as one settlement of the estates and of the heirlooms; the interest must be paid out of the income of the estate accrued during the lives of the tenants for life; capital moneys raised from other parts of the settled property might be applied in discharging incumbrances on the heirlooms; according to the true construction of the settlement and grant the succession duty on the jointure must be paid out of the capital moneys.
Re Egmont's (Earl) Settled Estates, Lefroy v Egmont [1912] 1 Ch 251; 81 LJ Ch 250; 106 LT 292

2147 Portions — When trustees entitled to raise out of capital
By a settlement dated 2 October 1906, lands and other hereditaments in Yorkshire were settled in the events which happened to the use of trustees for a term of ninety-nine years if G should so long live upon the trusts therein mentioned, and subject thereto to the use of G for life, and after his death to the use that his wife should receive during the remainder of her life a yearly rentcharge of £800, and subject and charged as aforesaid to the use of trustees for the term one thousand years from the death of G upon the trusts thereinafter declared with divers remainders over. The trusts of the one thousand years' term were, in the event which happened of G leaving five younger children, that the trustees "shall," after the death of G or in his lifetime, at his request in writing raise the sum of £25,000 for portions to go to or amongst all or any of the younger children of G and their issue as G should by deed or will appoint. In a deed dated 4 November 1920, appointing this sum amongst these younger children and their issue, G requested the trustees to raise this sum by any means authorised by the settlement or by law or preferably, if the law permitted, out of capital moneys; and on 13 January 1921, G in writing requested and directed his trustees to raise the sum out of capital moneys.

This summons raised the question whether the trustees could and ought to comply with G's direction. There was evidence that it was desirable to do so if it was lawfully possible: *Held* although Settled Land Act 1882 (c 38) s 21 (repealed), did not sanction the application of capital moneys in the manner directed, the court would sanction such application subject to the consent being obtained of incumbrancers or persons whose interests had priority to the one thousand years' term, because if, as the trustees were bound to do at the direction of G, they raised the sum of £25,000 by mortgage of the rever-

sionary term of one thousand years, such mortgage would be an incumbrance "affecting the inheritance" within s 21(ii) (repealed), so that it could at once be discharged out of capital moneys. It was not the practice of the court to leave trustees to do indirectly what it would involve less expense to do directly.

Re Gisborough's (Lord) Settled Estates [1921] 2 Ch 39; 90 LJ Ch 400; 125 LT 701; 65 Sol Jo 553

Scottish, Irish and Commonwealth Cases

2148 Incumbrances on part of estates — Capital moneys from another part — Two estates in same settlement

Purchase-money of settled lands applied, at the instance of the tenant for life, in redemption of rentcharges payable to the Board of Works for loans for the drainage and improvement of other lands settled upon the like uses.

Re Navan & Kingscourt Ry Co, Ex p Dyas (1888) 21 LR Ir 369 (IR)

C Improvement

LAW See Halsbury's Laws (4th edn) vol 42 para 807

2149 Authorised improvements — Agricultural improvements

By a codicil to his will, a testator, who died on 14 May 1918, created a settlement of certain property consisting of agricultural land and provided: "39. As regards any sale enfranchisement exchange reconveyance surrender partition mortgage charge grant reservation lease (for any term or purpose) or other disposition covenant (restrictive or otherwise) or contract or any purchase or other acquisition of property real or personal or investment or application of capital money as regards any dealing or arrangement with respect to any part of the premises hereby settled or any easement right or privilege over or in respect of the same or of any share therein or any mines minerals or surface which is not hereby or by the Settled Land Acts otherwise authorised such disposition covenant contract acquisition investment application dealing or arrangement may be made or given effect to at any time and from time to time by the tenant for life either with the consent of the trustees or trustee in writing or under an order of the court 40. In giving such consent as aforesaid the trustees or trustee shall consider whether or not the proposed disposition covenant contract acquisition investment application dealing or arrangement will be for the benefit of the premises hereby settled or of the tenant for life or his successors in title but shall not be liable to account in respect of any such consent given in good faith which shall be binding on all persons then or thereafter interested hereunder and the court may make the order if in its opinion an Act of Parliament might be obtained authorising the transaction were it one which could have been effected without obtaining an Act of Parliament if the premises had not been settled." In 1945 and the succeeding years the tenant for life expended substantial sums on repairs to farms, farm cottages, and market garden cottages, and also on woodmen's cottages, cottages occupied by workmen of the estate building department, and gamekeepers' cottages, and she now sought recoupment of part of the expenditure out of the capital moneys: *Held* (1) on the true construction of clause 39 and clause 40, notwithstanding the disjunctive form of the words "for the benefit of the premises hereby settled or of the tenant for life or of his successors in title" the trustees must confine their consents to cases in which, proceeding with the greatest caution, they considered the matter beneficial to all parties, conducive to the general interest of persons presently or prospectively entitled, and clearly fair, right and reasonable in all the circumstances but in so far as the matters in respect of which recoupment was sought were not within the relevant statutory provisions, clause 39 and clause 40 could be invoked and consent given by the trustees on proper advice; (2) the word "landlord" in Settled Land Act 1925 s 73(1)(iv) had the meaning assigned to that term by Agricultural Holdings Act 1923 s 57; (3) by virtue of the provisions of Settled Land Act 1925, Agriculture Act 1947, and Agricultural Holdings Act 1948, and, in particular, s 73(1)(iv) of the 1925 Act, s 22(4) of the 1947 Act, and s 96(1) of the 1948 Act, the trustees were entitled to apply capital moneys of the settlement in payment (as for an improvement authorised by Settled Land Act 1925) of any money expended or to be expended and costs incurred or to be incurred by the tenant for life in or about the execution on or after 1 January 1945, of such repairs as were specified in para 23 of Schedule 3 to the 1948 Act in relation to agricultural land, whether or not the land were comprised in a contract of tenancy and whether or not within the definition of "agricultural land" in s 1 of the 1948 Act; (4) the trustees were bound under s 75(2) of the 1925 Act to comply with the directions of the tenant for life on being satisfied, on proper advice, that the application of the capital money was within the relevant provisions of that Act.

Re Northumberland (Duke), Halifax v Northumberland [1951] Ch 202; [1950] 2 All ER 1181; 66 (pt 2) TLR 1045; 94 Sol Jo 805

ANNOTATIONS **Apld** Re Brougham & Vaux's (Lord) Settled Estates [1953] 2 All ER 655 **Consd** Re Sutherland Settlmt Trusts [1953] 2 All ER 27 **Distd** Re Wynn, Public Trustee v Newborough [1955] 2 All ER 865; Re Boston's (Lord) Trusts, Inglis v Lord Boston [1956] 1 All ER 593

2150 Authorised improvements — Agricultural improvements

Expenditure on repairs done to agricultural land before 1 March 1948 not having been within the Agricultural Holdings Act 1923, is not money expended by a landlord "under or in pursuance of the Agricultural Holdings Act 1948, or any similar previous enactment, or under custom or agreement or otherwise", and may not be repaid out of capital under Settled Land Act 1925 s 73(1)(iv), as amended by Agricultural Holdings Act 1948 s 96(1). The words "or otherwise" in Settled Land Act 1925 s 73(1)(iv), must be construed as *ejusdem generis* with the preceding words and mean "otherwise by reason of some obligation". By reason of the provisions of Settled Land Act 1925 s 107(1), a tenant for life, in giving directions to the trustees for the application of capital money under Settled Land Act 1925 s 75(2), is acting as a trustee and may not allow his interest to conflict with his duty. Between 1945 and 1 March 1948, expenditure amounting to over £4,000 was made out of income by an estate company, the assigns of the tenant for life, on repairs to agricultural property. In 1952 the tenant for life, purporting to act under Settled Land Act 1925 s 75(2), directed the trustees of the settlement to apply capital moneys in recouping this expenditure. The trustees declined to do so. On an application by the company for directions to the trustees: *Held* the trustees had rightly declined, the expenditure having been incurred before the amendment of Settled Land Act 1925 s 73(1)(iv), by Agricultural Holdings Act 1948 s 96(1).

Re Sutherland Settlmt Trusts [1953] Ch 792; [1953] 2 All ER 27; [1953] 2 WLR 1163; 97 Sol Jo 387

2151 Authorised improvements — Agricultural improvements

In 1932, by a deed of family arrangement, the tenant for life under a real settlement assigned his equitable life interest to the trustees of the settlement to be held on specified trusts. In 1948 the tenant for life directed the execution on agricultural land, which was subject to the settlement, and which had been leased to tenants, of certain works including (*a*) "improvements to Dutch barn, sheeting west end, erecting extra stanchions, repairs to gutters and drainpipes, painting, etc," and (*b*) "improvements of a general nature, repairs to doors and gates, guttering and downpipes, painting all existing farm buildings, etc." In 1950 the tenant for life was adjudicated bankrupt. On an application by the tenant for life for an order that the trustees should meet the cost of the works out of capital moneys: *Held* notwithstanding that he was not at the material time entitled to receive the rents and profits of the property, the tenant for life was a "landlord" within Settled Land Act 1925 s 73(1)(iv), as a person having the statutory powers; the words "other than repairs which the tenant is under an obligation to carry out" in Agricultural Holdings Act 1948 Sch 3 para 23, were not imported into Settled Land Act 1925 s 73(1), as being part of the description of the improvements mentioned in s 81(1) of the 1948 Act, and, accordingly, the repairs mentioned in para 23 were incorporated into s 73(1)(iv) of the 1925 Act without qualification; and, therefore, although the tenant of the relevant land was responsible for repairs, the works were properly authorised by the tenant for life as improvements within s 73(1) of the 1925 Act and the cost should be met out of capital moneys.

Re Brougham & Vaux's (Lord) Settled Estates [1954] Ch 24; [1953] 2 All ER 655; [1953] 3 WLR 465; 97 Sol Jo 540

2152 Compensation payable to tenant of agricultural holding

The first defendant, who was entitled to the income of the Parliamentary estate of the Duke of Wellington, paid sums by way of compensation to outgoing tenants of agricultural holdings (which were subject to the trusts of the settlement created by the Duke of Wellington's Private Estate Acts) in respect of improvements effected by the tenants, pursuant to Agricultural Holdings Act 1948 (c 63) s 47(1). The question arose whether plaintiffs, as the trustees and statutory owners of the Duke's Parliamentary estate, could, under Settled Land Act 1925 (c 18) s 73(1)(iii), (iv) raise and pay to defendant out of capital moneys the sums paid by him as compensation: *Held* on the true construction of s 73(1)(iii), (iv) plaintiffs could not reimburse defendant out of capital moneys because: (1) whereas s 73(1)(iii) was concerned with the payment of the cost of improvements when they were carried out, the compensation payable to an outgoing tenant under s 47 of the 1948 Act was, by virtue of s 48 of that Act, an amount equal to the increase attributable to the improvement in value of the holding and consequently did not necessarily represent the cost of improvements, since it was based on a different criterion; (2) s 73(1)(iv) of the 1925 Act related to money expended by a landlord incidental to an improvement and accordingly could not cover the reimbursement of compensation payable to an outgoing tenant on a basis which was other than the cost of expenditure.

Per *Plowman J*: the fact that compensation to an outgoing tenant is outside the provisions of s 73 of the 1925 Act does not necessarily mean that it is irrecoverable by the landlord, since s 82 of the 1948 Act contains a provision enabling a landlord to obtain from the Minister an order charging the holding with repayment of compensation, and the trustees can

redeem that charge out of capital moneys pursuant to s 73(1)(ii) of the 1925 Act.

Re Duke of Wellington's Parliamentary Estates, King v Wellesley [1972] Ch 374; [1971] 2 All ER 1140; [1971] 3 WLR 184; 115 Sol Jo 549; 22 P&CR 867

D Purchase of land

LAW See Halsbury's Laws (4th edn) vol 42 para 807

2153 Power to buy certain land — Purchase of other land

Re Hill, Hill v Pilcher no 2097 ante

2154 Purchase of equity of redemption

Re Radnor's (Earl) Settled Estates [1898] WN 174

2155 Repurchase of land sold — Sale in ignorance of defect in title

A tenant for life sold a public-house, portion of a settled property. After conveyance it was found that the public-house was subject to a reversionary lease, granted by the predecessor in title of the tenant for life, of which all parties were ignorant: *Held* (1) this did not furnish any ground for rescission; (2) the repurchase of the public-house by the trustees out of capital moneys in their hands might be sanctioned.

Re Tyrell, Tyrell v Woodhouse (1900) 82 LT 675; 64 JP 665

2156 Settled land subject to charges — Jointure and portions — Land purchased with proceeds of sale of heirlooms — Whether subject to charges

Where land was settled and chattels were also settled to devolve with the land as heirlooms, the settled land having been charged with jointures and portions for younger children, on a sale of the heirlooms under Settled Land Act 1882 (c 38) s 37 (repealed), and the investment of the proceeds in land, the land so purchased was not subject to the charges created by the settlement affecting the land settled.

Re Marlborough (Duke) & Governors of Queen Anne's Bounty [1897] 1 Ch 712; 66 LJ Ch 323; 76 LT 388; 45 WR 426; 41 Sol Jo 387

Scottish, Irish and Commonwealth Cases

2157 Purchase of sporting rights

Capital money may in a proper case be invested in the purchase of sporting rights, such rights being a privilege convenient to be held with the settled land within s 21(viii) of the Settled Land Act 1882.

Quaere: whether sporting rights are incorporeal hereditaments which can be purchased with capital money as being a purchase of "land in fee simple" within s 21(vii) of the Act.

Re Portarlington's Estate [1918] 1 IR 362 (IR)

E Proceeds of sale of heirlooms

LAW See Halsbury's Laws (4th edn) vol 42 para 807

2158 Improvement to settled estates

A tenant for life under a settlement containing a discretionary trust for sale of the settled estates, and also a power to sell certain settled heirlooms, asked leave of the court under Settled Land Act 1882 (c 38) s 37 (repealed), that he might be authorised to sell part of the settled estates, and also a specified portion of the heirlooms, that the money might be paid to the trustees, and that such part as might be necessary might be applied by them in paying for certain improvements, consisting of (*a*) a larger and better supply of water to a mansion house; (*b*) a new and improved system of drainage of the mansion house; (*c*) rebuilding of the stables, which were out of repair; (*d*) the building of an agent's house; and (*e*) the building of two cottages. The trustees submitted that the proposed improvements, except the cottages, were not within Settled Land Act 1882 (c 38) s 25 (repealed); and, that even if they were the court would not supersede the power of the trustees by giving leave to the tenant for life to sell either the estate or the heirlooms: *Held* the proposed outlay was all within Settled Land Act 1882 (c 38) s 25 (repealed); and would have been authorised without the statute; and leave given to the tenant for life to sell both the settled estates and the heirlooms, and for the application of the proceeds as prayed.

Re Houghton Estate (1885) 30 Ch D 102; 55 LJ Ch 37; 33 WR 869; sub nom

Cholmondeley's (Marquis) Settled Estate (1885) 53 LT 196

ANNOTATIONS **Dbtd** Re Gerard's SE [1893] 3 Ch 252
Consd Re De Crespigny's SE [1914] 1 Ch 227

2159 Repair of unsold heirlooms

Re Waldegrave, Waldegrave (Earl) v Selborne (Earl) no 2523 post

10 Payment for improvements generally

LAW See Halsbury's Laws (4th edn) vol 42 para 808

2160 Principle on which court acts — In apportioning expenditure between capital and income

Under 1890 Act s 15, the court has jurisdiction to sanction the application of capital moneys in repaying to a tenant for life the expenses of improvements on the settled estate executed and paid for by him without the submission of a scheme. But in exercising such jurisdiction the court will take care that no expenses shall be thrown upon capital, which as between tenant for

life and remainderman ought in fairness to be paid out of income. The cost of works which are not permanent improvements likely to benefit the remainderman more than the tenant for life, but are mere repairs or works incidental to the ordinary use, occupation, and enjoyment of the property, ought not to be allowed out of capital moneys arising under the Settled Land Acts. The cost of additions to and alterations in the drainage and sanitary arrangements of a mansion house held to fall within this principle.

Re Tucker's Settled Estates [1895] 2 Ch 468; 64 LJ Ch 513; 72 LT 619; 43 WR 581; 39 Sol Jo 502; 12 R 320, CA

ANNOTATION **Apld** Re Thomas, Weatherall v Thomas [1900] 1 Ch 319

v REPAYMENT OF CAPITAL MONEY

1 General expenses incurred in execution of powers

LAW See Halsbury's Laws (4th edn) vol 42 para 811 et seq

2161 Future capital moneys — Not within powers

Settled Land Act 1882 (c 38) s 21 (repealed) only provided as to capital moneys "when received," and the court could not charge the future purchase-money of the land to meet the expenses of the trustees until the sale was carried out.

Round v Turner (1889) 60 LT 379

2162 Costs of sale

Sebright v Thornton no 2190 post

2163 Costs of sale — Attempted sale

Settled property which had been put up for sale by auction by the tenant for life under Settled Land Act 1882 (c 38) (repealed), but withdrawn for want of any sufficient offer, having been sold by private contract on the same day. On summons by the trustees for the decision of the court: *Held* one charge, according to the scale set out in Pt I of Sch 1 to the General Order under Solicitors Remuneration Act 1881 (c 44) (repealed), was payable out of the purchase-money to the tenant for life's solicitor for conducting the sale, including the conditions of sale, and one charge for deducing the title and completing the conveyance, including the preparation of the contract; and the costs of the concurrence in the sale by the mortgagees of the tenant for life, and a proper sum for the auctioneer's charges, were also payable out of the purchase-money.

Re Beck, Re Cartington Estate (1883) 24 Ch D 608; 52 LJ Ch 815; 49 LT 95; 31 WR 910

ANNOTATION **NF** Cardigan v Curzon-Howe (1888) 40 Ch D 338

2164 Costs of sale — Attempted sale

Where a tenant for life, acting honestly and with due diligence in the exercise of the powers conferred on him by Settled Land Act 1882 (c 38) (repealed), attempted to sell the settled land, but the sale was unsuccessful, the costs or expenses properly incurred by him in respect of such attempted sale were payable out of capital money under Settled Land Act 1882 (c 38) s 21(x) (repealed).

Upon an application by the tenant for life in such a case in reference to costs or expenses so incurred, the court, under ss 46(6), 47 and 55(3) (repealed) of the Act, had power to order that such costs or expenses be paid out of the property subject to the settlement, and raised by a charge on the settled land.

Re Smith's Settled Estates [1891] 3 Ch 65; 60 LJ Ch 613; 64 LT 821; 39 WR 590; 7 TLR 517

2165 Costs of sale — Auctioneer's charges

Re Beck, Re Cartington Estate no 2163 ante

2166 Costs of sale — Several persons constituting tenant for life — Separate solicitors

Upon a sale of settled land by twenty-five persons, who together constituted the tenant for life for the purposes of Settled Land Act 1882 (c 38) (repealed), all the vendors employed the same solicitor to conduct the sale and to deduce title to the property, but four of them employed separate solicitors to peruse and complete on their behalf the conveyances to the purchasers: *Held* the costs incurred by these separate solicitors must be paid out of the proceeds of sale.

Smith v Lancaster [1894] 3 Ch 439; 63 LJ Ch 842; 10 TLR 665; sub nom

Re Smith, Smith v Lancaster (1894) 71 LT 511; 43 WR 17; 38 Sol Jo 680; 7 R 465, CA

2167 Costs of sale — Form of order

Re Rudd [1887] WN 251

2168 Costs of sale — Sale in lots

(1) In giving a direction under Settled Land Act 1882 (c 38) s 22(2) (repealed), the tenant for life was bound to act as a trustee.

(2) The rule laid down in *Cardigan v Gurzon-Howe* (no 2172 post) that on a sale by a tenant for life under Settled Land Act 1882 (c 38) (repealed), the costs of obtaining the consent and concurrence of the mortgagees on his life estate ought not, as a general rule, to be paid out of capital moneys, applied as well where the capital moneys were in the hands of trustees as where they were in court.

(3) Where a tenant for life, who had sold under Settled Land Act 1882 (c 38) (repealed), directed capital moneys in the hands of the trustees to be applied in payment of the costs, charges, and expenses of his solicitors in relation to the sale, the trustees were not bound to have such costs, charges, and expenses taxed, but were entitled to have an opportunity of considering their propriety, and if satisfied might without taxation pay them out of capital moneys.

(4) The same rule applied to the payment out of capital moneys of the costs of procuring the concurrence in the sale of the incumbrances on the fee.

(5) Where property was offered by a tenant for life for sale in lots the tenant for life was vendor in respect of each contract of sale into which he eventually entered, and in such a case it was competent to the vendor's solicitor, who, before entering upon the business, had given the necessary notice under rule 6 of the General Order under Solicitors Remuneration Act 1881 (c 44) (repealed), of his intention to charge the ordinary detailed charges and not the scale fee in the case of sales under a certain amount, to treat the sale of each lot as a separate transaction, and to charge his costs accordingly.

Re Peel's (Sir Robert) Settled Estates [1910] 1 Ch 389; 79 LJ Ch 233; 102 LT 67; 26 TLR 227; 54 Sol Jo 214

2169 Costs of sale — Taxation

Re Peel's (Sir Robert) Settled Estates no 2168 ante

2170 Costs of procuring concurrence of mortgagees in sale — Mortgage of life interest

Re Beck, Re Cartington Estate no 2163 ante

2171 Costs of procuring concurrence of mortgagees in sale — Mortgage of life interest

Sebright v Thornton no 2192 post

2172 Costs of procuring concurrence of mortgagees in sale — Mortgage of life interest

On a sale by a tenant for life under Settled Land Act 1882 (c 38) (repealed), the costs of obtaining the consent and concurrence of mortgagees of the life estate, although they were costs incidental to the exercise of the statutory power of sale, ought not as a general rule to have been paid out of capital money produced by the sale, though there might be special cases in which they could properly be so paid.

Cardigan v Curzon-Howe (1889) 41 Ch D 375; 58 LJ Ch 436; 60 LT 723; 37 WR 521; 5 TLR 412, CA

ANNOTATION **Consd** Re Peel's SE [1910] 1 Ch 389

2173 Costs of procuring concurrence of mortgagees in sale — Mortgage of life interest — Purchase-money in hands of trustees or court

Re Peel's (Sir Robert) Settled Estates no 2168 ante

2174 Costs of procuring concurrence of mortgagees in sale — Taxation

Re Peel's (Sir Robert) Settled Estates no 2168 ante

2175 Appointment of guardian — Proceedings by infant

Re Rudd [1887] WN 251

2176 Costs of survey of estate preliminary to sale

Re Eyton's Settled Estates [1888] WN 254

2177 Costs of preparing scheme for improvements

Re Stamford's (Lord) Settled Estates no 1985 ante

2178 Commission to estate agent — Procuring lease

The commission charged by an estate agent for procuring a lease of settled land for a tenant for life under Settled Land Act 1882 (c 38) (repealed), was payable out of capital money arising under the Act (repealed).

Re Maryon Wilson's Settled Estates [1901] 1 Ch 934; 70 LJ Ch 500; 84 LT 708

2179 Commission to estate agent — Procuring lease — Short occupation lease

An estate agent's commission for obtaining a tenant for a short occupation lease granted by the life tenant under Settled Land Act 1882 (c 38) (repealed), was an income charge, and was not thrown on capital by s 21(x) (repealed).

Re Leveson-Gower's Settled Estate [1905] 2 Ch 95; 74 LJ Ch 540; 92 LT 836; 53 WR 524; 49 Sol Jo 482

2180 Commission to estate agent — Procuring lease — Short occupation lease

Re Watson, Brand v Culme-Seymour [1928] WN 309; 166 LT Jo 439

2181 Architect's fees — Short occupation lease

Re Watson, Brand v Culme-Seymour no 2180 ante

2182 Solicitors' fees — Obtaining short occupation lease

Re Watson, Brand v Culme-Seymour no 2180 ante

2183 Fees of surveyors consulted as to sufficiency of price offered — Sale by request of assignee of tenant for life

A tenant for life assigned his life interest in settled estates to an insurance company, and it was provided that he should receive an annuity out of the estates, which annuity was to be forfeited if he refused or neglected to exercise his powers under Settled Land Acts (repealed) when reasonably requested to do so by the company. He also covenanted not to exercise his powers as tenant for life without the company's consent, and to do all things reasonably required by them in relation to the exercise of his powers. On

being requested by the company to sell a part of the settled estate he consulted surveyors as to the sufficiency of the price offered, and claimed that their fees were payable out of capital moneys: *Held* (1) those fees were incurred by the tenant for life in relation to the proposed exercise of his power of sale and on account of his position as a trustee for all parties entitled under the settlement, and were payable out of capital moneys; (2) when the company required the tenant for life to exercise his powers in the future he was entitled to obtain proper advice, but he was not entitled to initiate a scheme for the exercise of his powers, and if, when asked to exercise his power, he was afforded, at the expense of the estate, reasonable information and advice, that fact would have an important bearing upon the question whether further costs were properly incurred by him.

Re Hope, Tarleton v Hope (1911) 28 TLR 93

2184 Compensation to secure vacant possession

Settled land was about to be developed as a building estate, and as a necessary preliminary to carrying out the approved scheme of improvements authorised by Settled Land Act 1882 (c 38) (repealed), it was essential to obtain vacant possession of a farm let to a yearly tenant, and forming an important part of the settled land in question. The tenancy was determined by notice and compensation was awarded to the tenant in respect of tenant right and improvements not coming within the First or Second Schedules to the Agricultural Holdings Act 1908 (c 28) (repealed): *Held* neither under Settled Land Act 1882 (c 38) s 21(iii) or (x) (repealed), nor under s 25 (repealed), could payment of the compensation in question be allowed out of capital moneys in the hands of the trustees; and to allow such an expenditure out of capital moneys would be entirely inconsistent with the whole purpose and scheme of the Settled Land Acts (repealed).

Re De La Warr's (Earl) Cooden Beach Settled Estate [1913] 1 Ch 142; 82 LJ Ch 174; 107 LT 671; sub nom *Re Cooden Beach Estate* (1913) 29 TLR 30; 57 Sol Jo 42, CA

2185 Compensation payable to tenant of agricultural holding

Re Duke of Wellington's Parliamentary Estates, King v Wellesley no 2152 ante

2186 Ascertainment and payment of duties

Where a tenant for life of settled estates has made various sales and granted leases of parts of the settled estate, and incurred expenditure in the preparation of accounts, returns, and valuations necessary to enable the commissioners to assess the increment value duty payable on sales and the reversion duty payable on the determination of leases: *Held* the expenses incurred in the ascertainment and payment of duties so far as these expenses arose in respect of a transaction involving the exercise of any of the statutory powers conferred upon the limited owner, were expenses incidental to the exercise of these powers within Settled Land Act 1882 (c 38) s 2(x) (repealed), and payable out of capital. Included in such cases would be the expenses incurred in respect of increment value duty, and of the reversion duty payable on the acceptance of a surrender of a lease; but in cases where reversion became payable on the determination of a lease by effluxion of time the expenses would not come within s 2(x) (repealed), and if the tenant for life desired to throw them upon the settled land he must exercise his statutory power of charging for that purpose.

Re Maryon-Wilson's Settled Estates, Maryon-Wilson v Du Cane [1915] 1 Ch 29; 84 LJ Ch 121; 112 LT 111

2 Costs of legal proceedings

LAW See Halsbury's Laws (4th edn) vol 42 para 822 et seq

2187 Application for payment of income of fund

Costs of an application by tenant for life to obtain payment of the income of funds paid into court under Trustee Relief Act 1847 (c 96) (repealed), held to be payable out of the income and not out of the *corpus*.

Re Hamersley's Settlement (1856) 23 Beav 267; 53 ER 104

2188 Application for payment of income of fund

On a petition by tenant for life under Trustee Relief Act 1847 (c 96) (repealed), for payment of the income, her costs were ordered to be paid out of the income, and those of the trustee out of the *corpus*.

Re Hadland's Settlement (1856) 23 Beav 266; 4 WR 690; 53 ER 104

2189 Application for payment of income of fund

Upon petition by the tenant for life of a trust fund which had been paid into court under Trustee Relief Act (repealed), for the payment of the dividends to them: *Held* though petitioner's costs were payable out of the income, the trustees' costs had to come out of the *corpus*.

Re Gordon's Trusts (1868) LR 6 Eq 335; 37 LJ Ch 408

ANNOTATION **Follo** Re Knight's Trusts (1868) 37 LJ Ch 409

2190 Action to determine title — Costs as between party and party

Sebright v Thornton [1885] WN 176

2191 Action to determine title — Tenant for life and mortgagees — One set of costs

Sebright v Thornton no 2190 ante

2192 Proceedings for protection of settled land — Establishment of claim to earldom

Proceedings successfully prosecuted before the House of Lords Committee for Privileges to establish a claim to an earldom, the consequences of which was that petitioner afterwards recovered estates which were subject to similar limitations, held to be "proceedings taken from the protection of settled land," the costs of which the court directed to be paid out of property subject to the settlement, under Settled Land Act 1882 (c 38) s 36 (repealed).

Re Aylesford's (Earl) Settled Estates (1886) 32 Ch D 162; 55 LJ Ch 523; 54 LT 414; 34 WR 410

2193 Proceedings for protection of settled land — Unsuccessful proceedings — Without sanction of court

Where a tenant for life, without the previous sanction of the court, institutes legal proceedings for the protection of the settled estate which ultimately prove unsuccessful, and subsequently applies to the court that the costs of the proceedings may be paid out of the estate, the court will consider the matter as though it were an application for leave to commence the proceedings at the cost of the estate.

On such an application the costs of unsuccessful litigation will not, as a rule, be allowed out of the estate where it appears that the proceedings were of a speculative nature, even although the tenant for life acted in good faith and under legal advice.

Re Yorke, Barlow v Yorke [1911] 1 Ch 370; 80 LJ Ch 253; 104 LT 134

2194 Proceedings for protection of settled land — Proceedings abandoned — Costs paid by tenant for life — Action for recovery of land

The court had jurisdiction under Settled Land Act 1882 (c 38) s 36 (repealed), to approve of proceedings once proposed to be taken for the recovery of land alleged to be subject to a settlement and to direct the costs to be re-imbursed out of capital notwithstanding that at the date of the application the proceedings had been abandoned and the costs paid by the tenant for life.

Re Wilkie's Settlement, Wade v Wilkie [1914] 1 Ch 77; 83 LJ Ch 174; 109 LT 927; 58 Sol Jo 138

2195 Attempt by remainderman to restrain sale — Extra costs of tenant for life

A tenant for life of an estate in strict settlement had power to cut certain timber and other trees, to sell the same and to apply the produce to his own use. In 1881 he contemplated a sale of the estate, but he was restrained from selling, either under the power in the will or under that contained in Settled Land Act (repealed), by an injunction granted in an action brought by persons entitled in remainder. In 1884 the action was dismissed with costs, and in 1885 the tenant for life sold the estate under conditions of sale which stated that the purchaser should in addition to the purchase-money pay for the timber according to a valuation. The tenant for life claimed to be paid the difference of his costs, as between party and party and solicitor and client, in the action which was dismissed: *Held* the tenant for life was entitled, in defending the action which was dismissed with costs, to be paid his extra costs of so much of the action as related to the exercise of the powers contained in Settled Land Act (repealed) as incidental to the exercise of his power of sale under the provisions of Settled Land Act 1882 (c 38) (repealed).

Re Llewellin, Llewellin v Williams (1887) 37 Ch D 317; 57 LJ Ch 316; 58 LT 152; 36 WR 347; 4 TLR 170

ANNOTATION **Follld** Re Smith's SE [1891] 3 Ch 65

2196 Unsuccessful application for declaration of right to exercise powers

Re Horne's Settled Estate (1888) 39 Ch D 84; 37 WR 69, CA

vi POWERS OF SALE AND EXCHANGE

1 Generally

LAW See Halsbury's Laws (4th edn) vol 42 para 826 et seq

CROSS REFERENCE See INFANTS vol 28(3) (2nd reissue) no 1287 et seq (power of infant for life to sell)

2197 Power of tenant for life to sell

Thomas v Williams no 2250 post

2198 Power of tenant for life to sell — Property inalienable by law

(1) A dignity of title of honour, as an incorporeal hereditament, was "land" within Settled Land Act 1882 (c 38) s 37 (repealed).

When a dignity is limited to the heirs of the body, then although no place be named in the creation of the title, the dignity is within Statute De Donis 1285

(c 1), and descendible as an estate tail, and the patent does not create a fee simple conditional.

There is no difference in these respects between a baronetcy and other descendible dignities.

(2) Settled Land Act 1882 (c 38) (repealed), did not enable a limited owner to sell any property which, when vested in a tenant in fee simple was by law inalienable.

(3) The court had jurisdiction under Settle Land Act 1882 (c 38) s 37 (repealed), to order a sale of personal chattels settled so as to devolve with such a title.

Re Rivett-Carnac's Will (1885) 30 Ch D 136; 54 LJ Ch 1074; 53 LT 81; 33 WR 837; 1 TLR 582

2199 Power of tenant for life to sell — Remainder sold before Settled Land Act 1882 (c 38)

Wheelwright v Walker no 1741 ante

2200 Power of tenant for life to sell — Where express power in settlement — Settlement made by private Act — Proviso restricting power of sale

Re Chaytor's Settled Estate Act no 2133 ante

2201 Power of tenant for life to sell — Where express power in settlement — Statutory power overriding settlement

Re Houghton Estate no 2158 ante

2202 Power of tenant for life to sell — Where express power in settlement — For sale of residuary estate

Where in a settlement of personalty by his will, testator directs his trustees to purchase a dwelling-house for the widow's residence, and that such house afterwards shall fall into and form part of his residuary estate bequeathed on trust for sale, Law of Property Act 1925 (c 20) s 32 is excluded, and the widow can sell under her life tenant powers.

Re Hanson, Hanson v Eastwood [1928] 1 Ch 96; 97 LJ Ch 86; 138 LT 462; 71 Sol Jo 964

2203 Power of tenant for life to sell — Pendency of action — Decree for execution of trusts

The pendency of an action by tenant for life, in which a decree had been made for execution of the trusts of a settlement, did not prevent him from exercising his power of sale under Settled Land Act 1882 (c 38) (repealed), without the sanction of the court.

Cardigan v Curzon-Howe (1885) 30 Ch D 531; 55 LJ Ch 71; 33 WR 836; sub nom

Re Cardigan's (Earl) Settled Estates, Cardigan v Curzon-Howe (1885) 53 LT 704

ANNOTATION **Folld** Bernhardt v Galsworthy [1929] 1 Ch 549

2204 Power of tenant for life to sell — Undivided share — Whether concurrence of cotenant necessary

Re Collinge's Settled Estates no 1101 ante

2205 Power of tenant for life to sell — Undivided share — Whether concurrence of cotenant necessary

Cooper v Belsey no 1102 ante

2206 Power of tenant for life to sell — Without consent of trustees

(1) Except in a case mentioned in s 15 [repealed], a tenant for life has, under the Settled Land Act 1882 (c 38) [repealed], an absolute power of selling the settled land without the consent or control of the trustees of the settlement, unless they have reason to believe that any intended exercise of the power is improper, in which case they may apply to the court for directions under s 44 [repealed]. Consequently, neither the fact that at the time the tenant for life enters into a contract for sale there are no trustees of the settlement under the Act [repealed], nor when there are any, the fact that no notice has been given them by the tenant for life, under s 45(1) [repealed] of his intention to proceed to a sale, prevents his making a statutory title. It is sufficient for the protection of the purchaser if by the time he comes to complete there are trustees under the Act [repealed] to whom he may pay his purchase-money if required so to do by the tenant for life under s 22 [repealed] and notice has been given them under s 45(1) [repealed]; though under s 45(3) [repealed] a purchaser dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of the notice.

(2) Now, looking back to the power, I find, first of all, in s 3 [repealed], "powers of sale, exchange, and partition, with, in s 4 [repealed], the usual provisions which one finds in such powers, for instance: 'Every sale shall be made at the best price'; and 'every exchange and every partition shall be made for the best consideration in land or in land and money that can reasonably be obtained,' and so on. So that I think the meaning of this s 53 [repealed] is that, for the security of the remaindermen, as between the tenant for life and them, he in exercise of this power shall be treated as a trustee and shall have all the liabilities of a trustee exercising a like power. The consequence of that is, no doubt, that if a purchaser knows the tenant for life is exercising the power improperly, and is aware that what the tenant for life is doing would amount to a breach of trust, he, the purchaser, has a perfect right to say, 'I will not complete'" (*Kay J*).

Hatten v Russell (1888) 38 Ch D 334; 57 LJ Ch 425; 58 LT 271; 36 WR 317

2207 Power of tenant for life to sell — Subsoil alone

A tenant for life by virtue of Settled Land Act 1882 (c 38) s 63 (repealed), of a settlement by way of trust for sale created by will, of undivided shares of settled land beneath which a railway company desired to construct tunnels for an electric railway, having joined with the owners of the remaining shares in entering into an agreement with the company for the sale of them of the right to construct, and use tunnels with railways therein under the land, took out a summons under Settled Land Act 1884 (c 18) s 7 (repealed), asking for leave to enter into a contract in the form of an agreement with the company for the sale of them of that right. It was urged in support of the application that to proceed under Settled Land Acts (repealed) was cheaper and more simple than under Lands Clauses Consolidation Act 1845 (c 18), and that the right in question constituted an easement under Settled Land Act 1882 (c 38) s 3 (repealed), or, if not, that the court had power under that section to make the order asked for: *Held* the sale of the subsoil of the settled land was not the sale of an easement under Settled Land Act 1882 (c 38) s 3 (repealed), but the court had power under that section to make an order authorising the sale as being a sale of the settled land.

Re Pearson's Will (1900) 83 LT 626

2208 Power of tenant for life to sell — Right to discharge mortgages

Land which was subject to mortgages was settled, subject to a term for securing incumbrances, to the use, in the events which happened, of A for life, with remainders over. The trusts of the term provided that so long as the mortgages remained unpaid the trustees should receive the rents and profits and manage the premises and keep down the interest of the mortgage debts and certain rentcharges created by the settlement, that they should then pay to the tenant for life for the time being subject to the term an annuity of £600 a year, and should apply the residue of the rents and profits towards the payment of the principal moneys charged by the mortgages, and there was a proviso for the cesser of the term upon the discharge of the mortgage debts. The settlement conferred on the trustees an immediate power of sale and exchange, but no power of leasing. The court, having held that A was a person having the powers of a tenant for life under Settled Land Act 1882 (c 32) (repealed), ordered him to be let into possession upon his undertaking to perform the trusts of the term, and gave him the custody of the title deeds. The court would have made the order apart from the annuity to A.

A subsequently contracted to sell, under the powers of Settled Land Acts (repealed), certain portions of the settled lands, including parts of all the mortgaged lands and a portion which was unincumbered, and in order to complete the sale it was necessary that the mortgages should be paid off. A therefore directed that the trustees should apply the proceeds of the sale in paying off the mortgages. He deposed that he considered that this would be for the benefit of all the parties entitled under the settlement, seeing that the mortgages bore interest at 4 per cent whereas the purchase-money could not be invested in trustee securities to yield more than 3 per cent. Upon a summons to determine whether the mortgages ought not to be kept on foot for the benefit of the ultimate remainderman: *Held* the beneficiaries under the settlement took subject to the power of sale conferred on the trustees, and inasmuch as the trustees in the exercise of that power might properly, for the purpose of carrying into effect a beneficial sale, pay off the existing incumbrances out of the purchase-money, a tenant for life doing the same thing under the powers of Settled Land Acts (repealed) ought not to be held to be acting unjustly towards the remaindermen: consequently the mortgages ought not to be kept on foot, and upon the payment off out of the capital moneys of all the mortgages the term would cease. *Semble*: the court would have arrived at the same conclusion if the settlement had conferred no power of sale upon the trustees.

The tenant for life acting *bonâ fide* ought not to be interfered with unless the court can see that, in spite of his honesty, he is acting injuriously towards those whose interest he is bound to protect (*Stirling J*).

Re Richardson, Richardson v Richardson [1900] 2 Ch 778; 69 LJ Ch 804

ANNOTATIONS **Folld** Re Money Kyrle's Settlmt, Money Kyrle v Money Kyrle [1900] 2 Ch 839 **Distd** Re Llanover, Herbert v Ram [1907] 1 Ch 635 **Consd** Re Stamford & Warrington, Payne v Grey [1925] Ch 162

2209 Power of tenant for life to sell — Effect of assignment of part — Necessity for concurrence of assignees — Application of doctrine of merger

Re Barlow's Contract no 2001 ante

2210 Power of tenant for life to sell — Lunatic tenant for life

A tenant for life, who is a lunatic so found by inquisition, can sell and convey the fee as beneficial owner, and the court has power to authorise a committee to enter into covenants for title so as to bind the lunatic.

Re Ray [1896] 1 Ch 468; 65 LJ Ch 316; 73 LT 723; 60 JP 340; 44 WR 353; 40 Sol Jo 238, CA

2211 Power of tenant for life to sell — "Unless settlement otherwise provides" — Law of Property Act 1925 (c 20) s 32

By a personalty settlement created by his will, testator directed his trustees to purchase a house as a residence for his wife until his son D attained twenty-five, if she so long continued testator's widow. After D attained twenty-five or the wife remarried whichever first happened, the house was to fall into the residuary estate, which was given to the trustees on trust for sale and conversion. After testator's death a house was purchased and assured to the wife and the other trustees in fee simple. It was now desired to sell it, and the question arose whether a title could be made under the trust for sale which "unless the settlement otherwise provides" is imported by Law of Property Act 1925 (c 20) s 32, or whether the title must be made under Settled Land Act 1925 (c 18): *Held* the direction that the house was to be purchased for the wife's residence was inconsistent with an immediate trust for sale, and amounted to a provision excluding Law of Property Act 1925 (c 20) s 32, so that there was no trust for sale, and the title must be made under Settled Land Act 1925 (c 18). *Quaere*: whether Law of Property Act 1925 (c 20) s 32 applies to a trust to purchase land.

Re Hanson, Hanson v Eastwood [1928] 1 Ch 96; 97 LJ Ch 86; 138 LT 462; 71 Sol Jo 964

ANNOTATION **Consd** Re Herklots' Will Trusts, Temple v Scorer [1964] 2 All ER 66

2212 Power of tenant for life to sell — Sale of settled land to tenant for life

By his will a testator settled his real estate on trust for his widow during her widowhood and thereafter to his son, the first plaintiff, for life and subject thereto as to one-half in trust for testator's granddaughter, and as to the other half in trust for the children of the first plaintiff. Testator died in 1958 and his will was proved by his three executors, namely, his widow, the first plaintiff and the first defendant. In April 1960 the executors made a vesting assent in favour of the widow as tenant for life in respect of part of the real estate. On 12 August 1960 the executors executed a conveyance by way of sale of a plot of land that had not been included in the vesting assent, the conveyance being expressed to be between the widow as purchaser of the one part and the widow, the first plaintiff and first defendant as vendors of the other part. Clause 1 of the conveyance referred to the receipt of the purchase price by the "personal representatives" of testator. The following day a vesting assent was made in respect of the remainder of the real estate. The widow built a dwelling-house on the plot of land and lived there until her death in 1966. In 1967 plaintiffs, as her personal representatives sold the land and house but before completion the question arose whether plaintiffs could give a good title because the conveyance of 12 August 1860 was, on the face of it, an unauthorised sale by testator's executors to one of themselves: *Held* the conveyance of 12 August 1960 was effectual to vest the fee simple in testator's widow, because: (1) although the powers conferred on the trustees of a settlement by Settled Land Act 1925 (c 18) s 68(2) were not in the minds of the parties to the transaction, those powers are available to them and since the transaction was one which could not properly be carried out without leave of the court except by the use of those powers, the conveyance ought to be treated as having been made in the exercise thereof; (2) the effect of s 68(2) was that where the tenant for life was himself one of the trustees of the settlement he should be a conveying party as well as the party in whose favour the conveyance was made.

Re Pennant's Will Trusts, Pennant v Ryland [1970] Ch 75; [1969] 2 All ER 862; [1969] 3 WLR 63; 113 Sol Jo 345; 20 P&C 540

2213 Sale by trustees — Discharge of incumbrances

Re Richardson, Richardson v Richardson no 2208 ante

2214 Joint tenants for life — Disagreement as to exercise — Powers of court

Barker v Addiscott no 2092 ante

2215 Exercise of power — Purposes foreign to object of settlement

Purchaser not compelled to take a doubtful title; *viz* by executing a power of sale, introduced under a direction by a decree, establishing a will, to the master to approve a proper settlement: the will not authorising the insertion of such a power; nor could it be sustained under a power by a former settlement; which, if not extinct by the failure of the limitations, and the union of the estate for life with the reversion, could not be duly applied to purposes clearly foreign to its original object; and though purchasers are not put to exercise a very nice and critical judgment with regard to the purposes, for which powers are created, it could never be intended to refer to a perfectly new set of limitations, in a new settlement, at a long subsequent period, under a disposition by the will of the owner of the fee; to be exercised, not for any purpose in the least degree connected with the settlement, but avowedly as an expedient to supply the want of a valid power in that settlement, and enable those, whom he had made only tenants for life, to dispose of the estate.

Wheate v Hall (1809) 17 Ves 80; 34 ER 31

ANNOTATIONS **Consd** Brewster v Angell (1820) 1 Jac&W 65; Wolley v Jenkins (1857) 3 Jur NS 321 **Distd** Wise v Piper (1880) 13 Ch D 848

2216 Exercise of power — Purposes foreign to object of settlement

Powers of sale and exchange in settlements are only given to trustees for the benefit, and to be exercised with the consent, of the persons entitled to the estate under and by virtue of the settlement containing the power; and the devisees of the ultimate remainder in fee of the settlor, which was his own reversion, cannot be said to claim under the settlement.

Upon the marriage of A and B, A's estate was settled upon him for life; remainder to the use, that if B should survive she should have a jointure of £600 per annum; remainder to trustees for 500 years, to secure the arrears of jointure; remainder to trustees for two thousand years, to raise portions for younger children; and subject thereto, the estate was limited to the issue of the marriage, with an ultimate remainder to A in fee. The settlement contained a power to B, at any time after the marriage, to charge the sum of £2,000 on the property, to be raised after her decease, and for the benefit of her personal estate; and for the purpose of raising that sum, she had power to create a term. There was in the settlement a power of sale and exchange given to trustee, to be exercised with the consent of A, and after his decease, within twenty-one years from thence, with the consent of the persons for the time being entitled to the rents and profits. There was no issue of the marriage, and A died, living B, having devised, amongst other things, the estate in question to trustees, upon trust to sell, and apply the proceeds as therein directed. It being desirable now to sell a portion of the estate comprised in the settlement, free from the jointure and the power of B to charge with £2,000 the trustees of the settlement entered into a contract to sell: *Held* under the circumstances, the power of sale in the settlement, could not now be exercised.

Wolley v Jenkins (1857) 28 LTOS 362; 3 Jur NS 321; 5 WR 281, LC

ANNOTATIONS **Consd** Taite v Swinstead (1859) 26 Beav 525; Vine v Raleigh (1883) 24 Ch D 238 **Distd** Re Kaye & Hoyle's Contract (1909) 53 Sol Jo 520

2217 Exercise of power — By party not authorised — Whether set aside

Hope v Liddell, Liddell v Norton no 2247 post

2218 Covenant to settle after-acquired property — Power of sale in subsequent settlement

Williams v Carter (1818) Sugden on Powers 8th edn App 945

2219 Covenant to settle after-acquired property — Power of sale in subsequent settlement

A settlement of personal estate contained a power to alter and vary, and a covenant to settle future acquired real and personal estate on similar trusts: *Held* a power of sale might be introduced into a settlement of subsequently acquired real estate.

Elton v Elton (No 2) (1860) 27 Beav 634; 54 ER 252

2220 Tenant for life without impeachment of waste — Exercise of power — Tenant not entitled to produce of timber

(1) A tenant for life without impeachment for waste, with power to sell, if he sells, is not entitled to the produce of the timber on the estate.

(2) Trustees, whose consent was required to the exercise of a power of sale by tenants for life, submitting to act under the direction of the court, on a bill for specific performance of a contract to sell, an inquiry into the propriety of the contract was ordered.

Doran v Wiltshire (1792) 3 Swan 699; 36 ER 1027

2221 Power of sale with consent of trustees — Action for specific performance — Trustees submitting to act under direction of court — Inquiry into propriety of sale

Doran v Wiltshire no 2220 ante

2222 Power directing purchase and settlement of other lands — Death of tenant for life before settling — Purchase presumed made under direction in power

Where a tenant for life sells part of the settled estate under the authority of an Act of Parliament which directs him to lay out the consideration money in the purchase of other lands, and to settle them to the same uses, and he afterwards purchases lands in fee simple, to nearly the amount, but dies without having settled them accordingly, leaving them to descend upon his heir-at-law, who was also the first tenant in tail in remainder under the settlement, a court of equity will intend that the purchase was made in performance of the obligation imposed by the Act, and will not permit the remainderman to recover the value of the lands sold against the personal estate of the tenant for life.

Tubbs v Broadwood (1831) 2 Russ&M 487; 39 ER 479

2223 Power to sell land if required for public undertaking — Cemetery company incorporated under Act — Sale to cemetery company good under power

By a settlement, executed on the marriage of plaintiff's eldest son, it was provided that plaintiff, who was tenant for life of the lands comprised in the settlement, should have power to contract with any

person or persons for the sale of any part of those lands, in case the same should, by virtue of any Act of Parliament, be wanted or required for the purposes of any canal, railway, or other undertaking. By an Act of Parliament, passed subsequently to the date of the settlement, certain incorporated persons were empowered to purchase part of the lands comprised in the settlement, but there was no clause in the Act empowering them to compel the sale and conveyance of the lands in question: *Held* plaintiff was entitled to compel a specific performance against the persons incorporated, of a contract entered into by him with them for the sale of part of the lands comprised in the settlement.
Kensington (Lord) v West London Cemetery Co (1838) 8 LJ Ch 81; 2 Jur 959, LC

Scottish, Irish and Commonwealth Cases

2224 Necessity for leave of court
Upon a petition under Conveyancing and Law of Property Act 1898 the court allowed the sale of portion of a settled estate consisting of vacant land and the expenditure of the purchase-money in the erection of buildings to be approved by the master, upon the unsold portion.
Re Tighe's Settled Estates (1902) 2 SRNSW 81; 19 NSWWN 145 (AUS)

2225 Necessity for leave of court
Re Coffill's Settled Estate (1920) 20 SRNSW 412; 37 NSWWN 110 (AUS)

2226 Necessity for leave of court
A person who, by virtue of Settled Land Act 1882 (c 38) s 63, is "deemed to be a tenant for life" of settled land is not entitled, as a matter of course, to an order under Settled Land Act 1884 (c 18) s 7(ii), giving appellant leave to sell or proceed with a sale of settled land.
Re Tuthill [1907] 1 IR 305 (IR)

2227 Necessity for leave of court
Re Settled Land Acts & Obré [1920] 1 IR 32 (IR)

2228 Necessity for leave of court
Re Harris' Trust [1919] SC 432; 56 Sc LR 294; [1919] 1 SLT 220 (SCOT)

2229 Necessity for leave of court
The Settled Land Act 1925, which does not extend to Scotland, provides, by s 39(1), that every sale of land which is subject to the provisions of the Act shall be made for the best consideration in money that can reasonably be obtained. The liferenter of certain Scottish estates belonging to an English trust, and the trustees of the trust, presented a petition to the *nobile officium* of the Court of Session for authority to sell and to feu the estates in accordance with powers conferred upon them by the High Court of Justice in England, and, in particular, the powers conferred by Settled Land Act 1925. Petitioners having sought the inclusion in the order to be pronounced by the court of a proviso in the terms of s 39(1). The court granted the petition subject to deletion of the proposed proviso, holding that it was for the court of the domicil of the trust to determine the powers to be exercised by the trustees and to decide any questions which might arise with beneficiaries; the Scottish Court was merely exercising an auxiliary jurisdiction; and it was inappropriate that an order by the Scottish Court should incorporate provisions from the Settled Land Act.
Campbell, Petitioner [1958] SC 275 (SCOT)

2230 Necessity for leave of court — Consent of life tenant necessary — Life tenant receiving consideration from purchaser
Eastern Trust Co v Dwyer [1927] 1 DLR 366; 59 NSR 158 (CAN)

2231 Proposal to purchase other lands outside Province — Leave refused
An application under the Settled Estates Act RSO 1937, to sanction the sale of the settled lands and the purchase, with the proceeds, of other lands situate outside the Province, will be refused. The expression "other lands" in s 23(*c*) means other lands in Ontario.
Re Fell [1940] 4 DLR 73; [1940] OR 397 (CAN)

2232 Powers of court
The Nova Scotia Supreme Court has power under ss 15 and 16 of the Nova Scotia Judicature Act 1950, originally conferred under the Nova Scotia Judicature Act RSNS 1884, to authorise a life tenant to sell the whole fee simple of land, in which contingent remaindermen have an interest.
Re Baugild & Baugild [1954] 3 DLR 586; 34 MPR 346 (CAN)

2233 Power to sell "if necessary for support" — Exercise of power
A and B, spouses, executed a deed of conveyance, of heritage belonging in fee to B the wife, to trustees to convey to C after the death of the survivor of A and B, with power to either of A and B during their lifetime, "if necessary for our support," to sell. B and C, as well as all the trustees, predeceased A, the husband, who conveyed the property to certain persons "in gratitude for their past services, as well to secure a continuance of their care and attention to him in time to come, and to provide for their comfort and maintenance after his death." The court reduced the deed.
Boyce v Dunbar (1858) 1 WR 374 (SCOT)

2 Appointment of trustees

LAW See Halsbury's Laws (4th edn) vol 42 para 826 et seq

CROSS REFERENCE See no 1063 ante

2234 Effect of failure to appoint — On entering into contract for sale
Hatten v Russell no 2206 ante

2235 Effect of failure to appoint — On entering into contract for sale
Settled Land Act 1882 (c 38) s 22 (repealed), which conferred on a tenant for life the option of capital

money arising under the Act (repealed) having been paid either to the trustees of the settlement or into court, presupposed that there were trustees for the purposes of the Act (repealed) in existence. Therefore, where a vendor having sold as tenant for life entered into a contract for the sale of settled land, he could not, under s 22 (repealed), require the purchaser to pay the purchase-money into court where no trustees for the purposes of the Act (repealed) were in existence when the time came for the completion of the contract, and the contract would not be enforced. Where, however, a purchaser payed his purchase-money into court in ignorance of the fact that there were no trustees in existence, he would get a good title.

Re Fisher & Grazebrook's [1898] 2 Ch 660; 67 LJ Ch 613; 79 LT 268; 47 WR 58; 42 Sol Jo 731

2236 Effect of failure to appoint — At time fixed for completion

Hatten v Russell no 2206 ante

2237 Effect of failure to appoint — At time fixed for completion — Payment of purchase-money into court not ordered — Effect of payment in by purchaser in ignorance

Re Fisher & Grazebrook's Contract no 2235 ante

2238 Power to sell with consent of tenant for life — Sale or mortgage by tenant for life — Power of consenting not extinguished

Under his marriage settlement A was tenant for life; and a power was given to trustees, with A's consent, to sell the property. A, by lease and release, conveyed his life estate by way of mortgage: *Held* his power of consenting was not thereby destroyed, and it might be exercised either by the mortgagee reconveying the estate, or joining in the conveyance to the purchaser.

Walmesley v Butterworth (1835) 4 LJ Ch 253

ANNOTATIONS **Follld** Holdsworth v Goose (1861) 29 Beav 111 **Consd** Alexander v Mills (1870) 39 LJ Ch 407 **Apld** Re Bedingfeld & Herring's Contract [1893] 2 Ch 332

2239 Power to sell with consent of tenant for life — Sale or mortgage by tenant for life — Power of consenting not extinguished

The trustees of a marriage settlement were empowered to invest the trust funds in land, and afterwards to resell the lands, with the consent of the tenant for life. After the trustees had invested part of the funds in land, the tenant for life conveyed his interest under the settlement to a purchaser, by the description of all his life and other estate and interest in all the moneys, stocks, funds and securities, and messuages, lands, tenements and hereditaments into which the moneys, stocks, funds and securities were, or, at any time thereafter, might be converted and changed: *Held* the tenant for life's power to consent to a resale of the lands was not destroyed by the alienation of his interest under the settlement.

Warburton v Farn (1849) 16 Sim 625; 18 LJ Ch 312; 13 Jur 528; 60 ER 1016

ANNOTATIONS **Consd** Alexander v Mills (1870) 6 Ch App 124; Hardaker v Moorhouse (1884) 26 Ch D 417

2240 Power to sell with consent of tenant for life — Sale or mortgage by tenant for life — Power of consenting not extinguished

The trustees of settled estates had a power of sale, to be exercised at the request and direction of H, the tenant for life, who was also entitled to the ultimate reversion in fee. H made an absolute conveyance of all his interest to A for value. Subsequently the trustees, by the direction of H, purported to exercise the power of sale by conveying the estate to A: *Held* H's power to consent was not extinguished by the absolute alienation of his life estate, and could still be exercised with the concurrence of the alienee.

Alexander v Mills (1870) 6 Ch App 124; 40 LJ Ch 73; 24 LT 206; 19 WR 310, LJJ

ANNOTATIONS **Consd** Re Cooper, Cooper v Slight (1884) 27 Ch D 565; Hardaker v Moorhouse (1884) 26 Ch D 417

2241 Power to sell with consent of tenant for life — Sale or mortgage by tenant for life — Power of consenting not extinguished — Bankruptcy of tenant for life

A settlement of real estate contained a power of sale by the trustees with the consent of the tenant for life. The tenant for life incumbered his life estate and was adjudicated a bankruptcy and the trustees afterwards entered into a contract to sell the land: *Held* the consent of the tenant for life to the sale could still and must be given; but a good title could not be made without the concurrence also of the incumbrancers and of the trustee in bankruptcy.

Re Bedingfeld & Herring's Contract [1893] 2 Ch 332; 62 LJ Ch 430; 68 LT 634; 41 WR 413; 9 TLR 354; 37 Sol Jo 355; 3 R 483

2242 Power to sell with consent of tenant for life — Trustees claiming specific performance — Necessity to show consent

Where by the terms of a devise or settlement of real estates the consent of the tenant for life is necessary to enable the trustees to sell the estates, upon a bill filed by the trustees to compel the specific performance of a contract for sale plaintiffs in order to obtain a decree for specific performance at the hearing, must prove that the requisite consent to the contract was given before the filing of the bill. It is not sufficient

for the purpose of obtaining an immediate decree to prove that such consent was given before the hearing.
Adams v Broke (1842) 1 Y&C Ch Cas 627; 62 ER 1046

2243 Power to sell with consent of tenant for life — Sale to tenant for life
Where the trustees of lands in strict settlement have a power to sell, with the consent of the tenant for life, a sale by the trustees to the tenant for life will be held good.
Howard v Ducane (1823) Turn&R 81; 1 LJOS Ch 85; 37 ER 1025, LC

ANNOTATIONS **Expld** Eland v Baker (1867) 29 Beav 137 **Apld** Dicconson v Talbot (1870) 6 Ch App 32

2244 Power to sell at request of tenant for life — Bankruptcy of tenant for life — Power of sale not extinguished
A power of sale over a settled estate was given to trustees at the request and by the direction of the tenant for life. The tenant for life became bankrupt: *Held* the power was not extinguished, but that with the assent of the tenant for life and his assignees a perfect title could be made under the power.
Holdsworth v Goose (1861) 29 Beav 111; 30 LJ Ch 88; 4 LT 196; 7 Jur NS 301; 9 WR 443; 54 ER 569

ANNOTATIONS **Apprvd** Alexander v Mills (1870) 6 Ch App 124 **Consd** Re Cooper, Cooper v Slight (1884) 27 Ch D 565 **Expld** Hardaker v Moorhouse (1884) 26 Ch D 417 **Distd** Re Bedingfeld & Herring's Contract [1893] 2 Ch 332

2245 Power to sell at request of tenant for life — Bankruptcy of tenant for life — Power of sale not extinguished
Eisdell v Hammersley (1862) 31 Beav 255; 6 TL 706; 54 ER 1136

ANNOTATIONS **Apprvd** Alexander v Mills (1870) 6 Ch App 124 **Consd** Re Cooper, Cooper v Slight (1884) 27 Ch D **Apld** Re Bedingfeld & Herring's Contract [1893] 2 Ch 332

2246 Power to sell under subsequent settlement — Reference to former settlement — "Ulterior to limitations therein"
Held the expression "ulterior to the limitations therein" meant ulterior in point of position in the deed, and not ulterior in point of time.
Morgan v Rutson (1848) 16 Sim 234; 17 LJ Ch 419; 11 LTOS 238; 12 Jur 813; 60 ER 863

2247 Sale by tenant for life — Adoption by trustee — Validity of sale
(1) A sale of settled estates under a power by a party having no authority to sell was, under the circumstances, refused to be set aside by the court, the sale having been made *bonâ fide*, and the money being obtainable from the parties who received it, or their estates.

(2) A sale made by a tenant for life, and adopted by a trustee acting under a power to sell, will be supported in equity against tenants in tail in remainder, although the contract was made in consideration of payments to be made to the tenant for life at long and indefinite periods, but for which the trustee gave a receipt at the time, though the money was not then paid.
Hope v Liddell, Liddèll v Norton (1855) 21 Beav 183; 25 LJ Ch 90; 26 LTOS 305; 2 Jur NS 105; 4 WR 145; 52 ER 829

ANNOTATION As to (1) **Consd** Re Bellamy & Metropolitan Board of Works (1883) 24 Ch D 387

2248 Tenant for life sole surviving trustee — No objection to sale
The circumstance of the tenant for life of real estate being the sole surviving trustee in whom the power of sale was vested, held to be no objection to a sale under the power.
Forster v Abraham (1874) LR 18 Eq 351; 43 LJ Ch 199; 22 WR 386

Scottish, Irish and Commonwealth Cases

2249 Power to sell with consent of tenant for life
Where there was a settlement on a person for life with remainder over and power is given to the trustees to sell the settled property in their uncontrolled discretion but during the life of the life tenant only with his consent, *primâ facie* the provision requiring the consent of the life tenant to be given during his lifetime will be regarded as inserted solely in the interest of the tenant for life. In such a case the power is not fiduciary and the tenant for life may consent by his duly appointed attorney.
Re Callen (1918) 18 SRNSW 219; 35 NSWWN 65 (AUS)

3 Price

LAW See Halsbury's Laws (4th edn) vol 42 para 826 et seq

2250 Ascertainment of best price — What court will consider — Possible increase in value of property
An action was brought by a remainderman to obtain an injunction to restrain the tenant for life and the trustees of a settled estate containing coal mines from selling it in such a manner as would be prejudicial to the interest of the remaindermen. Plaintiffs alleged that a sale at the present time would be disadvantageous, as the development of the minerals had only recently commenced. The will by which the estate was settled gave the trustees a power to sell at the request of the tenant for life; and Settled Land Act 1882 (c 38) (repealed), had come into operation since

the commencement of the suit. A new trustee, who consented to an immediate sale, had been appointed by plaintiffs during the pendency of the suit without asking the consent of the court: *Held* by the will the trustees had a power of sale, and they could only be prevented from exercising it if the sale were improvident or a breach of trust, and by Settled Land Act (repealed) the tenant for life had cumulative powers to sell, so that both under the will and the Act (repealed) the tenant for life had a clear right to sell; the court would not speculate as to a probable increase in the value of property for the benefit of remaindermen to the disadvantage of the tenant for life; also, it was not here necessary for defendants to have obtained the consent of the court to their appointment of a new trustee *pendente lite*.

Thomas v Williams (1883) 24 Ch D 558; 52 LJ Ch 603; 49 LT 111; 31 WR 943

2251 Validity of agreement to fix by arbitration — Effect of private Act

A tenant for life of settled land agreed with a municipal corporation to sell a portion of the settled land at a price to be fixed by arbitration. The agreement was conditional on the sanction of Parliament by a local Act being obtained. The corporation obtained a local Act which confirmed the agreement, scheduled to it, and made it "binding on the parties thereto respectively, and same shall and may be carried into effect accordingly." The agreement was made between the tenant for life, an assignee of his life estate, and the corporation, and provided that the award of the arbitrators or umpire fixing the price should be "binding upon all the parties hereto respectively, and upon all parties interested in the" (settled) "estates": *Held* although it was a breach of trust on the part of the tenant for life to delegate his authority and enter into an agreement to sell at a price to be fixed by some one else, yet the effect of the agreement and the Act was that the agreement should be carried into effect as a sale by a tenant for life under Settled Land Acts (repealed), with all the consequences which that involved, and the persons interested in remainder in the settled estates were therefore bound.

Re Wilton's (Earl) Settled Estates [1907] 1 Ch 50; 76 LJ Ch 37; 96 LT 193; 23 TLR 64; 51 Sol Jo 67

2252 Validity of consideration other than cash — Consols

Re Sutton's Contract no 1795 ante

Scottish, Irish and Commonwealth Cases

2253 Land sold without power of sale — Land increasing in value — Refusal of court to approve sale

A trustee of settled land having no power of sale sold the same in 1903. The purchasers subsequently ascertained that their title was defective and a petition was presented in 1914 asking the court to sanction the sale retrospectively. The evidence showed that the land had gone up in value since 1903, and the court refused to make an order *nunc pro tunc* approving of the sale at the original price against the wish of the guardian of certain infant beneficiaries.

Re Crowshaw's Settled Estates (1914) 14 SRNSW 262; 31 NSWWN 95 (AUS)

2254 Payment of commission

Re Milligan Settled Estates (1912) 21 OWR 701; 3 OWN 895; 2 DLR 883 (CAN)

2255 Payment of commission

The trustees have power to pay out of the purchase-money in the event of sale of an estate to the Congested Districts Board under the provisions of Irish Land Acts 1903 to 1909, a proper negotiation fee properly and necessarily incurred.

Re Quintin Dick (1913) 47 ILT 222 (IR)

4 Mode and conditions of sale

LAW See Halsbury's Laws (4th edn) vol 42 para 826 et seq

2256 Restrictive covenant — Validity of agreement to release — On payment of sum of money

In 1887 a water company entered into a contract with a tenant for life, acting under the powers conferred by Settled Land Acts 1882 to 1890 (repealed), for the purchase of a plot of settled land with the object of erecting thereon certain buildings for the purposes of their undertaking, and agreed to enter into a covenant not to build thereon or let it for building otherwise than for the purpose of their undertaking. They promoted a Bill in Parliament for power to erect the proposed buildings, which was thrown out before the conveyance was executed, and thereupon requested the vendor to agree to the omission from the conveyance of the covenant restrictive of building on the plot sold. The vendor, however, insisted on a conveyance in accordance with the contract, but entered into an agreement with the company to which the trustees of the settlement were parties, to the effect that if the company should not require the land for the purposes of their undertaking and should desire to erect other buildings thereon or to sell or let the same and thereof should give notice to the vendor, then the vendor would on payment of £10, consent to the company building upon or selling the land without the restric-

tion as to building contained in the conveyance, which agreement, although dated the day after the conveyance, was executed simultaneously and formed one transaction with it. The vendor died and was succeeded by his son as tenant in tail of the settled land, who possessed lands adjoining the plot sold. The company then gave notice and tendered to him £10 in accordance with the agreement, but he declined to give his consent, alleging that he was not bound thereby. On a special case stated by consent of the parties under RSC Ord 34 r 1: *Held* the vendor as tenant for life of the settled land had no power under Settled Land Acts 1882 to 1890 (repealed), to enter into such an agreement with the company, which therefore was not binding on his successors in title.

Palmer v Grand Junction Waterworks Co (1902) 86 LT 352

Scottish, Irish and Commonwealth Cases

2257 Power to sell in lots

A tenant for life selling in exercise of the powers conferred by Settled Land Acts lands held under a fee-farm grant can sell in lots, carrying out the sales by making sub-fee-farm grants or long leases to the respective purchasers.

Re Braithwaite's Settled Estate [1922] 1 IR 71 (IR)

5 Payment of purchase-money

LAW See Halsbury's Laws (4th edn) vol 42 para 826 et seq

2258 Payment into court — Option of tenant for life — Effect of consent to order for payment in

In 1859 a suit was instituted for the administration of the estate of testator, who had devised land in strict settlement. In 1886 the tenant for life sold the land under the provisions of Settled Land Act (repealed). Trustees had previously been appointed by the court for the purposes of the Act (repealed). The purchaser refused to complete his contract, unless the purchase-money was paid into court, and an order was made on his application, with the consent of the tenant for life, giving him liberty to pay it in, and it was paid in accordingly: *Held* (1) by consenting to the order for payment of the purchase-money into court, the tenant for life had exercised the option given to him by s 22(1) (repealed) of the Act, of having the money paid either to the trustees of the settlement or into court, and the money could not, therefore be paid out to the trustees but must remain in court, and be invested or applied under the direction of the court.

(2) *Semble*: the power to give receipts, which was conferred on trustees by s 40 (repealed) of the Act, extended to trustees appointed by the court under s 38 (repealed).

Cookes v Cookes (1887) 34 Ch D 498; 56 LJ Ch 397; 56 LT 159; 35 WR 402; 3 TLR 332

2259 Payment into court — Option of tenant for life — Where no trustee appointed — Effect of ignorance of purchaser

Re Fisher & Grazebrook's Contract no 2235 ante

2260 Payment into court — On to trustees of settlement

Where property sold by a tenant for life is subject to an incumbrance prior to the settlement, which exceeds the purchase-money in amount, and the whole of the purchase-money is intended to be applied in reduction of the incumbrance, the purchaser is not justified in paying his purchase-money direct to the incumbrancer by the direction of the tenant for life. He cannot get a good discharge for his purchase-money except by paying it to or by the direction of the trustees of the settlement or into court. The absence of such a discharge will prevent the purchaser making a good title upon a subsequent sale.

Re Norton & Las Casas' Contract [1909] 2 Ch 59; 78 LJ Ch 489; 100 LT 881

2261 Who may give receipt — Trustees appointed for purpose of sale

Cookes v Cookes no 2258 ante

2262 Who may give receipt — Trustees appointed for purpose of sale

Pyne v Phillips [1895] WN 8

2263 Who may give receipt — Sole trustee

Re Garnett Orme & Hargreaves' Contract no 1723 ante

2264 Who may give receipt — Sole trustee — Tenant for life

A sole trustee with a conditional trust for sale who was also tenant for life of the settled estates was a trustee for the purposes of Settled Land Acts 1890 (c 69) (repealed), and was entitled to receive and give a good discharge for the purchase-money of any part of the settled estate sold by him as tenant for life.

Re Johnson's Settled Estates (1913) 57 Sol Jo 717

2265 Who may give receipt — Compound settlement — Trustees of original settlement

Re Du Cane & Nettlefold's Contract no 1066 ante

2266 Who may give receipt — Compound settlement — Trustees of original settlement

Re Keck & Hart's Contract no 2551 post

2267 Who may give receipt — Compound settlement — Trustees of original settlement

Re Alington (Lord) & London County Council's Contract no 1028 ante

vii POWER TO GRANT AND ACCEPT LEASES

1 Generally

LAW See Halsbury's Laws (4th edn) vol 42 para 836 et seq

2268 Power of tenant in tail — Whether issue bound

Anon (undated) Plowd Queries 62; 75 ER 946

2269 Power of tenant in tail — Whether issue bound

A being seised of certain houses in tail, and of certain lands in fee held *in capite*, by deed indented made leases of the said houses whereof he was seised in tail rendering rent, and which leases were not warranted by 32 Hen 8, and died: the reversion descended to the heirs general of A, being two females: and it appeared that the leases were to have continuance after the said heirs general should be out of ward; and by office after the death of A it was found that A died seised of the said estate tail of the said houses, and that they descended to the said heirs general, by force whereof the said houses were seised into the Queen's hands. Resolved, that although the King, in the right of the heir, had avoided it for his time, yet in doth not avoid the leases so absolutely that the heirs in tail, after the King's interest determined, cannot make them good by acceptance of rent.

Bedford's (Earl) Case (1586) 7 Co Rep 7b; 77 ER 421

2270 Power of tenant in tail — Whether issue bound

Foord's Case (1596) as reported in 5 Co Rep 81a; 77 ER 177; sub nom

Betford v Ford (1596) Cro Eliz 472

2271 Power of tenant in tail — Whether issue bound

Cother v Merrick (1657) Hard 89; 145 ER 395

2272 Power of tenant in tail — Whether issue bound

Cudmore v Betison (1661) 1 Sid 62; 82 ER 971

2273 Power of tenant in tail — Whether issue bound

Tenant in tail makes a lease *in futuro* it is not void but voidable only, and the conusee shall have the advantage of election as well as the issue (*Kelyng J*).

Opey v Thomasius (1665) T Raym 132; 83 ER 71; sub nom

Opee v Thomasius (1665) 1 Sid 260

2274 Power of tenant in tail — Whether issue bound

A tenant in tail, remainder to A fee, makes a lease and dies before commencement, and the issue levies a fine, the lease is good against conusee.

Symonds v Cudmore (1693) 1 Salk 338; Carth 257; 1 Freem KB 503; Holt KB 666; 4 Mod Rep 1; 12 Mod Rep 32; 1 Show 370; Skin 328; 91 ER 296; sub nom

Simonds v Cudmore (1693) 3 Salk 335

ANNOTATION **Consd** Martin d Tregonwell v Strachan (1744) Willes 444

2275 Power of tenant for life — Whether remainderman bound

Heyns v Villars (1659) 2 Sid 64, 157; 82 ER 1259, 1309

2276 Power of tenant for life — Whether remainderman bound

Foord's Case (1596) 5 Co Rep 81a; 77 ER 177; sub nom

Betford v Ford (1596) Cro Eliz 472

2277 Power of tenant for life — Whether remainderman bound — By acceptance of rent

Anon (1532) Bro NC 121; 73 ER 900

2278 Power of tenant for life — Whether remainderman bound — By acceptance of rent

A lease, void against a remainderman, cannot be set up by his acceptance of rent.

Jenkins d Yate v Church (1776) 2 Cowp 482; 98 ER 1199

2279 Power of tenant for life — Whether remainderman bound — By acceptance of rent

A lease void against a remainderman, cannot be set up by his acceptance of rent, and suffering the tenant to make improvements after his interest vests in possession.

Doe d Simpson v Butcher (1778) 1 Doug KB 50; 99 ER 36

2280 Power of tenant for life — Whether remainderman bound — By acceptance of rent

Tenant for life makes a lease for years to commence on a certain day and dies before the expiration of the lease in the middle of the year. The remainderman receives rent from the lessee, who continues in possession but not under a fresh lease, for two years together on the days of payment mentioned in the lease. This is evidence from which the court will presume an agreement between the remainderman and the lessee that the lessee should continue to hold from the day and according to the terms of the original demise, so that notice to quit ending on that day is proper.

Roe d Jordan v Ward (1789) 1 Hy Bl 97; 126 ER 58

2281 Power of tenant for life — Whether remainderman bound — By acceptance of rent

Tenant for life leases premises for twenty-one years, and before the expiration of that term dies; the trustees of the remainderman, then an infant, continue to receive the rent reserved, and he, on coming of age, sells the premises by auction; in the conditions of sale the premises are declared to be subject to the lease, and in the conveyance to the purchaser the lease is referred to as in the possession of the lessee; and in the covenant against incumbrances, that lease is excepted; the purchaser mortgages and in the mortgage deeds the like notice is taken of the lease, and the mortgagees for some time receive the rent reserved: *Held* the lease expired with the interest of the tenant for life, and the notice since taken of it did not operate as a new lease.

Doe d Potter v Archer (1796) 1 Bos&P 531; 126 ER 1049

2282 Power of tenant for life — Whether remainderman bound — By acceptance of rent

By a marriage settlement, an estate was settled to the use of the wife for life, remainder to such persons and for such estates as she should by deed or will attested by three witnesses, appoint, and for want of such appointment reversion to herself in fee: during her husband's life she made a will in pursuance of the power, devising the estate to A in fee; after which she and her husband executed a lease of part of the settled estate to defendant, not executed pursuant to the power; and after her husband's death she received rent from defendant: *Held* such lease was voidable only by her upon her husband's death; and her receipt of rent accruing afterwards, was a confirmation of it against A who claimed under her appointment by the will.

Doe d Collins v Weller (1798) 7 Term Rep 478; 101 ER 1086

ANNOTATION **Consd** Toler v Slater (1867) 37 LJQB 33

2283 Power of tenant for life — Whether remainderman bound — By acceptance of rent

Where a lease not warranted by a power is granted by a tenant for life, containing a covenant for perpetual renewal, the reversioner, by accepting for many years after he comes into possession the rent reserved upon the lease, does not confirm it so far as to make the covenant for renewal binding upon him.

Higgins v Rosse (1821) 3 Bli 112; 4 ER 546, HL

2284 Power of tenant for life — Whether remainderman bound — By acceptance of rent

A remainderman is not bound by the terms made between a previous tenant for life and his tenant, merely by the receipt of rent from the tenant after the death of the tenant for life: some knowledge of the terms made, and some evidence of acquiescence in them, must be shown in order to bind him.

Oakley v Monck (1866) LR 1 Exch 159; 4 H&C 251; 35 LR Ex 87; 14 LT 20; 30 JP 180; 12 Jur NS 213; 14 WR 406, Ex Ch

ANNOTATION **Consd** Wyatt v Cole (1877) 36 LT 613

2285 Power of tenant for life — Whether remainderman bound — By acceptance of rent

A tenant for life without leasing power demised a plot of building land for the term of sixty years, from 29 September 1834, at the annual rent of 6*d*; the lease contained a covenant by the tenant for life for quiet enjoyment. The lessee accordingly erected a house on the plot of land. After the death of the tenant for life the fee simple ultimately vested in H, who accepted rent at the rate above mentioned from J, who was a son of the original lessee, and was then in possession of the house. H afterwards conveyed the house and land to plaintiff by indenture: the grant was made expressly subject to the supposed term of sixty years. No notice to quit had been given, and the annual value of the house and land was about £6. Plaintiff having sued to recover possession of the house and land: *Held* as the representatives of the original lessee, under the indenture of 29 September 1834, could not have sued H for breach of the covenant for quiet enjoyment, the void lease afforded no defence against plaintiff claiming under the grant of the fee simple subject to it; a tenancy from year to year had not been created by the payment of a

rent at the rate of 6*d* a year; and plaintiff was entitled to immediate possession of the house and land.
Smith v Widlake (1877) 3 CPD 10; 47 LJQB 282; 26 WR 52, CA

2286 Power of tenant for life — Whether remainderman bound — Remainderman inactive while lessee rebuilds
When the remainderman lies by, and suffers the lessee or assignee to rebuild, and does not by his answer deny that he had notice of it, all these circumstances together will bind him from controverting the lease afterwards (*Lord Hardwicke C*).
Stiles v Cowper (1748) 3 Atk 692; 26 ER 1198, LC

ANNOTATION **Consd** Story v Johnson (1835) 5 LJ Ex Eq 3

2287 Power of tenant for life — Assignment of life estate — Lease good during life of tenant for life
If tenant for life make a lease for years, and then surrenders or forfeits his estate, yet the lease for years remains good during his life, if the years continue so long (*Holt CJ*).
Sutton's Case (1701) 12 Mod Rep 557; 88 ER 1516

2288 Effect of express power in settlement — Necessity for consent of tenant for life — To lease by trustees
Re Atherton [1891] WN 85

2289 Effect of express power in settlement — Whether overridden by statutory power — Grant "in exercise of every power or authority enabling"
Lonsdale (Earl) v Lowther no 2604 post

2290 Effect of express power in settlement — To successive tenants for life as and when entitled
Lonsdale (Earl) v Lowther no 2604 post

2291 What may be leased — Right of way — Over park attached to principal mansion house
The tenant for life of a settled estate for the purpose of giving his wife a dower or jointure house, in 1889 granted her a lease for twenty-one years of a house called X, about three miles from the principal mansion house on the T estate, of which estate X formed part, together with rights of way over all roads and drives which from time to time should exist on the T estate. The drives then existing were about twenty-five miles long, and extended over the estate generally, including the part usually occupied with the mansion house and up to the gate and door of such mansion house. At the same time, and substantially as part of the same transaction, the tenant for life granted to his wife a building lease for ninety-nine years of a piece of land forming part of a portion of the T estate never previously used as building ground, and inconvenient for such a purpose, together with the right of way over certain drives, including the carriage-drive over and up to X. Any house on the building site would overlook and destroy the privacy of X.

It was part of the arrangement that the two leases should be renewed every few years, so as to ensure that, so far as possible, the terms should begin to run from the death of the tenant for life.

In May 1891, the two leases were renewed on the same terms. Neither the old nor the new leases were substantially acted on during the life of the tenant for life. After the death of the tenant for life the lessees brought an action to have the validity of the leases established: *Held* (1) the leases were invalid, because they were not granted in the *bonâ fide* exercise of the leasing powers of the tenant for life having "regard to the interests of all parties entitled under the settlement" within Settled Land Act 1882 (c 38) s 53 (repealed); (2) having regard to Settled Land Act 1882 (c 38) s 6 (repealed), and Settled Land Act 1890 (c 69) s 10 (repealed), the lease of X was invalid by reason of its granting rights of way over the park and lands usually occupied with the principal mansion house; (3) the lease of X could not be regarded as a valid contract for a lease without the rights of way under Leases Act 1849 (c 26) (repealed); (4) *Semble*: a tenant for life may grant a lease to a married woman although she is his own wife.
Sutherland (Dowger Duchess) v Sutherland (Duke) [1893] 3 Ch 169; 62 LJ Ch 946; 69 LT 186; 42 WR 12; 9 TLR 530; 37 Sol Jo 618; 3 R 650

ANNOTATIONS As to (1) **Consd** Gilbey v Rush [1906] 1 Ch 11; Re Cornwallis West, Ex p Trustee (1919) 88 LJKB 1237. As to (2) **Folld** Pease v Courtney [1904] 2 Ch 503

2292 Effect of bribe to tenant for life — Remedy of remaindermen
Chandler v Bradley no 2477 post

2293 Effect of grant of invalid underlease
A tenant for life, impeachable for waste, under a settlement which included real estate and unopened mines severed from the surface, which was not included in the settlement, granted a take-note or licence for three years to search for and work gold and other ores in the mines subject to the rights of the Crown, if any. The tenant for life subsequently acquired a lease from the Crown for twenty-one years of the gold and silver ores in the mines together with a release of the Crown's statutory right of pre-emption over the base ores. He then granted further take-notes and leases of the mines for short terms, all of which expired during his life, and received rents and premiums. None of the take-notes or leases

were valid under Settled Land Acts (repealed), under which alone he had power to deal with the mines. On the expiration of the Crown lease he obtained a renewal for a further period of twenty-one years, and granted valid separate sub-leases of the gold and silver ores and of the base minerals for the residue of the Crown term less one day. On the death of the tenant for life in 1916 the tenant in tail in remainder, who had barred the entail, brought an action against the executors of the tenant for life claiming the amount of the premiums and three-fourths of the rents received by him, and a declaration that plaintiff was entitled to the subsisting Crown lease subject to and with benefit of the sub-leases. *Sargant J*, held that the take-notes and leases for short terms being invalid under Settled Land Acts the rents and premiums received thereunder could not be recovered by plaintiff, and the subsisting Crown lease and sub-leases did not belong to the estate.

The Court of Appeal affirmed the first part of the decision of *Sargant J*, but reversed the second, on the ground that the tenant for life had used his position to obtain the Crown lease, and so far as the release of the right of pre-emption over the base ores was concerned that lease extended to something which was included in the settlement. He must therefore be taken to have acquired the lease as trustee for the beneficiaries, and plaintiff was entitled to the unexpired portion of the lease subject to and with benefit of the sub-leases.

Lloyd-Jones v Clark-Lloyd [1919] 1 Ch 424; 88 LJ Ch 278; 120 LT 578; 35 TLR 273; 63 Sol Jo 317, CA

2294 Power to vary leases — Settled Land Act 1925 (c 18) s 59 — Construction of section

It is apparent in my opinion, that Settled Land Act 1925 (c 18) s 59(1) is dealing only with a question of form, because it is clear from the final words of s 59(1) that no more is being authorised than what might have been done under Settled Land Act 1925 (c 18) s 52(1). The provision in question is that "every such lease or grant shall, after such variation, release, waiver or modification as aforesaid, be such a lease or grant as might then have been" granted after a surrender, etc. In my opinion s 59(1) is not limited to cases where the result of the variation, release, waiver or modification will at common law effect a surrender and regrant. This section is conferring a power on the tenant for life to execute documents in a particular form which he could have executed in another form as the result of the surrender or the surrender and regrant of the land previously dealt with. It relates to the widest possible release, variation, waiver or modification, including cases in which only part of the land comprised in the old lease or grant is the subject of those alterations (*Maugham J*).

Re Savile Settled Estates, Savile v Savile [1931] 2 Ch 210; [1931] All ER 556; 100 LJ Ch 274; 145 LT 17

ANNOTATIONS **Consd** Re Bruce, Brudenell v Brudenell [1932] 1 Ch 316 **Folld & Apld** Re Arkwright's Settlement, Phoenix Assurance Co v Arkwright [1945] Ch 195

2295 Power to vary leases

W, the tenant for life of settled estates, which included mines and minerals, in 1882 granted a lease of a coal mine to a company, under the powers contained in the will of a testator who died in 1859, and by order of the court under Settled Estates Act 1877 (c 18) (repealed). The trustees of the settlement paid three-quarters of the rents to the tenant for life, and retained one-quarter as capital. In 1916 the estates were disentailed and resettled, subject to overriding estates and interests, W remaining tenant for life, in possession, with remainder to B. Under the resettlement a tenant for life of full age was entitled to receive all the rents and profits, including the mining royalties. W died in February 1925, and B became tenant for life under the resettlement. In July 1925, he executed a deed extending the term of the lease granted to the company until 1984, it being agreed that the deed should be executed in that form in lieu of a surrender of the old lease and a grant of a new one. In 1942 all mineral rents and royalties became vested in the Coal Commission. Up till that time the trustees had received the rents, and had continued to retain and invest one-quarter thereof: *Held* the tenant for life had power under the settlement of 1916 to vary, modify or extend a lease, and he had exercised that power by the extension deed of 1925, which did not purport to operate by way of surrender and regrant, and in fact did not so operate. The tenant for life was therefore entitled, as between himself and the persons entitled in remainder under the settlement of 1916, to receive the whole of the mining rents and royalties payable under the extended lease down to 1 July 1942.

Re Arkwright's Settlement, Phoenix Assurance Co Ltd v Arkwright [1945] Ch 195; [1945] 1 All ER 404; 114 LJ Ch 180; 172 LT 316; 61 TLR 257; 89 Sol Jo 201

ANNOTATION **Consd** Re Morgan's Lease, Jones v Norsesowicz [1971] 2 All ER 235

2296 "Lease" — Includes agreement for lease

Under a compound settlement comprising a settlement made in 1886, and a resettlement made in 1942, plaintiff was tenant for life of Nos 8 and 10 to 17, Clarges Street, London. Plaintiff was the absolute owner of Nos 6 and 7, Clarges Street. It was desired to redevelop all these properties by means of building leases. Plaintiff entered into an agreement with a limited company, conditional on the sanction of the

court being obtained, which agreement provided for the company to develop the property, and that in consideration of such development there should be granted (at a future date or dates which might not be for twelve years or so) to the company, separate leases of the property in three blocks, *viz*, Nos 6, 7 and 8 in one block, Nos 10 to 13 in a second block and the remainder in the third block, at an aggregate rent of £17,500 per annum to be apportioned between the three blocks in a ratio to be agreed. The leases were to be for ninety-nine years commencing not later than 25 December 1972, after the falling in of subsisting leases, the remainders of the terms of which varied from seven to twelve years. The proposed rent of £17,500 was more than one-fifth of the aggregate annual value of the property with the buildings thereon: *Held* (1) the tenant for life had no power to grant a lease of settled property together with property of which he was absolute owner in a single lease without providing for apportionment of the rent between the settled property and his own property, and accordingly had no power to effect the agreement in regard to Nos 6, 7 and 8, Clarges Street; (2) the tenant for life had power to contract to grant under Settled Land Act 1925 (c 18) s 90(1)(iii), future leases that would be in conformity, when granted, with the Act, notwithstanding the requirement of s 42(1) that a lease should take effect in possession not more than twelve months after its date and the definition of "lease" in s 117(1)(x) as including an agreement for lease; (3) the agreement provided for settled land to be leased in lots within s 44(3) of the 1925 Act, and since, whatever apportionment of the rent was made, the rent reserved in the lease of at least one of the properties must exceed one-fifth of the annual value of the land comprised in that lease with the buildings thereon, the tenant for life had no power to enter into that term of the agreement.

Semble: in Settled Land Act 1925 (c 18) s 117(1)(x), the description "agreement for lease" in the definition of "lease" refers to such an agreement for a lease as in equity is equivalent to a lease.

Re Rycroft's Settlmts, Rycroft v Rycroft [1962] Ch 263; [1961] 3 All ER 581; [1961] 3 WLR 890; 105 Sol Jo 649

2297 Lease of settled property and property of which tenant absolute owner — Necessity for apportionment of rent

Re Rycroft's Settlmts, Rycroft v Rycroft no 2296 ante

Scottish, Irish and Commonwealth Cases

2298 Power of tenant for life — Whether remainderman bound

A lease granted by a tenant for life in exercise of her powers under Settled Land Act 1908, contained a clause allowing the tenant at the end of the term to remove any buildings that might be erected by the lessee: *Held* the demise had been made to that extent at any rate "without impeachment of waste" and was not binding on persons taking in remainder.

Dickerson v Otley [1925] NZLR 674 (NZ)

2299 Power of tenant for life

Kun Hang Wing Firm v Tai Tung Sim (1921) 16 Hong Kong LR 15 (HONG KONG)

2300 Power of tenant for life

Thatcher v Bowman (1889) 18 OR 265 (CAN)

2 Express power of leasing

A In general

2301 Nature of express power — Different from power usually accessory to life estate

Hele v Greene (1651) 2 Roll Abr 261

2302 Lease in reversion — Power to lease generally

A power to make leases generally, extends only to leases in possession, and not to leases in reversion or *futuro*.

Shecomb v Hawkins (1613) Cro Jac 318; 79 ER 273; sub nom

Slocom v Hawkins (1613) Yelv 222

2303 Lease to commence after death of tenant in tail without issue

Feoffment to the use of B in tail, remainder to C in tail, etc provided that on failure of B's estate tail, D shall have a rent out of the land. B creates a term of a thousand years, and, after levying a fine and suffering a recovery, dies without issue: *Held* the rent is barred by the recovery, and is not preserved during the term.

Benson v Hudson (1674) 1 Freem KB 362; T Raym 236; 1 Mod Rep 108; 3 Keb 292; 89 ER 269; sub nom

Hudson v Benson & Baron (1674) 2 Lev 28

ANNOTATIONS **Consd** Ratcliffe's Case (1719) 1 Stra 267; Martin d Tregonwell v Strachan (1744) Wiles 444

2304 Recovery of rent reserved — Action by remainderman — Necessity to show authority of tenant for life — To make lease

Sands v Ledger no 2374 post

2305 Object of power — Mutual advantage of possessor and successor

(1) The limitation of estates by virtue of powers must be strictly pursued.

(2) Of all kinds of powers, the most frequent is, that "to make leases." For the encouragement of farmers, to occupy, stock, and improve the land, it is necessary they should have some permanent interest. Unless the owner of the estate for life was enabled to make a permanent lease, he could not enjoy to the best advantage, during his own time; and they who come after, must suffer, by the land being un-tenanted, out of repair, and in a bad condition.

(3) The plan of this power is for the mutual advantage of possessor and successor. The execution thereof is checked with many conditions, to guard the successor; that the annual revenue shall not be diminished; nor those in succession or remainder, at all prejudiced in point of remedy, or other circumstance of full and ample enjoyment (*Lord Mansfield*).

Taylor d Atkyns v Horde (1757) 1 Burr 60; 1 Keny 143; 97 ER 190; on appeal (1758) 6 Bro Parl Cas 633, HL

2306 Absence of express power — Power not implied in favour of jointress

Power of jointress to make leases not expressed cannot be implied.

Roe d Bolton (Duke) v Grantham (1761) 3 Burr 1259; 97 ER 820

2307 Assignment of life estate — Subject to rent and with power of re-entry — No power to lease in assignee

(1) Where a power of leasing was given to the father, tenant for life, and after his decease, to the son, tenant for life; and the son obtained a grant from the father of his life estate, without noticing the power, subject to a certain rent, with a power of re-entry for non-payment, etc: *Held* the son, during the lifetime of his father, could not lease under the power.

(2) Under a leasing power, with a condition (*inter alia*) for re-entry for non-payment of rent for twenty-one days, a lease granted with a condition for re-entry for non-payment of rent in twenty days, in case no sufficient distress can be taken on the premises whereby to levy the rent, etc is not a good execution of the leasing power; such conditional power of re-entry being less beneficial to the remainderman than an absolute power of re-entry on non-payment of rent.

Coxe v Day (1810) 13 East 118; 104 ER 312

ANNOTATION As to (2) **Consd** Smith v Jersey (1821) 3 Bli 290

2308 Leasehold lands mixed with entailed lands

If tenant in tail reserves an entire rent upon a farm in which some leasehold lands are mixed with the entailed lands, the lease is not good against the reversioner.

Rees d Perkins v Phillip (1810) Wight 69; 145 ER 1178

2309 Lease not in conformity with power — Voidable by remainderman

E being tenant for life under a deed of settlement, with a power to lease under certain restrictions, grants leases not in conformity with the power and dies, leaving by will the residue of his personalty to J his son, the next remainderman under the settlement. J having called upon the executors to pay the residue, they require an indemnity against the contingent claims of the tenants in case of eviction, and upon the refusal of J to give such indemnity, he files a bill against them for an account and payment of the residue: *Held* as J had the power to disturb the leases, he was bound either to confirm them, or to give the indemnity required, and the executor had a right to hold the residue, till he obtained the confirmation or indemnity.

Vernon v Egmont (1827) 1 Bli NS 554; 4 ER 979, HL

2310 Private Act giving tenant for life power to lease — Parol agreement for lease not enforced — If prejudicial to remainderman

A parol agreement for a lease, made by a tenant for life, with a power of leasing [under a private Act] and purporting to bind those in remainder, cannot bind the remainderman.

Trotman v Flesher, Flesher v Trotman (1861) 3 Giff 1; 4 LT 108; 7 Jur NS 386; 66 ER 297

2311 Private Act giving tenant for life power to lease — Subsequent Act conveying premises to trustees for sale — Clause dealing with interim income — No leasing power implied

By a private Act passed in 1720 for the purposes of confirming a prior settlement, the Shrewsbury estates were limited to the issue of the settlor as they should succeed to the earldom; and the Act contained powers for each successive tenant for life or in tail to lease all or any part of the lands for three lives or twenty-one years, or for any term of years determinable on three lives, so as there should be reserved and made payable by every such lease the usual and accustomed yearly rents, boons, and services, with proviso for re-entry for non-payment.

By a subsequent Act, passed in 1803, certain outlying portions of the estate were conveyed to trustees, "for ever freed, released, and discharged, and absolutely acquitted, exempted, and exonerated, of and

from all and every the uses, trusts, estates, entails, remainders, charges, powers provisoes limitations, and agreements in and by the settlement and the Act of 1720 respectively created, limited, provided, and declared of and concerning the same hereditaments and premises, or any of them, except only such leases as had been theretofore made and granted of the same in pursuance of the powers contained in the settlement and Act," in trust to sell, and, on payment of the purchase-money, to convey the same to the purchasers "freed and discharged, and acquitted, exempted, and exonerated as aforesaid," the proceeds of such sales to be laid out in the purchase of other lands, to be subject to the same uses, etc, as the lands so sold.

By s 7 of the Act of 1803 it was enacted and declared, that "in the meantime and until the manors, lands, etc, thereby directed to be sold, should be sold in pursuance of the trusts aforesaid, the same premises respectively should be held, possessed, and enjoyed, and the rents issues, and profits thereof should be had, received, and taken by and be applied to and for the benefit of such person and persons as would have been entitled thereto, and ought to have held, possessed, or enjoyed and received the same respectively in case that Act had not been made."

No sale was effected under the powers conferred by this Act: and in 1838 the then earl granted to P a lease of a portion of the land so vested in the trustees for sale, for ninety-nine years, provided three persons named, or either of them, should so long live, at the yearly rent of £30, P covenanting to lay out £1,000 in building on the land within five years: *Held* the earl had no power to lease the land in question so as to bind succeeding tenants in tail of the Shrewsbury estates.

Shrewsbury (Earl) v Keightley (1866) LR 2 CP 130; 36 LJCP 17; 16 LT 265; 12 Jur NS 999; 15 WR 284, Ex Ch

Scottish, Irish and Commonwealth Cases

2312 Lease not in conformity with power

Gray v Knox (1825) 5 I Eq R 465 (IR)

2313 Parol agreement for lease — Part performance by lessee — Whether remainderman bound

A parol agreement to grant a lease, entered into by a tenant for life with leasing power, coupled with part performance by the lessee during the lifetime of the tenant for life, does not bind the remainderman who did not acquiesce in the part performance or know of the agreement.

Hope v Cloncurry (Lord) (1874) 8 IR Eq 555 (IR)

B Construction of power

2314 Intention of parties considered

(1) Tenant in tail makes a lease without rent, it is not void, but voidable (*Wyndham J*).

(2) Powers are to be expounded according to the intent of the parties (*Twisden J*).

Opey v Thomasius (1665) T Raym 132; 83 ER 71; sub nom

Opee v Thomasius (1665) 1 Sid 260

2315 Liberal construction given

Power to make leases to be liberally construed.

Right d Basset v Thomas (1763) 3 Burr 1441; 1 Wm Bl 446; 97 ER 916

2316 How far objects of settlement considered — Powers clearly expressed

Regard is to be had to the objects of the settlement, where the power is of doubtful construction; but no such consideration is to control powers expressed in clear terms, according to their ordinary acceptation.

Sheehy v Muskerry (Lord) (1848) 1 HL Cas 576; 9 ER 885

ANNOTATION **Consd** Mostyn v Lancaster, Taylor v Mostyn (1883) 23 Ch D 583

2317 How far objects of settlement considered — Power ambiguously expressed

Sheehy v Muskerry (Lord) no 2316 ante

2318 Power of tenant in tail — Construction of private Act

Shrewsbury (Earl) v Keightley no 2311 ante

C Execution of power

a In general

2319 Power must be pursued strictly

Sussex (Countess) v Wroth (1582) Cro Eliz 5; 78 ER 272; sub nom

Leaper v Wroth (1582) cited in 6 Co Rep at p 33a; sub nom

Lepur & Wroth's Case (1582) 1 Leon 35; sub nom

Wroth & Sussex (Countess) Case (1582) 3 Leon 130; sub nom

Sussex (Countess) & Worths Case (1582) 4 Leon 65

ANNOTATIONS **Consd** Fitzwilliam's Case (1603) 6 Co Rep 329; Slocomb v Hawkins (1612) Yelv 222; Berry v White (1662) O Bridge 82; Bosworth v Forard (1666) O Bridge 153; Winter v Loveday (1696) 5 Mod Rep 378

2320 Power must be pursued strictly

The lease of a tenant for life, with power of leasing under certain conditions, must be in strict conformity to those conditions, and if it vary from them

in the interest demised, or the rent reserved, it cannot be supported against the remainderman.
Cavan (Countess) v Doe d Pulteney (1795) 6 Bro Parl Cas 175; 2 ER 1010, HL

2321 Power must be pursued strictly
Lease, under a power, by a person, having only a particular estate, if not conformable to the power, is not good at law: but, where the persons, granting the lease, have at law the inheritance, with directions only, how they are to execute leases, the legal estate passes.
A-G v Griffith (1807) 13 Ves 565; 33 ER 406, LC

2322 Execution by power of attorney — Power personal to donee
Gresham's (Lady) Case (1582) cited in 9 Co Rep at p 76a; 77 ER 845

ANNOTATION **Distd** Combes's Case (1613) 9 Co Rep 135

2323 Who may execute power — Power given to donee and assigns — Assignment by donee — Execution by executor of assignee
A power of leasing given to A and his assigns, may be well executed by the assignee of the executor of A's assignee.
Howe v Whitebanck (1679) 1 Freem KB 476; 89 ER 357; sub nom
Whitefield v How (1679) 2 Show 57; sub nom
How v Whitfield (1679) T Jo 110; 1 Vent 339

ANNOTATIONS **Consd** Doe d Douglas v Lock (1835) 2 Ad&El 705; Ashton v Wood (1857) 3 Sm&G 436; Stevens v Austen (1861) 3 E&E 685

2324 Who may execute power — Agreement for lease by tenant for life — Death of tenant for life — Execution by trustees during minority of infant tenant in tail
By a will devising real estate in strict settlement, powers of granting building leases were given to any tenant for life and to trustees during the minority of any tenant in tail. The tenant for life, in pursuance of his power, entered into a contract to grant a building lease, but died without having executed a lease, and was succeeded by an infant tenant in tail: *Held* the trustees had power to effectuate the contract of the tenant for life by executing a lease.
Davis v Harford (1882) 22 Ch D 128; [1881–5] All ER Rep 930; 52 LJ Ch 61; 47 LT 540; 31 WR 61

2325 Settlement on son for life with power to lease — Lease not pursuant to power — To father on trust for younger child — Considered as lease by father
A man made a voluntary settlement on his son for life, and after to his first and other sons in tail, with power for the son to make a lease in possession for ninety-nine years, determinable on three lives, and also to make leases for sixty years to commence after his death, if he had issue male, to continue so long as he had issue male; the son makes a lease to his father in trust for one of his younger children; but the lease was not pursuant to the power; yet it was decreed good, and taken to be as a lease made by the father after a voluntary settlement.
Gooding v Gooding (1698) 1 Eq Cas Abr 342; 21 ER 1089; sub nom
Anon (1698) Freem Ch 224

2326 Term of lease in excess of power
A tenant for life, with power to grant leases for twenty-one years, or three lives, agrees to grant a lease for thirty-one years: *Held* he was only bound to grant such a lease as is warranted by the power.
Byrne v Acton (1721) 1 Bro Parl Cas 186; 1 ER 503, HL

2327 Power not exercisable to prejudice of successors
Taylor d Atkyns v Horde no 2305 ante

2328 Power not exercisable to prejudice of successors
By a marriage settlement, land was settled on the intended husband and wife, and the survivor of them, for life, remainder to the issue of the marriage, with a power to the tenants for life, respectively, to make leases for twenty-one years, reserving the best rent, and so as the lessee be not made dispunishable of waste, that the leases contain clauses of re-entry, and that the lessees seal and deliver counterparts, the wife survived the husband, married again, and made a lease for twenty-one years to her second husband, in accordance with these provisions: *Held* on ejectment by the remainderman, this was not a valid execution of the power.
Doe d Hartridge v Gilbert (1843) 5 QB 423; Dav&Mer 429; 13 LJQB 21; 2 LTOS 207; 8 Jur 37; 114 ER 1309

2329 Lease of mine reserving tolls — Right of remainderman to tolls
Basset v Basset (1744) Amb 843; 27 ER 527, LC

2330 Purported surrender of old and grant of new lease — New lease invalid — Whether surrender of old lease effective
A having a life estate, with a power to grant building leases for ninety-nine years, so as the best rent be reserved that can be got, for the same, etc, demises, reciting the power, and by virtue thereof, and of all other powers in her vested, to B, in consideration of rent and of the surrender of a former demise by the previous tenant in fee, etc, and at the time, the original lease and counterpart are mutually cancelled and exchanged; and upon a special verdict finding the second lease to be void, the best rent not being

reserved: *Held* although A had a life estate, and might have made a good demise for her life, yet the lease referring to the power, it was the intention of the parties it should operate by virtue of the power, and not out of the estate, and, as the second lease was void under the power, and did not operate according to the intention of the parties, it was no surrender of the first.

Roe d Berkeley (Earl) v York (Archbp) (1805) 6 East 86; 102 ER 1219; sub nom *Doe d Berkeley (Earl) v York (Archbp)* (1805) 2 Smith KB 166

ANNOTATIONS **Distd** Doe d Courtail v Thomas (1829) 9 B&C 288 **Consd** Lovell v Smith (1857) 3 CBNS 120

2331 Purported surrender of old and grant of new lease — New lease invalid — Whether surrender of old lease effective

A lease had been granted, conformably to a power. A later lease was expressed to be granted "for the consideration of the surrender of the present lease, and which is hereby surrendered accordingly" and of a sum of money. The earlier deed of lease was actually given up on the execution of the second. The second lease was not valid as an execution of the power; but rent was received according to its terms, by successive tenants for life and in remainder under the settlement: *Held* the surrender of the first lease was good.

Doe d Egremont (Earl) v Forwood (1842) 3 QB 627; 11 LJQB 321; 114 ER 647

ANNOTATIONS **NF** Doe d Egremont v Courtenay (1848) 11 QB 702; Doe d Biddulph v Poole (1848) 11 QB 713

2332 Purported surrender of old and grant of new lease — New lease invalid — Whether surrender of old lease effective

Tenant in fee demised the land by indenture for a term depending on certain lives, and then devised his estate to his son for life, with remainders over, and with a power to tenant for life to grant leases. After testator's death, and during the above term, the son granted the lessee a fresh lease of the land, and the new indenture of lease set forth that it was granted in consideration of the surrendering up into the hands of the lessor by the lessee, at or before the delivery thereof, of the lease first granted, which surrender was thereby made and accepted accordingly. The new lease was a bad execution of the power. One of the lives mentioned in the first lease was still existing: *Held* the surrender was inoperative and the first lease remained in force, and this, whether the second lease, at the time of the demise, was void or only voidable at the will of the tenant for life, and whether the surrender was implied or express: the ground of decision being that the new lease did not pass an interest according to the contract, and therefore the acceptance of it, though with express words as above stated did not effect an absolute surrender.

Doe d Egremont (Earl) v Courtenay (1848) 11 QB 702; 17 LJ QB 151; 11 LTOS 25; 12 Jur 454; 116 ER 636

ANNOTATIONS **Apld** Noble v Ward (1867) LR 2 Exch 135; Zick v London United Tramways [1908] 2 KB 126; Canterbury Corpn v Cooper (1909) 100 LT 597

2333 Purported surrender of old and grant of new lease — New lease invalid — Whether surrender of old lease effective

Tenant for life, with a leasing power, demised premises, in 1784, for ninety-nine years, on three lives. In 1788, the lessee being desirous to sell his term in part of the premises it was arranged that the lessor should grant to the intended vendee a lease of this parcel, and grant the original lessee of fresh lease of the unsold residue. Indentures of lease were executed accordingly. The fresh lease to the original lessee purported to be made in consideration of the surrender of the prior lease and granted a term of ninety-nine years on the same three lives to commence from the date of the fresh lease. The lease was not a due execution of the power; but the premises were held under it till 1845 when ejectment was brought by parties, in remainder, the lives not having terminated: *Held* the acceptance of the fresh lease, which had been avoided contrary to the intention of the parties thereto, and had thus failed to pass the interest contracted for, was not in itself a surrender of the prior lease, but worked no more than a surrender conditioned to be void if the new grant should fail.

Doe d Biddulph v Poole (1848) 11 QB 713; 17 LJQB 143; 11 LTOS 25; 12 Jur 450; 116 ER 641

ANNOTATIONS **Apld** Noble v Ward (1867) LR 2 Exch 135; Canterbury Corpn v Cooper (1908) 99 LT 612

2334 Reservation of rent to tenant for life, his heirs and assigns — Remainderman entitled to rent

Where one seised in fee settles lands on himself for life, with remainders to other persons, reserving a leasing power, which he afterwards exercises, reserving rent to himself, his heirs and assigns, those in remainder shall have the rent. So, where one seised in fee settles lands on A for life, with remainders, and gives him a leasing power, which he exercises, reserving rent, during the term, to himself, his heirs and assigns, those in remainder shall take it. By a deed to lease the uses of a recovery, lands were limited to the use of such persons as A should by deed or will appoint, and in default of and until appointment, to the use of B, in trust for A, his heirs and assigns, reserving to A a leasing power. A, reciting the power, demised for a term to C "yielding and

paying unto A, his heirs and assigns, during the term," a certain rent, with covenants to pay rent, to repair etc, and a proviso for re-entry by A, his heirs and assigns, in case of breach: *Held* the covenants enured in favour of the assignee of the reversion.

Greenaway v Hart (1854) 14 CB 340; 2 CLR 370; 23 LJCP 115; 23 LTOS 174; 18 Jur 449; 2 WR 702; 139 ER 140

2335 Power to lease by deed — Lease not under seal

Where lands were settled in tail under a special Act of Parliament, empowering the owner for the time being to grant leases in accordance with the provisions of 32 Hen 8 c 28 (repealed), and a tenant in tail in possession executed an agreement for a lease not under seal: *Held* such agreement was not binding upon the issue in tail, notwithstanding the acceptance on his part of rent for the property forming the subject of the agreement.

Osborn v Marlborough (Duke) (1866) 14 LT 789; 12 Jur NS 559; 14 WR 886

Scottish, Irish and Commonwealth Cases

2336 Term of lease in excess of power

A tenant for life agreed to grant a lease for the term of three lives, or 31 years. He had no power to lease for any time beyond his own life: *Held* he should, so far as was possible, specifically perform the agreement, and should give compensation for any difference in value between the terms which he had agreed to grant, and that which his leasing power enabled him to do.

Leslie v Crommelin (1867) 2 IR Eq 134 (IR)

b Validity of execution

i Generally

2337 Unreasonable lease to one child in preference to others

A proviso in deed of settlement authorising the covenantor to limit any part of the settled estate for lives or years, will not enable him to make an unreasonable lease, in preference of one of his children.

Mildmay v Standish (1584) Cro Eliz 34; Moore KB 144; 78 ER 300; sub nom

Mildmay's Case (1584) 1 Co Rep 175a

ANNOTATION **Consd** Peover v Hassel (1861) 1 John&H 341

2338 Power coupled with an interest — Mortgage of estate subsequent to leases — Assignment of mortgage prior to some and subsequent to other leases

Vincent v Ennys (1730) 2 Eq Cas Abr 665; 22 ER 559

ANNOTATION **Dbtd** Walmesley v Butterworth (1835) 4 LJ Ch 253

2339 Power coupled with an interest — Lease by woman to second husband

Doe d Hartidge v Gilbert no 2328 ante

2340 Lease of lands comprised in power — Along with other lands

Cardigan (Earl) v Montague (1754) Sugden on Powers 8th edn App 918, LC

ANNOTATIONS **Consd** Taylor v Horde (1757) 1 Burr 60 **Apld** Doe d Egremont v Stephens (1844) 6 QB 208 **Consd** Boyce v Edbrooke [1903] 1 Ch 836

2341 Lease of lands comprised in power — Along with other lands

Lease of lands of which lessor was seised in fee, and of other lands of which he was seised for life a power of leasing, at one entire rent, and the lease not well executed according to the power: *Held* the lease was good after the death of lessor for the lands in fee, though not for the other lands, for the rent may be apportioned.

Doe d Vaughan v Meyler (1814) 2 M&S 276; 105 ER 384

ANNOTATIONS **Apprvd** Smith v Jersey (1821) 3 Bli 290 **Consd** Doe d Williams v Matthews (1833) 5 B&Ad 298

2342 Lease of lands comprised in power — Along with other lands

A lease executed professedly in pursuance of a power, included property to which the power did not extend. There was one entire rent reserved: *Held* the lease was entirely void against the remainderman as the rent could not be apportioned.

Doe d Williams v Matthews (1833) 5 B&Ad 298; 2 Nev&MKB 264; 2 LJKB 163; 110 ER 801

2343 Lease of lands comprised in power — Along with other lands

Lands were devised for life, remainder over, with power to the tenant for life to lease: *Held* a lease by the tenant for life, comprehending, at a single rent, as well some of the lands devised, as other not devised and not previously let with those devised, was bad as to the lands devised, although the rent reserved, with the heriots, etc, was in proportion to the rents, etc, previously reserved on all respectively.

Doe d Egremont v Stephens (1844) 6 QB 208; 13 LJQB 350; 3 LTOS 160; 8 Jur 951; 115 ER 81

2344 Power to lease under written agreement — Parol demise by tenant for life — Interest determines with life of lessor

Under a parol demise from year to year, by a tenant for life, with power to lease by deed, etc, and under written agreements for lease not exceeding three years, signed by the lessees, but not by the tenant for

life, though witnessed by his agent, the interest of the lessees determines with the life of the lessor, and the rents are apportionable.

Symons v Symons & Powell (1821) 6 Madd 207; 56 ER 1070

2345 Lease by tenant for life to trustee for himself

The doctrine that a tenant for life with a power to sell or lease may sell or lease to a trustee for himself is an established exception to the rule as to dealing by persons filling fiduciary positions.

Bevan v Habgood (1860) 1 John&H 222; 30 LJ Ch 107; 3 LT 209; 7 Jur NS 41; 8 WR 703; 70 ER 728

ANNOTATION **Dbtd** Boyce v Edbrooke [1903] 1 Ch 836

Scottish, Irish and Commonwealth Cases

2346 Fraud on power

Harnett v Yielding (1805) 2 Sch&Lef 549 (IR)

2347 Defective execution of power — Equitable relief

Quaere: whether, in case of a lease made by tenant for life, having leasing power, the lessee at best rent, without fine is so far a purchaser as to be entitled to equity to relief, as against the remainderman, from a defect in the execution of the power under which the lease was intended to have been made. *Semble*: it is questionable whether the rule that equity will aid a defective execution of power only in behalf of purchasers of valuable consideration, or a child is a sound one.

Donnell v Church & Clark (1842) 4 I Eq R 630 (IR)

2348 Defective execution of power — Lease obtained by misrepresentation — No relief

Held a new lease having been obtained by misrepresentation it was not made *bonâ fide* within Leases Act 1849 (c 29) s 2, and there having been no surrender of existing interests, it had the incurable defect to being made in reversion, for both of which reasons Leases Act did not apply.

Moffett v Gough (1878) 1 LR Ir 331 (IR)

2349 Excessive execution of power — Effect of laches

D, tenant for life, purporting to exercise a leasing power, made, in 1767, a lease which contained a covenant for quiet enjoyment against act of all persons claiming through him. In 1848, the lease was impeached as an excess of the power. *Semble*: the mere lapse of time, and the acquiescence from 1767 to 1848 would bar relief.

Donegal (Marquis) v Greg (1849) 13 Eq R 12 (IR)

ii Building and repairing leases

2350 Power to grant building lease — Lease not expressed to be building lease — Covenant by lessee to repair old houses to be built — Naked power not coupled with interest

A tenant for life having power to grant building leases for sixty-one years reserving the best improved ground rent granted a lease for that term which was not expressed to be a building lease, but which contained a covenant by the lessee to keep in repair the premises demised, old houses, or such other house as should be built during the term: *Held* this was not a building lease within the power. Such a lease being granted by tenant for life, who had a bare naked power without any legal interest, is void, and consequently not capable of being confirmed by the remainderman accepting rent.

Jones d Cowper v Verney (1739) Willes 169; 125 ER 1115

ANNOTATION **Consd** Edwards v Millbank (1859) 4 Drew 606

2351 Power to grant building lease — Building or rebuilding and repairing — Lease containing covenant to repair only

Testator devised a messuage and premises to his son for life, with power to demise for sixty-one years "for the purpose of new building or effectually rebuilding and repairing any messuage, etc being or to be on the premises." The son granted a lease for that term, in which the tenant covenanted to expend £250 at least for the purpose of effectually repairing the messuage and premises, to the lessor's satisfaction, and he also covenant when the same should be so well and effectually repaired as aforesaid, to repair and uphold the same as need should require, during the term. On ejectment brought after the son's death by the remainderman against the lessee: *Held* this lease was not a good execution of the power, inasmuch as a covenant effectually to repair, if the above-mentioned covenant were such, was not equivalent to a covenant effectually to rebuild and repair.

Doe d Dymoke v Withers (1831) 2 B&Ad 896; 1 LJKB 38; 109 ER 1375

ANNOTATION **Dbtd** Truscott v Diamond Rock Boring Co (1882) 20 Ch D 251

2352 Power to grant building lease — And to lease mines — Building lease reserving minerals

Where under a settlement a tenant for life has power to lease all or any part of the settled lands for building purposes, and also power to lease mines of coal, iron, or other material, either with or without the surface lands, those powers enable him to lease the settled lands for building purposes, reserving the minerals under the lands so leased.

Re Rutland's (Duke) Settled Estates, Rutland (Duke) v Bristol (Marquis) [1900] 2 Ch 206; 69 LJ Ch 603; 44 Sol Jo 484

2353 Pattern lease with absolute covenant to repair — Proviso for re-entry for non-

performance — Lease containing covenant to repair — Within six months after notice

In a power of leasing, it was stipulated that the leases should contain the usual and accustomed covenants, and the pattern lease contained an absolute covenant to repair, with a clause of re-entry for the non-performance of the covenant: *Held* a lease, which contained a covenant to repair within six months after notice by the lessor, with a clause of re-entry for non-performance, was not a valid lease under the power.

Doe d Egremont (Lord) v Burrough (1844) 6 QB 229; 13 LJQB 357; 3 LTOS 160; 8 Jur 954; 115 ER 89

2354 Power to grant building or repairing lease — Buildings in state of decay — Lease containing ordinary covenants to repair and deliver up

Testator devised his freehold dwelling-house and trade premises to his daughters and the survivor for life, "with full power to them or her to grant leases thereof, or of any part thereof, for a term or terms not exceeding twenty-one years, at a rack-rent, and without taking any premium or premiums for the same, or building or repairing leases for the term of sixty-one years": *Held* a lease for forty years with a covenant by the lessee to well and sufficiently repair, maintain, amend and keep the demised premises in, by and with all manner of needful and necessary reparations and amendments, and at the end of the term to yield them up, so being in all things well and sufficiently repaired, amended, and kept together, with a power to the lessor to enter and view and give written notice of all defects and want of reparation, and a covenant by the tenant within three months to make good all such defects was a valid lease in execution of the power.

Easton v Pratt (1864) 2 H&C 676; 4 New Rep 69; 33 LJ Ex 233; 10 Jur NS 732; 12 WR 805; 159 ER 280; sub nom

Pratt & Cordrey v Easton & Bilton (1864) 9 LT 841, Ex Ch

ANNOTATION **Apld** Truscott v Diamond Rock Boring Co (1882) 20 Ch D 251

2355 Power to lease to "any person who should improve or repair the premises" — Agreement for lease — "Lessee to do necessary repairs"

A settlement contained a power to the trustees to lease the property to any person who should improve or repair the same, covenant or agree to improve or repair the same. The trustees of the settlement agreed to let part of the property to a tenant, "the lessee to do the necessary repairs": *Held* the agreement to lease was within the power.

Truscott v Diamond Rock Borin Co (1882) 20 Ch D 251; 51 LJ Ch 259; 46 LT 7; 46 JP 486; 30 WR 277, CA

iii Power to grant leases for lives

2356 Lease for years determinable on lives — To commence after determination of subsisting lease

(1) Under a power to make a lease or leases, grant or grants, etc, as well in possession as in reversion of certain tenements or any parcel thereof, etc, with a proviso, that such lease or leases, grant or grants, shall not exceed the number of three lives at most, or twenty-one years, and so as the ancient and accustomable annual rent should be reserved, the premises being at the time of the creation of the power demised to one B for life; a lease may be made for ninety-nine years determinable on two lives to commence after the death or determination of the estate of B; and a reservation of an annual rent to the lessor who was tenant for life, his heirs and assigns, and to such person and persons to whom the premises demised after the death of the lessor should belong during the term, is good.

(2) Under a power to lease for three lives, a lease for ninety-nine years determinable on three lives is not good.

Whitlock's Case (1609) 8 Co Rep 69b; 2 Roll Abr 260 pl 3; 77 ER 580

ANNOTATIONS As to (1) **Apld** Berry v White (1662) O Bridg 82 **Consd** Smith v Ashton (1675) Freem Ch 308; Zouch d Woolston v Woolston (1761) 2 Burr 1136; Isherwood v Oldknow (1815) 3 M&S 382 **Apld** Greenaway v Hart (1854) 14 CB 340 **Distd** Yellowly v Gower (1855) 11 Exch 274. As to (2) **Apld** Rattle v Popham (1734) Cunn 102; Roe d Brune v Prideaux (1808) 10 East 158

2357 Lease for years determinable on lives — Lease for lives and longest liver

Alsop v Pine (1672) 3 Keb 44; 84 ER 585

2358 Power to lease for lives — Or any term of years upon lives — Lease for years if lives so long live

A power to make leases for three lives, or twenty-one years, or for any term of years, upon one, two, or three lives, will warrant a lease for ninety-nine years, if three lives should so long live.

Lutwich v Piggot (1689) 3 Mod Rep 268; 87 ER 177

2359 Power to lease for lives — Absolute lease for years — To commence after determination of existing lease for lives

A power to grant leases of "a manor and other hereditaments in possession for one, two, or three lives,

or thirty years or for any other number of years, determinable upon one, two, or three lives; or, in reversion, for one or two lives, or for thirty years, or for any other number of years determinable upon one or two lives, so as such demise be not made of any of the ancient demesne lands parcel of the manor," is well executed by the grant of an absolute lease for thirty years, to commence after the determination of an existing lease for two lives, provided it be not of copyhold lands; for ancient demesne being a quality inseparable from all copyhold lands, they are restrained by the proviso, as being "ancient demesne lands, parcel of the manor," but the rents and services are demisable within the power.

Winter v Loveden (1697) 5 Mod Rep 378; Freem KB 507; 1 Com 37; Carth 427; Holt KB 414; 1 Ld Raym 267; Comb 371; 2 Salk 537; 12 Mod Rep 147; 87 ER 717; sub nom

Loveday v Winter (1697) 5 Mod Rep 244

ANNOTATIONS **Consd** Campbell v Leach, Leach & Thomas v Campbell (1775) Amb 740 **Expld** Doe d Bartlett v Rendle (1814) 3 M&S 99

2360 Power to lease for lives — Lease to commence after determination of lives — On which subsisting lease determinable

Under a power to tenant for life to lease for ninety-nine years determinable on one, two, or three lives, a lease for ninety-nine years, if E should so long live, to commence from the death of J and M, two lives on which a subsisting lease for years was determinable, was held ill.

Doe d Copleston v Hiern (1816) 5 M&S 40; 105 ER 966

ANNOTATION **Distd** Sheehy v Muskerry (1848) 1 HL Cas 576

2361 Power to lease for lives — Lease for settlor's life — Lease for years with covenant to renew

Leases made by the heir of entail in possession, for nineteen years, with covenant to renew annually during his life, are not void, as being a transgression of the power to lease for the settlor's life, or nineteen years.

Queensberry Leases Case (1819) 1 Bli 339; 4 ER 127, HL

2362 Power to lease for lives — Consistent with interest of tenant for life — Lease for lives renewable for ever

On the marriage of T, a settlement was made of certain lands held on a lease for lives renewable for ever. The settlement gave T an estate for life, and contained the following power of leasing: "It shall be lawful for T and all and every other person or persons to whom any use is hereby limited, when in actual possession of the lands, etc, to demise the lands for any number of lives or years, consistent with their respective interests therein, to commence in possession, and not in reversion, remainder, or expectancy," reserving the best rents, without taking any money by way of fine, etc. T granted a lease to A at a farm rent, for the lives of three persons therein named; with a covenant, that a failure of any of the three lives, the lessor, his heirs and assigns, would, on the payment of £5 as a fine upon each life that should happen to die, add to the time and term of the lease the life of another person, nominated by the lessee, from time to time successively for ever: *Held* this lease was not warranted by the power; and a decree by the Court of Chancery in Ireland, directing specific performance of the covenant of renewal, was reversed, and the bill ordered to be dismissed with costs.

Clark v Smith (1842) 9 Cl&Fin 126; 6 Jur 697; 8 ER 363, HL

2363 Power to lease for lives or years — Lease for lives or years "which shall last longest"

J by marriage articles, covenants to settle his estate to certain uses, reserving to himself a power of making leases for thirty-one years, or three lives. He grants a lease to A for three lives, or thirty-one years, which shall last longest: *Held* this lease was supportable as a good execution of the power.

Commons v Marshall (1774) 6 Bro Parl Cas 168; 2 ER 1005, HL

2364 Lives must be certain and co-existing

Under a power of leasing for one, two, or three lives, or for any term of years determinable on one, two, or three lives, such lands as were then demised for any such term, lands are not included which were then held under a demise "to W and G for ninety-nine years, if W and his widow, and any eldest son living, or *en ventre sa mére* at the time of his, W's death, or if no son, any eldest daughter then living or a *ventre sa mére*, or any or either of those three, *viz* of W and such his wife, son, or daughter should so long live, remainder to G and his widow, son, or daughter, in the same manner"; of which description of persons, five were in fact living at the time of the power reserved, who were all entitled in succession, three at a time, to come in under a lease. Under such a general power, the three lives must be certain and co-existing.

Doe d Wyndham v Halcombe (1798) 7 Term Rep 713; 101 ER 1214

2365 Power to lease determinable on lives — Lease for lives absolutely

A being seised in fee of an estate, by lease and release executed upon his marriage, settled same upon himself for life, remainder to his first and other sons in

tail, with a power to the tenant for life to grant leases for years, determinable on three lives. A afterwards granted a lease of part of the estate in question for the lives of three persons therein named, and the life of the survivor; and there was a covenant that the lessee should quietly hold and enjoy the premises for and during the term, without interruption of the lessor, his heirs or assigns, or any other person claiming any estate, right, or interest by, from, or under him or any of his ancestors. The lease, being for three lives absolutely, was not conformable to the power, and became void on the death of A, and his eldest son brought an ejectment and evicted the lessee, two of the *cestuis que vies* being then living; *Held* by the words, during the term in that covenant, the parties intended a term to continue so long as any of the *cestuis qui vies* survived, and not a term to continue only for the life of the grantor.

Evans v Vaughan (1825) 4 B&C 261; 6 Dow&Ry KB 349; 3 LJOSKB 213; 107 ER 1056

2366 Power to lease for similar term as leases then held — Lease for two lives existing at date of settlement — Grant of lease for three lives

In 1743 a tenant in fee granted a lease for three lives, and in 1776 his son, whilst one of these lives was in being, granted another lease of the same property for two lives, to take effect after the death of the survivor of the three lives. In 1819 a settlement of these estates was made, by which power was given to the tenant for life to grant leases for lives for a similar term or terms as were comprised in the lease of 1776. In 1848 the then tenant for life granted a lease of the property for three lives: *Held* the lease was invalid, the power not justifying the granting of a lease for more than two lives.

Jenner v Morris (1861) 4 LT 347; 7 Jur NS 385; 9 WR 566

Scottish, Irish and Commonwealth Cases

2367 Power to lease for lives — Lease for lives renewable for ever

Steele v Mitchell (1840) 3 I Eq R 1; 2 Dr&Wal 568 (IR)

2368 Power to lease for lives or years — Lease for lives and for such other lives as should be added pursuant to covenant for perpetual renewal

Marriage articles contained a clause to make leases in these words: "with the usual leasing power for three lives, or 31 years, in possession, and not in reversion". *Semble*: a lease made under such a power, for three lives, and for such other lives as should be added, pursuant to a covenant for perpetual renewal, is not, therefore, void, as the demise for three lives is separable from the excess.

Jack d Wheatley v Creed (1828) 2 Hud&B 128; 2 Ir L Rec 1st ser 71 (IR)

2369 Power to lease for lives or years — Lease with clause enabling lessee in surrender

Marriage articles contained a clause to make leases in these words: "with the usual leasing power for three lives or 31 years, in possession, and not in reversion": *Held* a lease with a clause enabling the lessee to surrender was contrary to the power, and void.

Jack d Wheatley v Creed (1828) 2 Hud&B 128; 2 Ir L Rec 1st ser 71 (IR)

2370 Power to lease for lives or years — Agreement for lease not delivered to trustees during lifetime of lessor — Adequate rent reserved

King v Roney (1855) 5 I Ch R 64 (IR)

2371 Power to lease for lives and years — Lease for lives and years — To commence of certain date preceding death of survivor of cestuis que vie in lease

Under a power to make leases for any term not exceeding three lives and 41 years: *Held* a lease for three lives and 41 years commencing from 1 November preceding the day of the death of the survivor of the *cestuis que vie* in the lease, was a valid lease within such power.

Re Crommelin Estate (1851) 1 ICLR 182 (IR)

iv Power to grant leases in possession

2372 Lease in reversion

Sussex (Countess) v Wroth (1582) Cro Eliz 5; 78 ER 272; sub nom

Leaper v Wroth (1582) cited in 6 Co Rep at p 33a; sub nom

Lepur & Wroth's Case (1582) 1 Leon 35; sub nom *Wroth & Sussex (Countess) Case* (1582) 3 Leon 130; sub nom

Sussex (Countess) & Worths Case (1582) 4 Leon 65

ANNOTATIONS **Consd** Fitzwilliam's Case (1603) 6 Co Rep 32a; Slocomb v Hawkins (1611) Yelv 222; Berry v White (1662) O Bridg 82; Winter v Loveday (1696) 5 Mod Rep 378

2373 Lease to take effect on determination of existing lease

A being seised in fee, made a lease for life, and levied a fine for fifteen years, remainder to himself for life, with a power to make leases for life, or years in possession. The conusee may lease, during his term, land in lease at the time of the fine, when such lease expires.

Fox v Prickwood (1614) Cro Jac 347; 79 ER 297

ANNOTATION **Consd** Bosworth v Forard (1666) O Bridg 153

2374 Lease to take effect on determination of existing lease

(1) In debt by a remainderman for rent reserved upon a lease by tenant for life, plaintiff must show what authority the tenant for life had to make the lease.

(2) If the owner of an estate after granting a lease, settles the estate upon J for life, with power to make leases in possession, J can make no lease until the former one expires.
Sands v Ledger (1702) 2 Ld Raym 792; 92 ER 29

2375 Lease to take effect on determination of existing lease
Under a marriage settlement tenant for life, with remainder to his first and other sons by his wife F, in tail, with remainder to himself in fee, had power to grant leases for ninety-nine years in possession at the most improved rent under an indenture of lease to be executed with certain formalities. Twenty-eight years after the marriage, the wife still living, and there being no issue of the marriage, the husband gave a bond conditioned for the granting a lease for ninety-nine years, at a rent of £20 per annum, upon the expiration of a subsisting lease. As soon as the subsisting lease determined, the obligee of the bond entered into possession, and for some years paid a rent of £20: *Held* notwithstanding some evidence of inadequacy in the rent, the representatives of the obligee were entitled to a decree for specific performance of the agreement contained in the bond.
Butler v Powis (1845) 2 Coll 156; 5 LTOS 303; 9 Jur 859; 63 ER 679

2376 Lease to take effect on determination of existing lease — Lease by tenant for life
A tenant for life having power to grant leases in possession may bind himself by covenant to grant a lease in reversion expectant on the determination of a subsisting term; but a trustee having a similar power cannot, for he is bound to exercise the power for the benefit of the estate.
Moore v Clench (1875) 1 Ch D 447; 45 LJ Ch 80; 34 LT 13; 24 WR 169

ANNOTATION **Distd** Salamon v Sopwith (1876) 35 LT 463

2377 Lease to take effect on determination of existing lease — Lease by trustee
Moore v Clench no 2376 ante

2378 Lease to take effect on determination of existing lease — Lease by trustee
Trustees of a messuage and premises partly freehold and partly leasehold for a term of which fourteen years were unexpired, but which lease was renewable by custom on paying a fine granted a lease to W of the whole for fourteen years and covenanted to use their best endeavours to obtain a renewal of the lease, and thereupon would grant him a lease for a further term of seven years from the expiration of his tenancy at a like rent. The trustees' power was to lease at a rack rent for any term not exceeding twenty-one years. Before the expiration of W's lease new trustees had been appointed and the reversion in fee had become vested in other persons who would not renew the lease on the old fine the property having much increased in value: *Held* the trustees had no power to enter into a covenant to grant a further term at a like rent on the renewal of the lease and that the covenant did not bind the new trustees.
Salamon v Sopwith (1876) 35 LT 826, CA

2379 Lease from day of date
Antrim (Marquess) v Buckingham (Duke) (1663) Cas in Ch 17; Freem Ch 168; O Bridg 617; 22 ER 672; sub nom
Buckingham (Duke) & Antrim's (Lord) Case (1663) 1 Sid 101; sub nom
Atrim's (Lady) Case (1663) 3 Salk 276

ANNOTATION **Dbtd** Doe d Hartridge v Gilbert (1843) 5 QB 423

2380 Lease from day of date
One, under a power reserved in his marriage settlement to lease for twenty-one years in possession, but not in reversion, grants a lease to his only daughter for twenty-one years, to commence from the day of the date, adjudged a good lease. The word "from" may mean either inclusive or exclusive, according to the context and subject-matter; and the court will construe it so as to effectuate the deeds of parties, and not to destroy them.
Pugh v Leeds (Duke) (1777) 2 Cowp 714; 98 ER 1323

ANNOTATIONS **Apld** Doe d Cox v Day (1809) 10 East 427 **Consd** Ackland v Lutley (1839) 9 Ad&El 879 **Distd** Trow v Ind Coope (West Midlands) Ltd [1967] 2 All ER 900

2381 Lease expressed to commence at date after date thereof — Not executed till after day of commencement
Under a power to demise for twenty-one years in possession and not in reversion a lease dated in fact on 17 February 1802, *habendum* from 25 March next ensuing the date thereof is good if not executed and delivered till after 25 March, for it then takes effect as a lease in possession with reference back to the date actually expressed.
Doe d Cox v Day (1809) 10 East 427; 103 ER 838

ANNOTATION **Consd** Roberts v Church Comrs for England [1971] 3 All ER 703

2382 Lease by tenant in tail — Lease voidable
Opey v Thomasius no 2314 ante

2383 Agreement to exercise power at future period
A tenant for life of hereditaments with a power of leasing, in which there was a clause prohibiting reversionary leases, entered into an agreement to

exercise this power at a future period, and was alive at the time appointed for the exercise, the terms of the agreement being fair and reasonable: *Held* this agreement might be enforced against, and was binding upon, the persons entitled to the hereditaments in remainder, after the death of A.

Dowell v Dew (1843) 12 LJ Ch 158; 7 Jur 117, LC

2384 Agreement to renew unexpired lease

Testator, by his will, devised his real estate to the use of A for life, with remainder to his first and other sons in tail; and he declared it should be lawful for every tenant for life, or in tail in possession, who should have attained twenty-one, by an indenture to be sealed and delivered by them respectively in the presence of two or more witnesses, to demise all or any parts of the estates to any person or persons for any term not exceeding twenty-one years, to take effect in possession, and not by way of future interest, or as that there were reserved the most improved rent, etc, without taking any fine, etc, such lease to contain a condition for re-entry on non-payment of the rent, and the lessee to execute a counterpart, and to covenant for the payment of the rent, etc. A made an agreement to renew for fourteen years an unexpired lease, and died without executing a lease, but after the expiration of the original lease. On a bill filed by the infant tenant in tail for specific performance: *Held* the agreement was *ultra vires* the deceased tenant for life, and dismissed the bill.

Ricketts v Bell (1847) 1 De G&Sm 335; 10 LTOS 105; 11 Jur 918; 63 ER 1093

v Power to reserve rent

2385 Reservation informal as to persons to whom payable — Right of remainderman to rent

Lease for years in reversion, under a special power to a tenant for life to grant leases for years or lives sustained. The instrument creating the power having directed a particular rent to be reserved, a reservation informal in respect of the persons to whom the rent is made payable, will carry the rent to the remainderman; because the informality consisted in surplusage only; and the words of the actual reservation satisfied the power.

Berry v White (1662) O Bridg 82; 124 ER 480

ANNOTATIONS **Apld** Greenaway v Hart (1854) 14 CB 346 **Consd** Yellowly v Gower (1855) 11 Exch 274

2386 Power to lease "at so much per acre" — Estate consisting of lands and rectory — Lease of rectory at rent — Rectory consisting of tithes only

Walker v Wakeman (1675) 1 Vent 294; 86 ER 189; sub nom

Waker v Wakeman (1675) 2 Lev 150; sub nom

Wakeman v Waker (1675) Freem KB 413; 3 Keb 544, 547, 619

ANNOTATIONS **Distd** Bagot v Oughton (1726) Fortes Rep 332 **Consd** Goodtitle v Funucan (1781) 2 Doug KB 565; Pomery v Partington (1790) 3 Term Rep 665 **Expld** Doe d Bartlett v Rendle (1814) 3 M&S 99

2387 "Such rent as lessor shall think fit" — Lease reserving no rent

Talbot v Tipper (1694) Skin 427; 90 ER 189

ANNOTATION **Consd** Sheehy v Muskerry (1848) 1 HL Cas 576

2388 "Such rent as lessor shall think fit" — Power to lease at fixed rent and money heriot — Lease reserving larger heriot

Where a power of leasing requires that a fixed rent and a money heriot payable under peculiar circumstances shall be reserved, a lease granted under the power reserving a larger heriot is void.

Doe d Egremont (Lord) v Hellings (1842) 6 Jur 821

2389 "Best rent incident to reversion" — Lease expiring before half-yearly rent day

Doe d Wilmot v Gifford (1810) cited in 5 B&Ald at p 371; 106 ER 1227

ANNOTATIONS **Distd** Doe d Shrewsbury v Wilson (1822) 5 B&Ald 363 **Apld** Doe d Harries v Morse (1833) 2 Cr&M 247 **Distd** Rutland v Wythe (1843) 10 Cl&Fin 419

2390 "Best rent incident to reversion" — Rent reserved to tenant for life, his heirs and assigns

Yellowly v Gower no 2446 post

2391 "At most improved rent" — Lease reserving such sum as should amount to most improved rent

Hamilton (Duchess) v Mordaunt no 2412 post

2392 "At most improved rent" — Lease at rent to be estimated at valuation — Without reference to improvements by lessee

One having a power to lease at the most improved rent agrees to grant a lease at a rent to be estimated at a fair valuation, without reference to improvements made by the lessee, but these improvements are deemed part of the consideration for the lease. *Quaere*: whether such a lease is consistent with the terms of the power?

Price v Assheton

(1834) 1 Y&C Ex 82; 4 LJ Ex Eq 3; 160 ER 34

2393 Without fine — First rent payable within month from date of lease

Devise to the use of H for life without impeachment of waste, etc, remainder to the use of plaintiff for life, with power to make leases for two or three lives, etc, or for the term of twenty-one years, so as there be reserved the best rent without taking any sum or sums of money or other thing for or in lieu of a fine; and H by indenture 15 October, leased for fourteen years, to be computed as to the meadow land from 13 February last, the pasture from 25 March last, and the messuage from 12 May last, under a yearly rent, payable to lessor, and such other person as should be entitled to the freehold and inheritance, half-yearly, on 11 November and 25 March, the first payment to be made on 11 November next ensuing, and lessee covenanted with lessor, his heirs, and assigns, for payment to lessor and such other person, etc, of the rent at the days and times, etc: *Held* the lease for fourteen years was warranted by the power to lease for twenty-one, and the reservation of the first half year's rent, payable at the end of twenty-seven days, was not taking a sum of money for a fine, being in consideration of a preceding occupation, and plaintiff, after the death of H was an assignee within 32 H 8 c 34, and might maintain covenant against the lessee for rent-arrear after the death of H, and during the continuance of the term.

Isherwood v Oldknow (1815) 3 M&S 382; 105 ER 654

ANNOTATIONS **Consd** Rutland v Wythe (1843) 10 Cl&Fin 419 **Apld** Greenaway v Hart (1854) 14 CB 340 **Consd** Yellowly v Gower (1855) 11 Exch 274

2394 Without fine — First rent payable within month from date of lease

M, tenant for life without impeachment of waste, was, by indenture of January 1829, empowered to lease pasture land for twenty-one years, reserving the best rent, "without taking any fine, premium, or foregift," and so that "none of the lessees should be authorised to commit waste, or exempted from punishment for waste." In 1844, M converted some of the pasture into garden allotments, so as to commit waste; and by indenture, dated 13 December 1845, and reciting that January 1829, she leased the whole land to defendant for twenty-one years from 1 July last, reserving the best rent, and payable half-yearly, the first payment to be made on 1 January 1846; defendant covenanting not to plough up any of the pasture land demised, "except for the purpose of carrying out the allotment system introduced by M": *Held* the lease was a good execution of the power; the rent was not so reserved as to amount to the taking a fine, premium, or foregift; and the exception in defendant's covenant did not authorise him to commit waste, or exempt him from punishment for so doing.

Doe d Hopkinson v Ferrand (1851) 20 LJCP 202; sub nom
Doe d Hopkinson v Ferrand, Moss v Ferrand (1851) 17 LTOS 183

2395 Without fine — Covenant to provide board, etc, for lessor's children

A power was reserved to grant leases for a term not exceeding seven years, so as there was reserved in such leases the best rent that could be gotten for the same, without taking any premium for the making thereof. The donee of the power granted a lease for seven years, at a specified rent, which lease contained a covenant by the lessee, to find board, lodging, and wearing apparel during the term, for three children of the donee, if they wished it, at £7 a year each, and for the donee's son gratis: *Held* assuming the power to require two conditions, (*a*) that the rent reserved should be the best rent, and (*b*) that there should be no fine or premium; it did not clearly appear on the face of the lease that either of those conditions had been broken, because the covenant to maintain the children was not necessarily beneficial to the lessor, and therefore, parol evidence was admissible to show that the rent reserved was the best that could be obtained.

Doe d Rogers v Rogers (1833) 5 B&Ad 755; 2 Nev&MKB 550; 3 LJKB 23; 110 ER 969; subsequent proceedings, sub nom
Rogers v Humphreys (1835) 4 Ad&El 299

2396 Without fine — Lease for lives reserving rent — Fine payable for renewal of life

Clark v Smith no 2362 ante

2397 Without fine — Last half-year's rent payable before usual date

Rutland v Doe d Wythe no 2425 post

2398 "Best and most beneficial rent" — Whether rent must be best rent as between lessor and lessee — Or as between tenant for life and reversioner

(1) By Act of Parliament tenant for life was empowered to grant leases for any term not exceeding ninety-nine years, so as every such lease or leases be made to take effect either in possession, or immediately after the determination of the leases then subsisting thereof respectively, and so as in every such lease there be reserved, payable during the continuance of the term and estate thereby to be granted, the best and most beneficial yearly rent or rents. Part of the estate, being let upon leases which, in due course, would expire on 10 October 1791, the tenant for life, in consequence of one bargain, executed at the same time two leases of that part of the estate,

one bearing date 4 May 1787, for the term of thirty years, to commence on 10 October 1791, and the other bearing date 4 June 1787, for the term of sixty-three years, to commence 10 October 1821: *Held* this latter lease was void, inasmuch as it was not to take effect immediately after the determination of the subsisting lease.

(2) The first of these two leases reserved a rent of £270, the second reserved only £120. By a clause in the second lease the tenant was bound to rebuild either before the expiration of the term granted by the first lease, or within the first year of the term granted by the second. *Semble*: although the rents reserved by the two leases might be the most beneficial as between the lessor and lessee, yet they were not so between the tenant for life and the reversioner, and upon that account also, the second lease was void.

Doe d Sutton v Harvey (1823) 1 B&C 426; 2 Dow&Ry KB 589; 107 ER 158

ANNOTATION **Distd** Re Aldam's SE [1902] 2 Ch 46

2399 "By half-yearly payments" — Lease at rent payable on certain feast days — Admissibility of evidence showing feast days usual half-yearly days

By a marriage settlement certain estates were settled in strict settlement, and a power was reserved to the persons being in the actual possession of the premises, by virtue of the limitations in the settlement, to lease any part of the lands thereby settled "for one, two, or three life or lives, or any term or number of years not exceeding twenty-one years, so as upon all and every such lease or leases there should be reserved and continued payable during the respective continuance of such lease or leases, by half-yearly payments, the best and most improved yearly rents that could be reasonably had or obtained, without taking any sum or sums of money or other thing by way of fine or income for the same." By lease dated 11 January 1783, a tenant for life of the estates demised a part of the settled estates, to hold from 4 January, preceding, for the lives of three persons therein named, yielding and paying yearly and every year during the term the yearly rent or sum of £31 10*s*, at or upon the two most usual feasts or days of payment in the year, *viz*, the feast of St Philip and James the Apostles, 1 May, and St Michael the Archangel, 9 September, by even and equal portions; the first payment to be made on the feast of St Philip and James the Apostles next ensuing the date of the lease: *Held* (1) the lease was not a due execution of the power, and it was therefore invalid; (2) the leases of other estates in the same part of the country were not admissible in evidence to show that the days on which the rent was reserved in the lease were the usual half-yearly days of payment of rent in that part of the country.

Doe d Harries v Morse (1833) 2 Cr&M 247; 4 Tyr 185; 3 LJ Ex 70; 149 ER 752

ANNOTATIONS As to (1) **Distd** Rutland v Wythe (1843) 10 Cl&Fin 419; Doe d Hopkinson v Ferrard (1851) 20 LJCP 202. Generally **Consd** Doe d Douglas v Lock (1835) 2 Ad&El 705

2400 "At usual rent" — Rent payable at different periods

A manor was entailed by a special Act of Parliament which contained a proviso that the donees should do no act to the prejudice of their issue, unless for jointures or for term of life, etc, or for years or at will, according to the custom of the manor; rendering the true and ancient rent of the lands, etc, so demised, and that all other acts should be void. One of the donees accepted a fine of a stranger *sur conusans de droit come ceo*, etc, of the moiety of the manor, etc, and by the same fine granted the moeity for 300 years rendering rent. Among the lands, etc, so granted was an acre of waste, parcel of the manor of the value of twelve pence, but which had never been demised before; nor had the free rents, nor the copyhold rents, heriots, etc, parcel of the manor which were included in the same grant, ever been demised before. The rent reserved amounted to the rent formerly reserved upon the demesne lands, the free rents, the copyhold rents, etc, eighteen pence more and twelve pence for the acre of waste, and was made payable at two feasts of the year, the old rent having been reserved payable at four. After the death of the donee, the lessee brought an *ejectione firmæ* against the heir to the entail, and on special verdict, stating the above facts, judgment was given for defendant, and resolved: (1) although it is provided by the Act that all estates, etc, restrained by the Act, etc, shall be void, yet by construction of law they are not void as to the tenant in tail himself, but voidable by the issue; (2) in respect of the acre of waste which was never demised before, the rent which is entirely reserved out of the whole cannot be called the true and ancient rent; (3) the reservation of the rent at two days instead of four makes the grant and render void.

Mountjoy's (Lord) Case (1589) 5 Co Rep 3b; 77 ER 52

ANNOTATIONS As to (2) **Apld** Doe d Bartlett v Rendle (1814) 3 M&S 99. As to (3) **Distd** Worcester's (Dean & Chapter) Case (1605) 6 Co Rep 37a; Doe d Douglas v Lock (1835) 2 Ad&El 705

2401 "At usual rent" — Rent payable at different periods

By a private Act, passed in 1720, certain estates were settled in strict settlement, and a power was reserved to the respective tenants in tail, by deed, to lease any

part of the lands thereby settled, "for the term of three lives or twenty-one years, or for any term or number of years determinable upon the death or determination of three lives, so as upon every such lease there be reserved, and made payable yearly, during the continuance thereof, the usual and accustomed yearly rents, boons, and services for same; and so as there be contained therein a condition of re-entry for non-payment of the rent, and rents thereby to be reserved." By lease, dated 6 January 1785, a tenant in tail of the estates demised a part of the premises thereby, settled to hold from the date of the lease for ninety-nine years, if three persons therein named should so long live, yielding and paying yearly and every year during the term, unto the lessor, the yearly rent of £50 upon 25 March and 29 September, by even and equal portions, the first payment to be made on 25 March ensuing the date of the lease. Previous to the time of passing the Act, the premises demised by this lease had been demised jointly with other premises by the settlor's ancestor, by a lease bearing date 2 February 1708, "for ninety-nine years, determinable upon three lives, at a yearly rent of £82 payable on the same days as those mentioned in the lease of 6 January 1785, and the first payment to commence on 25 March ensuing the date of the lease." It did not appear whether any other lease was granted between that period and the year 1756. At that time another lease of the premises, demised by the lease of 6 January 1785, was granted at a rent of £32 payable at the same period as in the other leases: *Held* (1) it was not a valid objection to the lease of 6 January 1785, that the rent was made payable on 25 March and 29 September, although the term commenced on 6 January, and there was a forehand rent, which might prejudice the remainderman, inasmuch as the rent was made payable on the same days by the former lease, and this was the usual and accustomed rent; (2) for the same reason, it was no objection to the lease that the rent was made payable by half-yearly payments, although the power required it to be payable yearly; the word yearly meaning a payment of rent in the year; (3) part of premises formerly demised, jointly with others, at one entire rent, might be let under the terms of this power, at a rent bearing the same proportion to the old rent that the premises demised by the lease bore to the whole premises formerly demised.

Doe d Shrewsbury (Earl) v Wilson (1822) 5 B&Ald 363; 106 ER 1223

ANNOTATIONS As to (1) **Consd** Doe d Douglas v Lock (1835) 2 Ad&El 705; Rutland v Wythe (1843) 10 Cl&Fin 419

2402 "At usual rent" — Rent payable at different periods

Tenant in fee simple devised lands in L, and a manor and lands in P, to a tenant for life, with power to let the lands in L for twenty-one years in possession, and also to make leases of the lands in the manor of P for ninety-nine years determinable on one, two, or three lives, in possession or reversion, of such parts as were or had been anciently demised for one, two, or three lives, so as the ancient and accustomed yearly rents and reservations should be thereby reserved; and also to let all other lands in P, for twenty-one years, all the leases being made and granted in the same manner and form, and with and under such and the like reservations, restrictions, covenants, conditions, and agreements, as were usually and customarily contained in leases of the same kind in the several and respective parishes and places where the same premises were situate. Leases for ninety-nine years, determinable on lives as aforesaid, having been made by the tenant for life: *Held* (1) to show whether the first proviso in such power be complied with, the previous leases of the same premises, but not other similar lease in P, were evidence, and *semble* the latest preceding lease of the same premises is the most proper evidence; (2) to show whether the second proviso be complied with, leases of the same land in P are evidence; (3) *Quaere*: whether a lease be good which reserved the ancient amount of yearly rent on the premises, but made it payable quarterly, the ancient reservation having been of a half-yearly payment; (4) a lease under the power, with a condition for re-entry on the rent being twenty days in arrear, was not bad, although the condition in the ancient lease was for re-entry after rent being twenty-one days in arrear; (5) nor was such lease bad for restricting the re-entry to the case of there being no distress upon the premises, the ancient restriction of the re-entry being to the case of there being no overt distress upon the premises; (6) *Quaere*: whether, the ancient lease having reserved, as a heriot, the best beast of the lessee, being one of the lives, his executors, administrators, or assigns, or such person as should be in possession of the premises, and entitled to the same by virtue of the lease, a lease reserving only the best beast of the lessee, being one of the lives, be good; (7) a lease was not bad under the power, which reserved the best beast of the person or persons who, for the time being, should be tenant or tenants in possession of the premises.

Doe d Douglas v Lock (1835) 2 Ad&El 705; [1835–42] All ER 13; Nev&MKB 807; 4 LJKB 113; 111 ER 271

2403 "At usual rent" — Rent payable at different periods

(1) *Semble*: when leasing power requires that the lessee shall execute a counterpart, it is not necessary that the execution of the lease and of the counterpart should be contemporaneous.

(2) A power to lease, so as the usual rent be reserved or made payable yearly, is well executed by a lease reserving the usual yearly rent, but making it payable half-yearly.

Fryer v Coombs (1840) 11 Ad&El 403; 4 Per&Dav 120; 113 ER 468

2404 "At usual rent" — Land let with portion never let before

Mountjoy's (Lord) Case no 2400 ante

2405 "At usual rent" — Land let with portion never let before

Under the settlement of an estate, with a power to the tenant in possession to let all or any part of the premises so as the usual rents be reserved, a lease of tithes, which had never been let before, was held void. In all these cases, the intention of the parties is to govern the court in construing the power.

Pomery v Partington (1790) 8 Term Rep 665; 100 ER 792

ANNOTATION **Consd** Doe d Bartlett v Rendle (1814) 3 M&S 99

2406 "At usual rent" — Land let with portion never let before

Devise of lands to trustees and their heirs in trust to the use of W and his first and other sons in strict settlement remainder to J and his first, and other sons in strict settlement with power to the trustees from time to time during the minorities of the persons to whom the premises should descend and to any tenant for life to grant any lease of all or any part of the lands so limited, so as there be reserved the ancient and accustomed yearly rent: *Held* a lease by W of part of the land devised in several parcels, in one of which parcels were included, together with lands anciently demised, two closes never before demised at one entire rent, *viz*, the ancient rent for that part which had been anciently demised was void for the whole of the lands included in that parcel as well the lands never before let as those anciently let; but it seems to be good as to the other parcels which contained only lands anciently demised and on such of which there was a several reservation of the ancient rent.

Doe d Bartlett v Rendle (1814) 3 M&S 99; 105 ER 548

ANNOTATIONS **Apld** Doe d Williams v Matthews (1833) 5 B&Ad 298; Doe d Egemont v Stephens (1844) 6 QB 708

2407 "At usual rent" — Land let with portion never let before

Doe d Williams v Matthews (1833) 5 B&Ad 298; 2 Nev&MKB 264; 2 LJKB 163; 110 ER 801

2408 "At usual rent" — Land let with portion never let before — Covenants less advantageous to reversion than formerly

Where there is a power to grant leases in possession, but not by way of reversion or future interest, a lease *per verba de presenti* is not contrary to the power, although the estate, at the time of granting the lease, was held by tenants at will, or from year to year, if, at the time, they received directions from the grantor of the lease to pay their rent to the lessee. Under a power to lease all manors, messuages, lands, etc, so as there be reserved as much rent as is now paid for the same, such parts of the estate enumerated in the power as have never been demised may be let. *Quaere*: if a lease made under such a power, reserving the old rent, but with covenants less advantageous to the reversion than formerly, would not be a fraud on the power, and void.

Goodtitle v Funucan (1781) 2 Doug KB 565; 99 ER 357

ANNOTATIONS **Apld** Pomery v Partington (1790) 3 Term Rep 665 **Consd** Doe d Bartlett v Rendle (1814) 3 M&S 99

2409 "At usual rent" — Portion of land let at proportionate rent

Doe d Shrewsbury (Earl) v Wilson no 2401 ante

2410 "At usual rent" — Entire rent for two tenements usually let separately

Tenant for life, under the limitations of a devise, had power to lease, for term of years determinable upon two or three lives any part of the premises usually so leased, so that there were reserved the ancient and accustomed rents and heriots of the premises therein contained, or more, and so that in every of the leases there were contained the usual and reasonable covenants: *Held* two tenements, which had previously been leased separately, might be leased together under a single demise, no objection being made that the rents, etc, reserved were not in proper proportion.

Doe d Egremont (Earl) v Williams (1848) 11 QB 688; 17 LJQB 154; 11 LTOS 27; 12 Jur 455; 116 ER 631

2411 "At same rent as two years previous" — Land not let two years previously may be leased at any rent

Cumberford's Case (1635) 2 Roll Abr 262 pl 15

ANNOTATIONS **Apld** Wakeman v Waker (1675) Freem KB 413 **Consd** Goodtitle v Funucan (1781) 2 Dough KB 565

2412 "Ancient rents or more" — Lease "reserving the old accustomed rents"

Tenant for life, with power to make leases of all lands anciently demised, reserving the ancient rents, or more, and of other lands, reserving the most and best improved rents that could be got, makes a lease of part of the premises usually demised, reserving the old accustomed rents; and a lease of other part not usually demised reserving such sum of money as should amount to the best and most improved yearly rent. But these leases were held to be void as against the remainderman; the first, as not being warranted by the power; and the other, for the uncertainty of it.

Hamilton (Duchess) v Mordaunt (1726) 6 Bro Parl Cas 145; 2 ER 989, HL; affg SC sub nom *Orby (Lady) v Mohun (Lady)* (1706) 2 Vern 531, 542

ANNOTATIONS **Consd** Evelyn v Evelyn (1731) 2 P Wms 659; Taylor d Atkyns v Horde (1757) 1 Burr 60

2413 "At the usual or other the most rent" — Fine and reserved rent — Reserved rent exceeding rent in former lease

Devise of testator's reversion to J for life, with power to jointure and raise portions for younger children, remainder to his first and other sons, etc, with power to J and those in remainder during their respective possessions to make leases of the lands in Sussex and Huntingdonshire, for not exceeding twenty-one years, at the most rent; and of the lands in Middlesex and London for not exceeding sixty-one years at the usual or other the most rent: *Held* J, might well lease the lands in Middlesex upon a fine, and at a reserved rent, which rent exceeded the rent reserved upon a former lease in being at the date of the will, and at testator's death, and upon which lease the then lessor had also taken a fine.

Doe d Newnham v Creed (1815) 4 M&S 371; 105 ER 871

2414 "With no evident diminution of rental" — Lease at more than old rents — Underlease by lessee at increased rent

Under a strict tailsie prohibiting alienation, but containing a power to grant leases, provided they do not exceed twenty-one years, and be not let with evident diminution of the rental; the heir of tailsie in possession acting upon the opinion of counsel, made leases to his steward at rents a little above the former rents of the lands leased, but far below their market value; with intent that the steward should under let the lands at their full value, and pay the surplus, beyond the rents reserved in the principal leases, to persons named by the grantor of the leases, the heir of tailsie in possession. The steward accordingly underlet the lands at rents exceeding the principal rents by £1,371, and, some time after the grants of the principal leases, executed a trust obligation in favour of the objects of the trust: *Held* the leases, from the time of the grants until the declaration made by the trust obligations, were held in trust for the grantor, and they were invalid as a violation of the prohibitions, and not within the permission of the deed of tailsie.

Hamilton v Waring (1820) 2 Bli 196; 4 ER 300, HL

2415 "At ancient heriots or more" — Reservation of money heriot instead of three best beasts — Onus on lessee to show this as beneficial as old heriot

Tenant for life with a power to lease for three lives, reserving "the ancient and accustomed heriots or more," granted a lease reserving £6 13*s* 4*d* as a heriot on the failing of each life. The ancient heriot was the three best beasts or the £6 13*s* 4*d*, at the lord's option, not on the falling of each life, but contingent on a certain order of survivorship. In ejectment against lessee: *Held* as the lease avowedly varied from the ancient leases, the onus was on the lessee to show that the new reservation, without the option, was as beneficial to the lord as the ancient reservation.

Doe d Egremont (Earl) v Grazebrook (1843) 4 QB 406; 3 Gal&Dav 334; 12 LJ QB 221; 7 Jur 530; 114 ER 951

2416 "At ancient heriots or more" — Old heriot of best beast of lessee, executors, administrators or assigns — Lease with heriot of best beast of lessee

Doe d Douglas v Lock no 2402 ante

2417 Evidence of ancient rent — Letter to previous life tenant — Containing particulars of estate

Where A, tenant for life, with a limited power of leasing, reserving the ancient rent, received a letter from a confidential agent in 1728, containing a minute account of the tenants and rents of the estate, which letter the tenant for life indorsed "A particular of my estate," etc, and handed down to B, the succeeding tenant for life, who had a like limited power of leasing, by whom it was also preserved and handed down amongst the muniments of the estate to the first tenant in tail: *Held* such paper was evidence for the tenant in tail against a lessee of B, in order to show that the rent reserved by B the tenant for life, was less than the ancient rent which was reserved at the time to which such paper referred; the paper having been accredited by the then owner of the estate, who had the means of knowing the fact, and who had an interest the other way, *viz*, to diminish the rent in order to increase his fine upon renewal under the power.

Roe d Brune v Rawlings (1806) 7 East 279; 3 Smith KB 254; 103 ER 107

2418 Evidence of ancient rent — Whether latest lease has greatest weight

By will of 1761 power was given to tenants for life to lease for lives, so that there were reserved in every such lease the ancient and accustomed rents and heriots for the premises, or more. By codicil of 1763, reciting that another child was born to testator since the making of his will, that his former children were provided for, and that he wished to provide for his last-born child, provision was made accordingly and the will was thereby also ratified. In a lease of 1724 the rent was £1; and a heriot, or £3 in lieu of it, was reserved; and the lease was granted on payment of a fine. By another lease, granted in 1762, between the times of making the will and the codicil, the rent was £15, and there was no heriot or fine. A tenant for life, in execution of the leasing power, granted a lease according to the lease of 1724: *Held* although the latest lease preceding the creation of the power was entitled to greater weight than any single earlier lease, and ought to govern the decision where there was a balance of evidence, yet, where the ancient custom appeared to have been uniform, and a single lease varying therefrom was granted just before the creation of the power, the exceptional lease ought not then to govern merely because it was the latest.

Doe d Biddulph v Hole (1850) 15 QB 848; 20 LJQB 57; 15 LTOS 392; 15 Jur 13; 117 ER 678

2419 Evidence of ancient rent — Previous lease of same premises

Doe d Douglas v Lock no 2402 ante

Scottish, Irish and Commonwealth Cases

2420 Whether highest rent need be reserved

Under a power to lease of the best rent, the highest rent need not be reserved.

Dyas v Cruise (1845) 2 Jo&Lat 460 (IR)

2421 Rent reserved not best rent — Partial performance of agreement decreed

Tenant for life, with power to lease at the best rent, agrees to make a demise for a term warranted by the power, but at a rent which afterwards appears not to be the best rent. There being no fraud in the transaction, the court will decree a partial performance of the agreement, and direct the tenant for life agreement as far as his estate enables him to do so.

Days v Cruise (1845) 2 Jo&Lat 460 (IR)

2422 Setting aside lease — Sufficiency of proof of inadequacy of rent

Where a court is satisfied that a lessee has acted in good faith, and where it appears that the person who is authorised to exercise leasing powers has acted *bonâ fide* before the court should go the length of setting aside a lease the strongest and most convincing proof of the inadequacy of the rent reserved should be forthcoming.

Carter v Shipley [1921] NZLR 1065 (NZ)

vi Power to re-enter for non-payment-of rent

2423 Lease providing for re-entry if rent in arrear — And no sufficient distress on premises

Tankerville (Lord) v Wingfield v Pritchard (1773) 7 Price 343n; 3 Bli 331n; 2 Brod&Bing 498n; 5 Moore CP 346n; 146 ER 993; sub nom

Hotley v Scot (1773) Lofft 316

ANNOTATION **Consd** Smith v Jersey (1821) 3 Bli 290

2424 Lease providing for re-entry if rent in arrear — and no sufficient distress on premises

A power reserved upon a marriage settlement to tenants for life to grant or renew leases for lives, provided that a right of re-entry is reserved upon such leases for non-payment of rent, is well executed by a lease for lives providing a re-entry in case the rent remains in arrears fifteen days, and there is no sufficient distress on the premises.

Smith v Jersey (Earl) (1821) 3 Bli 2909; 4 ER 610; sub nom

Smith v Doe d Jersey (Earl) (1821) 2 Brod&Bing 472; 5 Moore CP 332; 7 Price 379, HL; revsg SC sub nom

Doe d Jersey (Earl) v Smith (1819) 1 Brod&Bing 97, Ex Ch

ANNOTATIONS **Apld** Doe d Shrewsbury v Wilson (1822) 5 B&Ald 363 **Consd** Morris v Rhydydefed Colliery Co (1858) 3 H&N 473

2425 Lease providing for re-entry if rent in arrear — And no sufficient distress on premises

Testator by his will empowered his devisee for life of real estate to demise and lease for twenty-one years, "so as upon such lease there were reserved and made payable during the continuance thereof, the best improved yearly rent that could reasonably be had for the same, without taking any sum or sums of money by way of fine or income for or in respect of such lease or leases, and that in every such lease there should be contained a clause of re-entry for non-payment." In exercise of this power, a lease was made for twenty-one years, to hold from 11 October 1833, at the yearly rent of £903, payable by equal half-yearly payments, *viz*, on 6 April, and on 11 October, in every year, except the last half-year's rent, which was thereby reserved and agreed to be paid on 1 August, next before the determination of the term: *Held* this lease was a valid execution of the power.

Rutland v Doe d Wythe (1843) 12 M&W 355; 10 Cl&Fin 419; 152 ER 1235, HL

2426 Lease providing for re-entry if rent in arrear — And no sufficient distress on

premises — Period for re-entry different in power and lease
Coxe v Day no 2307 ante

2427 Lease providing for re-entry if rent in arrear — Admissibility in evidence of previous leases under power
Smith v Jersey (Earl) no 2424 ante

2428 Lease of reversion
Nugent v Cuthbert (1822) cited Sugden's Law of property 475, HL

ANNOTATION **Distd** Davies v Davies (1888) 38 Ch D 499

2429 Power to lease on usual conditions — Lease following terms of former lease — Containing no clause of re-entry
Power in a will, to let such part of testator's premises as had been usually granted, or demised, and were then in lease for any term of years, determinable on lives, to any persons for the like terms, and in like manner, and under the like rents, services and conditions, as the same had been usually granted; and the residue of the same premises unto any person for any term of years not exceeding twenty-one years in possession, at the best rent that could be reasonably gotten for the same; so as that no such demise or lease should be made dispunishable of waste, nor without a condition of re-entry on non-payment of the rent or services thereby reserved, and so as each lessee should execute a counterpart of his lease: *Held* a lease made under this power, of lands, which were in lease at the time of the creation of the power, the second lease accurately following the terms of the former lease of the same land, was well executed under this power, though the second lease did not contain a clause of re-entry on non-payment of 40*s* reserved in lieu of heriot; the first lease containing no clause of re-entry on non-payment of a like reservation.
Doe d Bligh v Colman (1822) 1 Bing 28; 7 Moore CP 271; 130 ER 12

vii Other cases

2430 Power to lease for term of years — Lease for longer term — Valid for authorised term
Where a person has power to lease for ten years, and he leases for twenty, it is good in equity for ten.
Parry v Brown (1663) Freem Ch 171; 22 ER 137; sub nom
Parry v Bowen (1663) Nels 87; 3 Rep Ch 11; sub nom *Pawcy v Bowen* (1663) 1 Cas in Ch 23, LC

2431 Power to lease for term of years — Lease for longer term — Valid for authorised term
Tenant for life of estate, on which were mines opened, with power to let leases in possession for twenty-one years, reserving best rent, leases the mines, opened and unopened, for twenty-six years, without reference to the power, and before the expiration of a former lease, reserving ore as rent to him, his heirs, and assigns. The former lease shall be presumed surrendered. The lease shall bind the remainderman for twenty-one years.
Campbell v Leach (1775) 2 Amb 740; 27 ER 478, LC

ANNOTATION **Consd** Medwin v Sandham (1789) 3 Swan 685

2432 Power to lease for term of years — Lease for longer term
By marriage settlement, husband has the wife's estate for life, with power to grant leases for twenty-one years, but no longer. In breach of the power he grants a lease to A for ninety-nine years, determinable upon lives. Wife survives him, and conveys the fee to B; and in the conveyance is recited the lease to A, who is recognised as then being tenant in possession of the estate, at the yearly rent reserved.

B brings ejectment against the assignees of the lease: *Held* the lease being void, and the recital being only matter of description, no demand of possession was necessary to sustain the action.
Doe d Biggs v White (1823) 2 Dow&Ry KB 716; 1 LJOSKB 170

2433 Power to lease for term of years — Mines open and unopened on estate — Lease of both at gross rent
Campbell v Leach no 2431 ante

2434 Power to lease for term of years — Or lives — Lease for years determinable on lives
An estate, the greater part of which was in lease, either for years certain not exceeding twenty-one, or for longer terms of years determinable on lives, was settled on several tenants for life in succession, with remainders in tail; with power to every tenant for life "who should be entitled to the freehold of the premises or any part thereof, when he should be in the actual possession of the same, or any part thereof, from time to time, by indenture to make leases of all or any part or parts of the demesne lands, whereof he should be in the actual possession as aforesaid, for any term or number of years not exceeding twenty-one years, or for the life or lives of any one, two or three person or persons: so as no greater estate than for three lives be at any one time in being in any part of the premises; and so as the ancient yearly rent, etc, be reserved": *Held* the power only authorised either a chattel lease not exceeding twenty-one years, or a freehold lease not exceeding three lives; and a lease by tenant for life for ninety-nine years determinable on lives, as it might exceed

twenty-one years, was void at law, and was not even good *pro tanto* for the twenty-one years.
Roe d Brune v Prideaux (1808) 10 East 158; 103 ER 735

2435 Power to lease for term of years — Or lives — Freehold lease
Doe d— v Davis (1845) 5 LTOS 563

2436 Power to lease for term of years — "Term not exceeding twenty-one years" — Lease for twenty-one years — Determinable at option of lessee at certain periods
The trustees of a marriage settlement containing a power of leasing "for any term or number of years not exceeding twenty-one years," agreed to grant a lease of the mansion house and grounds for a term of twenty-one years, determinable at the option of the lessee at the end of the first seven or four years of the term: *Held* such a lease was within the power.
Edwards v Millbank (1859) 4 Drew 606; 29 LJ Ch 45; 7 WR 651; 62 ER 232

ANNOTATION **Consd** R v Bird [1909] 1 KB 827

2437 Power to lease for term of years — Lease for shorter term
Easton v Pratt no 2354 ante

2438 Power to lease with usual and reasonable covenants — Covenant for lessor to rebuild if premises blown down or burned
Under a power to a tenant for life to lease for years, reserving the usual covenants, etc, a lease made by him, containing a proviso, that in case the premises were blown down or burned, the lessor should rebuild, otherwise the rent should cease, is void; the jury finding that such covenant is unusual.
Doe d Ellis & Medwin v Sandham (1787) 1 Term Rep 705; 99 ER 1332; subsequent proceedings, sub nom
Medwin v Sandham (1789) 3 Swan 685

2439 Power to lease with usual and reasonable covenants — Usual covenants of district — Covenant by lessor to repair
Under a power to lease for twenty-one years reserving the best rent, so as the lease should not contain any clause whereby authority should be given to the lessee to commit waste, or whereby he should be exempted from punishment for committing waste, and so as such lease should contain such other conditions, covenants, and restrictions, as were generally inserted according to the usage of the counties where the premises were: *Held* a lease was good, though the lessor thereby took the repairs of the mansion house, excepting the glass windows, on himself, and covenanted that if he did not repair it within three months after notice, the tenant might and deduct the charges out of the rent reserved to the lessor, and though the lessor covenanted, in consideration of a large sum to be laid out by the lessee in the repair of the premises in the first instance, to renew during his, lessor's, life at the request of the lessee, his executors, etc, on the same terms, because this covenant only bound the lessor himself, and if the best rent were not reserved upon such renewal, the lease would be void against the remainderman.
Doe d Bromley v Bettison (1810) 12 East 305; 104 ER 119

ANNOTATIONS **Distd** Yellowly v Gower (1855) 11 Exch 274 **Consd** Gas Light & Coke Co v Towse (1887) 35 Ch D 519

2440 Power to lease with usual and reasonable covenants — Proviso for re-entry if rent twenty days in arrear — Former period twenty-one days
Doe d Douglas v Lock no 2402 ante

2441 Power to lease with usual and reasonable covenants — Proviso for re-entry if no distress on premises — Former proviso if no overt distress
Doe d Douglas v Lock no 2402 ante

2442 Power to add lives — Or exchange lives — Construction of power
Under a devise of seven different estates to a sister, brothers, and nephews, respectively, on to each stock, including as to six of the estates, three several lives in succession on each estate, and as to the seventh, which in the first instance was only limited to two persons for life in succession, giving those two a power "to add another life or lives to make three in like manner as after mentioned, for other persons to do the same"; and then giving this general power "that when and so often as the lives on either of the estates before given shall be by death reduced to two, that then it shall be in the power of the person or persons then enjoying the estate or estates to renew the same with the person or persons to whom the revenue thereof shall belong by adding a third life in such estate, and paying such reversioner two years' purchase, for such renewal; and also to exchange either of the two lives on payment of one year's purchase": *Held* this power of renewal only authorised the addition of one life to the three on each estate, and of making one exchange of a life.
Doe d Hardwicke v Hardwicke (1809) 10 East 549; 103 ER 884

2443 Power to lease by deed — Parol lease
Under a parol demise from year to year, by a tenant for life, with power to lease by deed, etc, the interest

of the lessee determines with the life of the lessor, and the rent is apportionable.

Re Smyth, Ex p Smyth (1818) 1 Swan 337; 36 ER 412, LC

2444 Power to lease without impeachment of waste — Condition in lease to pay ten pounds per acre for ploughing up pasture land

A lease granted by virtue of a power enabling tenant for life to make leases without impeachment of waste, contained a proviso that the tenant should pay a further rent of £10 per acre for ploughing up pasture land or for managing the farm contrary to the covenants. In an action to recover the penalty, a motion in arrest of judgment on the ground that this amounted to a licence to commit waste, was disallowed. *Quaere*: whether the above reservation was a rent or a penalty.

Bringloe v Goodson (1839) 8 Scott 71; subsequent proceedings 5 Bing NC 738

2445 Power to lease without impeachment of waste — Covenant by lessee not to plough up pasture — Except on system employed by life tenant

Doe d Hopkinson v Ferrand no 2394 ante

2446 Power to lease without impeachment of waste — Covenant in lease that lessor shall do repairs

By a settlement made in 1840, S, in contemplation of his marriage, conveyed certain real estates to trustees to his own use until the marriage, and after the marriage to the trustees their executors, administrators, and assigns, for the term of 500 years without impeachment of waste upon certain trusts, and immediately after the expiration or sooner determination thereof, and in the meantime subject thereto, to the use of S for life, without impeachment of waste, with remainder to certain other uses. It was also provided by the deed, that it should be lawful for S during his life, from time to time, by deed either referring to or not referring to the power, to demise the real estate for any term not exceeding twenty-one years, so that there should be reserved the best or most improved yearly rent, to be incident to the immediate reversion of the hereditaments so demised, that could be obtained for the same, so that the lessee was not by any clause or words therein to be contained made dispunishable for waste, or exempted from punishment for committing waste. The marriage took place, and S afterwards, by deed, leased the premises to defendant for twelve years. By the lease which did not refer to the deed of settlement, the rent was reserved to S, his heirs and assigns; and it contained a covenant by the lessee to repair a blacksmith's shop, and all the glass and lead-work of the windows of the messuages, and all doors, etc, the lessee being allowed sufficient bricks, etc, for the repairs, and to yield up the premises so repaired at the end of the term to S, his heirs and assigns; there was also a covenant by S that he would repair all the messuages, houses, outhouses, edifices, and buildings except in respect of repairs thereinbefore covenanted to be done by defendant. S died before the expiration of the term. In an action by the trustees against the lessee for a breach of the covenants of the lease, in not repairing the premises: *Held* the lease was not in pursuance of the power, and void as between the trustees and the lessee, because the condition as to the rent being reserved incident to the immediate reversion was not performed, for the rent was made payable to "S, his heirs and assigns," and S had no legal reversion, and because the lease contained an implied exemption from punishment for permissive waste.

Yellowly v Gower (1855) 11 Exch 274; 24 LJ Ex 289; 156 ER 833

2447 Power to lease without impeachment of waste — Power in lease to dig and use stones, etc, for colliery and buildings

An indenture of settlement contained a power for the tenant for life to lease for lives certain hereditaments to any person willing to build houses thereon. Also a power to lease for sixty-three years the coal mines under the lands "with all such powers, authorities, accommodations, liberties, and privileges as shall be necessary or are usually contained in leases of collieries or mines in the county, place, or neighbourhood where the collieries intended to be demised are or shall be situate, for seeking, winning, working, drawing, taking, and carrying away the coals; so as the lessees be not made dispunishable for waste by any express words therein contained. In an execution of this power the tenant for life granted a lease which contained a power for the lessee "to erect, build and construct, and set up in and upon the mines, lands and premises, all such engine houses, machine offices, counting houses, warehouses, store rooms, workshops, workmen's cottages, huts, etc, erections, buildings and accommodations as shall be *bonâ fide* necessary or proper for or in the due prosecution and carrying on of the works." There was also a power to dig and use stones, slate, brick earth and materials in any part of the land which should be required for the collieries or for any buildings thereby authorised to be made in the exercise of any power thereby granted. Ejectment having been brought to recover possession of the coal mines on the ground that the lease was not a due execution of the power, the jury found that a power to build cottages in places convenient with reference to the works was both

necessary and usual in leases of collieries in the neighbourhood: *Held* the lease was not in excess of the power; the lease was not void on the ground that the power to build was in violation of the provision in the settlement that the lessees should not be made dispunishable for waste.

Morris v Rhydydefed Colliery Co (1858) 3 H&N 885; 28 LJ Ex 119; 32 LTOS 163; 5 Jur NS 439; 7 WR 95; 157 ER 726, Ex Ch

ANNOTATION **Consd** Re Reveley's SE (1863) 32 LJ Ch 812

2448 Power to lease for twenty-one years at best rent without waste — Lease of part with sporting rights over rest

Estates, hereditaments, and premises were devised to R for life with power to the tenant for life to make any lease of the several estates, hereditaments, and premises, or any part or parts thereof, for twenty-one years, reserving the most improved yearly rent with a condition for re-entry on non-payment, so that there should be no clause giving the lessee power to commit waste, and so as the rent should be incident to, and go along with, the reversion: *Held* this power did not authorise a lease of part of the land with liberty to sport over the rest.

Dayrell v Hoare (1840) 12 Ad&El 356; 4 Per&Dav 114; 9 LJQB 299; 113 ER 847

ANNOTATIONS **Distd** Brown v Peto [1900] 2 QB 653 **Apprvd** Re Gladstone, Gladstone v Gladstone [1900] 2 Ch 101

2449 Lessee to execute counterpart — Execution not contemporaneous with lease

Fryer v Coombs no 2403 ante

2450 Lease by way of mortgage

G, a tenant for life in a marriage settlement, was thereby empowered to make leases for lives of lands in Ireland, at the best rent, without fine, and a power was also given, with the consent of trustees, to raise any sum of money. The trustees, in pursuance of the power, consent that G should, by mortgaging all or any part of the lands, or in any other manner he should think fit, raise any sum of money not exceeding £5,000.

Under this power and consent G, in consideration of £300 and a rent, grants to V part of the lands in settlement upon a lease for lives. The grant, and a receipt expressing that the £300 was raised under the power and consent as part of the £5,000, were duly registered.

Before, and at the date of this grant, V was the solicitor of G, who was involved in litigation, and in distress.

The rent, with the premium calculated at six per cent, were considerably short of the annual value of the lands.

Upon a bill, by a tenant in remainder under the settlement, to set aside the lease, and on appeal: *Held* the lease was a good execution of the power to raise money; but void, as obtained by a solicitor from his client, in circumstances of embarrassment, and at an undervalue.

Ward v Hartpole (1776) 3 Bli 470; 4 ER 671, HL

2451 Lease by way of mortgage

M, who died in 1831, settled certain real estates, and empowered the tenant for life thereof to grant leases of the mines therein for such term or number of years, and under and subject to such rents or reservations and agreements as to such tenant for life should seem reasonable and proper.

In 1843 L, the first tenant for life, demised to C the collieries comprised in a lease made in 1829 which expired in 1848, with powers to work, etc, "except as in the indenture of lease was excepted," for ninety-nine years at a peppercorn rent, subject to redemption on payment of £6,000 and interest: *Held* the mortgage of 1843 was a valid exercise of the leasing power.

Mostyn v Lancaster, Taylor v Mostyn (1883) 23 Ch D 583; 52 LJ Ch 848; 48 LT 715; 31 WR 686, CA

2452 Power to lay out land as roads and to lease — Grant of right of way to particular lessees

A private estate Act, enabling tenants for life to grant building leases, empowered the lessors to lay out and appropriate any part of the land authorised to be leased, as and for a way, street, square, passage, or sewer, or other conveniences for the general improvement of the estate and the accommodation of the tenants and occupiers: *Held* exclusive private rights of way over land so appropriated for a way, might be granted to particular lessees, as such appropriation did not confer a right of user by all the tenants and occupiers.

White v Leeson (1859) 5 H&N 53; 29 LJ Ex 105; 1 LT 189; 24 JP 24; 5 Jur NS 1361; 8 WR 137; 157 ER 1097

2453 Power to lease mines and pay profits to trustees for investment — Lease for sixty years — Power construed as restricted to life tenancy

A gift of a power to lease mines and minerals, following the gift of a life estate in the real property of which they form part, though expressed in general terms, does not of necessity imply a power in the tenant for life to make a lease exceeding the term of his own life. A devised his estates to his daughter for her life, without impeachment of waste, and then to

her issue, male and female, and in default of such issue, over. The will gave the daughter, or any person in possession under the limitations in the will, power to work or to make a lease of the mines. She was to receive and pay over to trustees the rents and profits of the mines, which were to be applied to the purchase of other estates, of which she was to receive the rents for her own life. While in possession she made a lease, reciting the will and granting a term of sixty years: *Held* the lease was not warranted by the power, for on the whole will it appeared to be the intention of testator to restrict her to making a lease for her own life only.
Vivian v Jegon (1868) LR 3 HL 285; 37 LJCP 313; 19 LT 218, HL; affg SC sub nom
Jegon v Vivian (1867) LR 2 CP 422, Ex Ch

3 Leases under statutory powers

A In general

2454 Appointment of trustees
Re Bentley, Wade v Wilson no 1858 ante

2455 Appointment of trustees — Protection of lessee
Mogridge v Clapp no 2047 ante

2456 Bonâ fide exercise of power — Necessity for
Sutherland (Dowager Duchess) v Sutherland (Duke) no 2291 ante

2457 Bonâ fide exercise of power — Necessity for
Re Handman & Wilcox's Contract no 2469 post

2458 Bonâ fide exercise of power — What amounts to — Lease to wife of tenant for life
Sutherland (Dowager Duchess) v Sutherland (Duke) no 2291 ante

2459 Bonâ fide exercise of power — What amounts to — Lease to wife of tenant for life — Principal mansion house
Gilbey v Rush no 2067 ante

2460 Bonâ fide exercise of power — What amounts to — Lease of public-house — With covenant against sale of intoxicating liquors
Re Somers (Earl), Cocks v Somerset (1895) 11 TLR 567; 39 Sol Jo 705

2461 Bonâ fide exercise of power — What amounts to — Lease to intended husband
Defendant was entitled under the will of her deceased husband to the use and enjoyment rent free of a certain house for so long during her widowhood as she should personally reside in the same. Being minded to marry again, she proposed to exercise her leasing powers as tenant for life under Settled Land Acts (repealed) by granting a lease of the house to her intended husband for twenty-one years. Plaintiffs, who were entitled in remainder on the cesser of her interest, objected to the lease and brought an action to restrain her from granting it. On a motion for an injunction: *Held* having regard to defendant's object in granting the lease, it was not a *bonâ fide* exercise of the powers of a tenant for life under the Settled Land Acts (repealed), and plaintiffs were entitled to succeed.

Middlemas v Stevens [1901] 1 Ch 574; 70 LJ Ch 320; 84 LT 47; 49 WR 430; 17 TLR 214

2462 Bonâ fide exercise of power — What amounts to — Lease to make provision for tenant for life and wife

A tenant for life of a mansion house and lands, part of the settled estate, granted a lease for twenty-one years from 25 March 1909, to his son-in-law, at a rental of £380 per annum, which was less than the best rent obtainable. The son-in-law never entered into possession of the property or performed any of the covenants in the lease, but subdemised it at a peppercorn rent to the tent for life and his wife for the full team of twenty-one years less one day, if they or the survivor of them should so long live. The tenant in fee simple in remainder was adjudged bankrupt in March 1916, and the trustee in bankruptcy issued a writ in July 1918, against the son-in-law to have the lease declared void, and judgment was given to this effect in January 1919. The tenant for life had died in July 1917, and his wife, not having been made defendant to the action, had been allowed to remain in possession of the mansion house and lands. She now claimed to remain in possession of the mansion house and lands as of right, and the trustee in bankruptcy accordingly moved for a declaration that he was entitled to vacant possession as against her: *Held* this lease was not a lease which was intended "to take effect in possession not later than twelve months after this date" within Settled Land Act 1882 (c 38) s 2(1) (repealed), and it had not reserved "the best rent that can reasonably be obtained" within s 7(2) (repealed) of the Act, and, accordingly, that there never was a *bonâ fide* exercise of the power of leasing under Settled Land Act 1882 (c 38) (repealed), but an abuse of that power for the purpose of making provisions for the tenant for life and his wife, with the result that the lease was void and the trustee entitled to possession.

Re Cornwallis West, Ex p Trustee (1919) 88 LJKB 1237; [1918–19] B&CR 231

2463 Lease by tenant for life to himself and others — Purported covenants between lessees and lessor
Boyce v Edbrooke no 2470 post

B Time for commencement

2464 General rule — Lease must take effect in possession within twelve months
Re Cornwallis West, Ex p Trustee no 2462 ante

2465 General rule — Lease must take effect in possession within twelve months — Effect of existence of underlease
A lease might be authorised under the Leases & Sales of Settled Estates Acts 1856 (c 120) (repealed) upon the surrender of an existing lease, although an underlease granted by the surrendering lessee was unexpired.
Re Ford's Settled Estate (1869) LR 8 Eq 309

ANNOTATION **Follld** Re Grosvenor Settled Estates, Westminster (Duke) v McKenna [1932] 1 Ch 232

2466 General rule — Lease must take effect in possession within twelve months — Effect of existence of underlease
Part of the freehold property comprised in a settlement was subject to a lease and also to an underlease. The tenant for life under the settlement wished to take a surrender of the lease and, without having a surrender of the underlease, to grant a new lease. On the evidence the proposed new lease reserved the best rent that could reasonably be obtained, and contained a proviso for re-entry on non-payment of the rent for twenty-one days: *Held* the tenant for life had power under Settled Land Act 1925 (c 18) s 42(1), and Law of Property Act 1925 (c 20) s 150, to grant the new lease although the underlease remained outstanding. The new lease would take effect in immediate possession notwithstanding the existence of the underlease, and would therefore comply with Settled Land Act 1925 (c 18) s 42(1).
Re Grosvenor Settled Estates, Westminster (Duke) v McKenna [1932] 1 Ch 232; 101 LJ Ch 145; 146 LT 402

2467 General rule — Lease must take effect in possession within twelve months — Effect of Settled Land Act 1925 (c 18) s 90(1)(ii)
Re Rycroft's Settlemts, Rycroft v Rycroft no 2296 ante

2468 Validity of covenant to grant lease in future — Sub-lease
The court had no power under Settled Estates Act 1877 (c 18) ss 4, 5 (repealed) to sanction a sub-lease of settled land, held under a renewable lease, for the unexpired residue of the term, with a covenant for the extension of the term by a further sub-lease after the renewal of the head lease. Such a lease would, as regards the further lease, not have been a lease taking effect in possession.
Re Farnell's Settled Estates (1886) 33 Ch D 599; 35 WR 250

ANNOTATION **Distd** Re Rycroft's Settlmts [1961] 3 All ER 581

C Rent

2469 Best rent — Necessity for
A tenant for life, purporting to act under the powers of Settled Land Act 1882 (c 38) (repealed), granted a building lease of some vacant land at less than the best rent that could reasonably be obtained, the rent having been reduced in consideration of the waiver by the lessee of a claim for damages against the lessor, and the lessee covenanted to lay out a certain sum in building. The lessee neglected to build, and the lease was sold by auction to the vendor at a large price. The vendor agreed to sell at an enhanced price to the purchaser, and the purchaser objected that, having regard to the amount of the price, it must be shown that the rent reserved by the lease was the best that could reasonably be obtained within Settled Land Act 1882 (c 38) s 7(2) (repealed). The vendor had no knowledge of the arrangement between the lessor and the lessee as to the reduction of the rent, and he insisted that, as purchaser for value without notice, he could make a good title to the purchaser: *Held* that, inasmuch as the lease did not comply with the statutory requirements as to rent, and the lessee did not act in good faith within s 54 (repealed), it was bad, and could be set aside as against a purchaser for value without notice.
Re Handman & Wilcox's Contract [1902] 1 Ch 599; 71 LJ Ch 263; 86 LT 246, CA

2470 Best rent — Necessity for
A tenant for life purported, in exercise of the powers of Settled Estates Act 1877 (c 18) s 46 (repealed), to demise the settled messuage, works, and premises to himself and his two partners for twenty-one years, the lease containing the usual lessee's covenants entered into by the three lessees jointly. A certain rent was reserved by the lease, but dehors the lease it was arranged between the partners that the tenant for life should be allowed to occupy the house rent free, and should receive an additional rent as compensation in the event of his ceasing to reside there. In an action by the remaindermen, after the death of the tenant for life, to recover possession of the premises from an assignee of the lease: *Held* the lease was void for non-compliance with the requirements of Settled Estates Act 1877 (c 18) s 46 (repealed), on the ground that (1) the best rent had not been

reserved; and (2) because the covenants in the lease, being joint covenants by a man and others with himself, were not enforceable at law, and consequently were not proper covenants within the meaning of the section, or such as the reversioners were entitled to have inserted in the lease.

Boyce v Edbrooke [1903] 1 Ch 836; 72 LJ Ch 547; 88 LT 344; 51 WR 424

ANNOTATION As to (2) **Apld** Ellis v Kerr [1910] 1 Ch 529

2471 Best rent — Necessity for

In 1905 defendants, a brewery company, who were lessees of licensed premises at a yearly rent of £150 under a lease for fourteen years from 24 June 1902, granted under Settled Land Act 1882 (c 38) (repealed), by previous tenant for life, deducted from their rent the compensation fund charges levied under the provisions of Licensing Act 1904 (c 23) (repealed). The tenant for life, who was an illiterate man, complained of the deductions and defendants subsequently agreed that if he granted them a new lease for twenty-one years at the same of £150, they would pay the charges themselves. Accordingly, the tenant for life, without having any legal assistance or consulting the solicitor to the settled trust estate, in exercise of his statutory powers granted defendants a new lease of the licensed premises for twenty-one years at a yearly rent of £150, and defendants covenanted to pay the rent without deduction, and also to pay all rates, taxes, assessments and charges, including all payments to the compensation fund under Licensing Act 1904 (c 23) (repealed), which then were or during the term should be charged on the demised premises without making any deduction from rent in respect thereof. Defendants had paid the charges under the Licensing Act (repealed) in fulfilment of their promise.

In an action by the remainderman against defendants for declaration that the lease did not reserve the best rent that could reasonably be obtained, and was not binding upon them: *Held* there was no valid reservation in the lease of the real amount which was to be paid for the use of the premises; the rent which was really reserved was £150 subject to the deductions, and no more, and was obviously in the circumstances, not the best rent that could be obtained; and therefore the new lease was not a valid lease under Settled Land Act 1882 (c 38) (repealed), so as to be binding upon the remaindermen.

Pumford v Butler (W) & Co Ltd [1914] 2 Ch 353; 83 LJ Ch 858; 111 LT 408; 78 JP 457; 30 TLR 556; 58 Sol Jo 655

2472 Best rent — Necessity for — Onus of proof

A tenant for life granted to defendant a weekly tenancy of premises to which the Rent Restriction Acts applied. After the death of the tenant for life, plaintiff, the sole surviving trustee of the settlement, in an action for possession for the premises, sought to raise a point that had not been pleaded, namely, that the tenancy had not reserved the best rent within Settled Land Act 1925 (c 18) s 42(1)(ii), and the onus of proving that the rent reserved was the best rent was on defendant: *Held* since the point concerning the best rent had not been pleaded, it was not open to plaintiff to raise it in argument; and, even if the point had been open to plaintiff, the onus of proving that the rent reserved by the tenancy was the best rent was not on defendant, who could rely on the provisions of Settled Land Act 1925 (c 18) s 110(1).

Per *Romer LJ*: *semble* Settled Land Act 1925 (c 18) s 42(5), is a comprehensive code in relation to leases for less than three years with the result that the requirement in s 42(1)(iii) as to re-entry in regard to longer leases is not introduced into those short leases.

Davies v Hall [1954] 2 All ER 330; 98 Sol Jo 370, CA

ANNOTATION **Consd** Re Morgan's Lease, Jones v Norsesowicz [1971] 2 All ER 235

2473 Best rent — Meaning of

There is but one criterion which our courts always attend to as a leading criterion in discussing the question whether the best rent has been got or not, that is, whether the man who makes the lease has got as much for others as he has for himself; if he has got more for himself than for others, that is decisive evidence against him (*Lord Eldon C*).

Montgomery v Charteris (Earl of Wemyss), Buccleuch (Duke) v Montgomery, Queensberry Leases (1817) 5 Dow 293, 344; 3 ER 1334, HL

ANNOTATIONS **Apld** Chandler v Bradley [1897] 1 Ch 315
Consd Boyce v Edbrooke (1903) 72 LJ Ch 547

2474 Best rent — Meaning of

Leases and Sale of Settled Estate Act 1856 (c 120) s 2 (repealed), requiring the best rent to be reserved, was modified by s 5 (repealed) of the same Act, extended by 21 and 22 Victoria c 77 s 5 (repealed), which allowed the court to permit the surrender of existing leases and the grant of new leases of the property surrendered. The best rent meant the best that under all the circumstances could reasonably be had, taking into account the value of the lease surrendered.

Re Rawlins' Estate (1865) LR 1 Eq 286; 13 LT 626; 14 WR 218

2475 Best rent — What may be taken into consideration — Value of lease surrendered

Re Rawlins' Estate no 2474 ante

2476 Best rent — What may be taken into consideration — "Money laid out" — Past voluntary expenditure

Past voluntary expenditure by lessee on buildings comprised in his lease was not consideration in law which would justify a tenant for life in granting a lease under Settled Land Act 1882 (c 38) s 8(1) (repealed), at less than the best rent that could be reasonably obtained as required by s 7(2) (repealed); neither could such expenditure be regarded as "money laid out" within s 7(2) (repealed), inasmuch as these words must have been taken to refer to money laid out for the benefit of the settled land with direct reference to the grant of the lease.

Re Chawner's Settled Estates [1892] 2 Ch 192; 61 LJ Ch 331; 66 LT 745; 40 WR 538; 8 TLR 466; 36 Sol Jo 397

2477 Best rent — Effect of bribe to tenant for life

C, tenant for life of a freehold house, who had mortgaged his life interest, in 1892 granted to defendant a lease of the premises for seven years in consideration of a yearly rent of £25 and covenants by the lessee to execute certain repairs and improvements. As an inducement to execute the deed defendant had paid to C the sum of £21, which he applied to his own use. There was no evidence that a higher rent could have been obtained. The lease purported to be granted by the mortgagees at the request of C and by C, as tenant for life, by virtue of the Settled Land Act 1882 (repealed). C died in 1895. In an action to set aside the lease: *Held* (1) the court, in giving relief to the beneficiaries, would not consider the question whether, they had been damnified or not; (2) on the evidence the payment to C could not be regarded as a fine, and the liability of defendant was not therefore limited to paying the sum over again to trustees appointed for the purposes of Settled Land Acts (repealed); and (3) having regard to the improper payment to C, the "best rent" required by Settled Land Act 1882 (c 38) s 7(2) (repealed), had not been obtained, and consequently the lease was void.

Chandler v Bradley [1897] 1 Ch 315; 66 LJ Ch 214; 75 LT 581; 45 WR 296; 41 Sol Jo 157

ANNOTATION As to (3) **Consd** Handman v Wilcox Contract [1902] 1 Ch 599

2478 Necessity for valid reservation in lease

Pumford v Butler (W) & Co Ltd no 2471 ante

D Building leases

2479 Necessity for valid reservation in lease — Lease of part not built over

Re Sabin's Settled Estates [1885] WN 197

2480 Necessity for valid reservation in lease — Agreement by lessee for expenditure on improvements and repairs — Other than work normally undertaken by landlord

A lease made partly in consideration of the lessee agreeing to extend a specific sum of money in doing the improvements and repairs specified in a schedule was a building lease within Settled Land Act 1882 (c 38) s 8(1) (repealed). The court, in the exercise of its discretion under Settled Land Act 1884 (c 78) s 7 (repealed), would not sanction a building lease in which the repairs or improvements agreed to be done by the lessee were such as an ordinary landlord was expected to do.

Re Daniell's Settled Estates [1894] 3 Ch 503; 64 LJ Ch 173; 71 LT 563; 43 WR 133; 38 Sol Jo 707; 7 R 462, CA

2481 Necessity for valid reservation in lease — Agreement by lessee for expenditure on improvements and repairs — "Substantial improvements"

Re Ellesmere (Earl) [1898] WN 18

2482 Grant as absolute owner — Without reference to statutory power — Operation under the statutes

Mogridge v Clapp no 2047 ante

2483 Consideration — Voluntary expenditure by lessee

Re Chawner's Settled Estates no 2476 ante

2484 Covenant to rebuild when necessary — Validity

A tenant for life has power under Settled Land Act 1925 (c 18) s 41, to grant a building lease for a term of 999 years containing a covenant by the lessee to rebuild existing premises when it shall become necessary, and in particular when required by the lessor's estate surveyor so to do, but without prescribing any definite time within which such rebuilding shall be carried out or begun.

Re Grosvenor Settled Estates, Westminster (Duke) v McKenna [1933] Ch 97; 102 LJ Ch 50; 148 LT 131; 49 TLR 7; 76 Sol Jo 779

2485 Lease in lots — Rent must exceed one-fifth of annual value

Re Rycroft's Settlmts, Rycroft v Rycroft no 2296 ante

Scottish, Irish and Commonwealth Cases

2486 Power to grant renewable building leases

In applying English Settled Estates Act 1856 (c 10) to this Province, the words "usual custom" in s 2 must be satisfied with something less than the immemorial custom of England. It is satisfied by proof of a well recognised method or usage of framing building leases in a given locality. Under that Act and 53 Victoria c 14 (O), the power to

lease with extended right of renewal may be granted up to 999 years.
Re Watson's Trusts (1892) 21 OR 528 (CAN)

2487 Lease for five hundred years
Leave was given to a tenant for life of a settlement to grant a building lease of settled land for five hundred years, under Settled Land Act 1882 (c 38) s 10(2).
Re O'Connell's Estate [1903] 1 IR 154 (IR)

E Mining leases

CROSS REFERENCE See MINES vol 34 (reissue) no 1529 et seq (mining leases in general)

F Forestry leases

4 Leases not authorised by powers

2488 Express power — Governed by intention of settlor
Vivian v Jegon no 2287 ante

2489 Lease good during life of tenant for life
Sutton's Case no 2453 ante

viii POWER TO SELL HEIRLOOMS

1 In general

LAW See Halsbury's Laws (4th edn) vol 42 para 942 et seq

CROSS REFERENCES See no 2158 et seq ante (application of proceeds of sale), no 2501 et seq (circumstances affecting court's decision)

2490 Jurisdiction of court of sanction — Merely on ground of benefit to all concerned
The court has no jurisdiction to order a sale of heirlooms which are settled in strict settlement, simply on the ground that a sale would be for the benefit of all parties interested.
D'Eyncourt v Gregory (1876) 3 Ch D 635; 45 LJ Ch 205, 741; 25 WR 6

ANNOTATION **Consd** Re Rivett-Carnac's Will (1885) 30 Ch D 136

2491 Jurisdiction of court of sanction — Sanction ex post facto — Heirlooms already sold
Re Ames, Ames v Ames no 2029 ante

2492 Heirlooms settled to devolve with a dignity
Re Rivett-Carnac's Wilt no 2198 ante

2493 Control of court — Discretionary
Re Beaumont's Settled Estates no 2521 post

2494 Control of court — Discretionary
(1) In exercising the power of sale of heirlooms conferred upon a tenant for life of settled estate by Settled Land Act 1882 (c 38) s 37 (repealed), the tenant for life was, by force of s 53 (repealed), in the position of a trustee with a discretionary power to sell, and had to have regard, not to his own interests alone, but to the interests of all persons entitled under the settlement, the interest of those remotely entitled being of less weight than the interest of those nearer to the succession. The court, in giving its sanction to any such proposed sale, had in the exercise of its judicial discretion to be satisfied that, under the circumstances of each particular case, the sale was reasonable and proper, having regard to the interests of all parties entitled.

(2) Now, as a general rule, I think that the circumstance that the tenant for life has incumbered his life estate under the settlement ought to be excluded from consideration by the court on a question of granting or refusing an order sanctioning a sale of heirlooms (*Chitty J*).
Re Radnor's (Earl) Will Trusts (1890) 45 Ch D 402; 59 LJ Ch 782; 63 LT 191; 6 TLR 480, CA

ANNOTATIONS As to (1) **Consd** Re Ailesbury's SE [1892] 1 Ch 506; Re Fetherstonhaugh's Estate (1898) 14 TLR 167 **Apld** Re Hope, De Cetto v Hope [1899] Ch 679 **Consd** Re Townshend's Settlmt (1903) 89 LT 691 **Apld** Re Hope's SE (1910) 26 TLR 413

2495 Control of court — Discretionary
Re Hope's Settlement no 2501 post

2496 Duty of tenant for life — To act as trustee for all persons interested
Re Radnor's (Earl) Will Trusts no 2494 ante

2497 Duty of tenant for life — To act as trustee for all persons interested
(1) A tenant for life applying to the court under Settled Land Act 1882 (c 38) s 37 (repealed), for leave to sell heirlooms with a view to obtaining an increased income, had to show that the proposed sale was in the interests of all parties entitled under the settlement, and the fact of his having got himself into difficulties by his own extravagance was not a circumstance which would have any weight with the court in favour of a sale.

(2) If the application was for leave to sell an heirloom of unique character and historical repute, such as a famous jewel or work of art, the court, in the exercise of the judicial discretion given to it by the Act (repealed), would have regard to the intention of the settlor and also to the wishes and feelings of the remaindermen.
Re Hope, De Cetto v Hope [1899] 2 Ch 679; 68 LJ Ch 625; 81 LT 141; 47 WR 641; 43 Sol Jo 655, CA

2498 Duty of tenant for life — To act as trustee for all persons interested

A tenant for life was to be regarded as a trustee for all the persons interested in the settled estate, and in exercising the extensive powers conferred upon him by the Settled Land Acts (repealed), he was bound to regard not his own interests only, but also those of the persons who were to follow him. In considering those interests more weight had to be given to those of persons nearest in succession than to the interests of those who were more remote. The court's duty, when asked to sanction an exercise of the tenant for life's powers under the Acts (repealed), was to put itself in the position of an honest tenant for life striving to do his duty with regard to the interests of all concerned; the court might, however, properly give a certain weight to the opinions and wishes of the tenant for life as head of the family.

The court sanctioned the sale by a tenant for life of certain heirlooms.

Re Hope's Settled Estates (1910) 26 TLR 413

2499 Case for sale must be made out

Re Hope's Settlement no 2501 post

2500 Conditional sanction — Subject to sale of estate

Re Ailesury Heirlooms (1893) 37 Sol Jo 561

2 Circumstances affecting court's decision

LAW See Halsbury's Laws (4th edn) vol 42 para 947

2501 Circumstances of each particular case

(1) The discretion [of the court regarding sale of heirlooms] is a judicial discretion to be exercised in the circumstances of the case (*Chitty J*).

(2) The circumstances that the pictures have no home is said to be a special ground. . . . Applicant is not to blame for having sold the mansion in Belgrave Square; but I cannot allow that as any special ground for assenting to the sale, because it is applicant himself, though in exercise of his legal power, who made the picture homeless (*Chitty J*).

(3) In regard to his financial position, that is not a circumstance which affects the rest of the family and those who succeed. . . . That is a circumstance which has been brought about by his own extravagance; . . . as a general rule the fact of the tenant for life having got himself into difficulties is not a circumstance which ought to have weight in deciding in favour of a sale (*Chitty J*).

(4) A person who comes to the court under the Settled Land Acts [repealed] and asks the court's sanction to a sale, must make out a case for a sale (*Chitty J*).

Re Hope's Settlement [1899] 2 Ch 691n; 9 TLR 506; 37 Sol Jo 560

ANNOTATION As to (3 & 4) **Apprvd** Re Hope, De Cetto v Hope [1899] 2 Ch 679

2502 Circumstances of each particular case — Intention of settlor

Re Beaumont's Settled Estates no 2521 post

2503 Circumstances of each particular case — Intention of settlor

Re Hope, De Cetto v Hope no 2497 ante

2504 Circumstances of each particular case — Wishes and feelings of remainderman

Re Hope, De Cetto v Hope no 2497 ante

2505 No substantial depreciation in value of estate — Heirlooms of small value compared with estate

Re Beaumont's Settled Estates no 2521 post

2506 Public considerations

Bruce (Lord) v Ailesbury (Marquess) no 2071 ante

2507 Incumbrance of life interests

Re Radnor's (Earl) Will Trusts no 2494 ante

2508 Financial difficulties of tenant for life due to extravagance

Re Hope's Settlement no 2501 ante

2509 Financial difficulties of tenant for life due to extravagance

Re Hope, De Cetto v Hope no 2488 ante

2510 Financial difficulties of tenant for life due to extravagance — Unable to marry

A nobleman, tenant for life of settled estates to which but for a settlement, to which he had himself been a party, he would have been entitled as tenant in tail was, through no fault of his own, in an impecunious position and unable to marry. The sale of certain heirlooms, including family portraits, some of historical interest, would put him in a better pecuniary position, and he applied under Settled Land Act 1882 (c 38) (repealed), for leave to sell the same. A remainderman, who was older than the tenant for life in the event of his not having male issue, opposed the sale by any family portraits or any portraits of persons connected with the family: *Held* under the circumstances of the case, the court ought to allow the sale of all the heirlooms, including the portraits.

Re Townshend's Settlement (1903) 89 LT 691

2511 Interests of all concerned

Re Radnor's (Earl) Will Trusts no 2494 ante

2512 Interests of all concerned

Re Hope's Settled Estates no 2498 ante

2513 Interests of all concerned

On an application by a tenant for life for leave to sell heirlooms, the court has to consider not only the interests of the tenant for life, but also the interests

of other persons; and it is for the tenant for life to show that the sale would be for the benefit of those to come after him. Where, therefore, it was only shown that the sale of heirlooms would be for the benefit of the tenant for life, the court refused the application.
Re Sebright, Sebright v Brownlow (1912) 28 TLR 191; 56 Sol Jo 240

ANNOTATION **Distd** Re Sebright, Sebright v Brownlow (1914) 31 TLR 25

2514 Interests of all concerned
On an application by a tenant for life for leave to sell heirlooms, the court taking into consideration the interests not only of the tenant for life but also of those to come after him, came to the conclusion that the purpose of the application was not merely to increase the income of the tenant for life, and granted the application.
Re Sebright v Brownlow (Earl) (1914) 31 TLR 25

2515 No suitable accommodation for heirlooms — Pictures
Re Hope's Settlement no 2501 ante

2516 Wishes and opinions of tenants for life as head of family
Re Hope, De Cetto v Hope no 2497 ante

3 In what circumstances authorised

LAW See Halsbury's Laws (4th edn) vol 42 para 947

2517 Payment of charges on estate — Payment for benefit of all concerned
The court has jurisdiction to order a sale of heirlooms apart from the land to which they are attached for the purpose of paying off mortgages, and will do so at the instance of a tenant for life where satisfied that it will be for the benefit of the parties interested that they should be sold, even where there are infant tenants in tail in remainder.
Fane v Fane (1876) 2 Ch D 711; 46 LJ Ch 174

ANNOTATION **Distd** D'Eyncourt v Gregory (1876) 3 Ch D 635

2518 Payment of charges on estate — Income diminished through no fault of tenant for life
Re Thynne (Lord John) (1884) 77 LT Jo 195

2519 Where mansion house ordered to be sold — Heirlooms settled as annexed to mansion house
Re Brown's Will no 2072 ante

2520 Where mansion house ordered to be sold — Chattels unsuitable for new mansion house
By the will of the settlor chattels were given upon trust to be held and enjoyed and go along with his P house. After his death some of the personalty settled by the will was laid out in the purchase of real estate, with a house upon it more suitable for the family mansion than the P house. It was desired to sell P house, and such of the chattels in it as were not suitable for removal to the new house, and to remove to that house such of the chattels as were suitable for removal: *Held* this might be done.
Browne v Collins (1890) 62 LT 566

2521 Heirlooms a characteristic feature of mansion house
A tenant for life of settled estates applied, under Settled Land Act 1882 (c 38) (repealed), for the sanction of the court to a proposed sale of chattels consisting for the most part of pictures at the family mansion house and settled as heirlooms. It was proposed that the sum arising from the sale should be applied in reduction of charges upon the settled estates. The estimated sum to arise from the sale was £7,300, and the annual income of the estates was about £7,500. The estates were settled as to one-half by a settlement made in 1876, and as to the other part by the will of testator who died in 1882. The guardians *ad litem* of the tenant in tail in remainder and the trustees were opposed to the proposed sale. It appeared that since testator's death there had been no substantial depreciation in the property. The pictures were a characteristic feature of the mansion house: *Held* under the circumstances of the case the court would in the exercise of its discretion refuse to sanction the proposed sale.
Re Beaumont's Settled Estates (1888) 58 LT 916

ANNOTATION **Distd** Re Radnor's Will Trusts (1890) 45 Ch D 402

2522 To enable tenant for life to pay succession duties and pensions — And reside in mansion house
Re Fetherstonhaugh's Estate (1898) 14 TLR 167; 42 Sol Jo 198

2523 Repair and renovation of unsold heirlooms
A settlement made by will included several large estates, with three mansion houses and the pictures, china, and furniture therein, which were settled as heirlooms. Two of the mansion houses were sold under orders of court made in pursuance of the provisions of the Settled Land Acts (repealed), and certain pictures, china and furniture removed therefrom, for which no room could be found in the remaining mansion house and the town house of the tenant for life for the time being, were warehoused. Of the other pictures for which room was found in the remaining mansion house,

some were in a bad state of repair, and required the expenditure of a considerable sum for the preservation. On an originating summons taken out by the tenant for life, to which the trustees of the settlement were made defendants for authority to sell the warehoused heirlooms, and that the trustees might have liberty out of the proceeds of sale to repair the remaining heirlooms: *Held* the tenant for life might sell the warehoused heirlooms, and the trustees might out of the proceeds of sale, spend such a sum as was necessary in repairing the remaining heirlooms, with liberty to apply in chambers as to the amount to be spent for that purpose.

Re Waldegrave, Waldegrave (Earl) v Selborne (Earl) (1899) 81 LT 632

ANNOTATION **Follld** Re Weld-Blundell Estate, Mowbray (Lord) v Weld-Blundell (1929) 73 Sol Jo 585

2524 Repair and renovation of unsold heirlooms — Express provision for proper preservation

Re Weld-Blundell Estate, Mowbray (Lord) v Weld-Blundell (1929) 73 Sol Jo 585

ix POWERS AS REGARDS TIMBER

LAW See Halsbury's Laws (4th edn) vol 42 para 847

2525 Power to sell — Produce of timber

(1) By a settlement certain hereditaments were settled to the use of certain trustees during the life of A without impeachment of waste upon the trusts, and with and subject to the powers thereinafter declared, with remainders as therein mentioned, and it was declared that the hereditaments were thereby limited to the trustees upon trust, during the life of A, that if at the time of such limitation taking effect in possession A should not be or have been bankrupt the trustees should allow him to enter into and remain in the possession or receipt of the rents and profits of the settled estates during his life or until he should become bankrupt. By an agreement, dated 7 December 1920, A agreed to sell all the timber standing in certain portions of the settled estates. On 18 January 1922, a contract was entered into by A for sale of part of the settled land, subject to the agreement of 7 December 1920, and on 14 March 1922, such land was conveyed to the purchaser, subject to the agreement: *Held* the proceeds of sale of the timber belonged to A.

(2) At the date of the contract for the sale of land and at the date of the conveyance, part of the timber, to the value of about £500, remained uncut: *Held* although as regards the purchaser of the land the timber was divided from the freehold, yet nevertheless it remained part of the inheritance and subject to the limitations of the settlement; accordingly, it did not vest in A, but being however part of the inheritance and still remaining subject to the limitations of the settlement, on severance it became the property of A, and therefore the £500 belonged to him.

Re Londesborough (Earl), Spicer v Londesborough (Earl) [1923] 1 Ch 500; 92 LJ Ch 423; 128 LT 792; 67 Sol Jo 439

2526 Sale of estate with timber — Valuation of timber to be considered capital money

Re Llewellin, Llewellin v Williams no 2195 ante

x POWER TO MORTGAGE

LAW See Halsbury's Laws (4th edn) vol 42 para 848

CROSS REFERENCE See MORTGAGE vol 35 (reissue) no 522 et seq (purposes for which settled land may be mortgaged)

2527 Exercise of power

Hampden v Earl of Buckinghamshire no 1980 ante

2528 Exercise of power

Re Lord Monson's Settled Estates no 1084 ante

xi POWER TO SHIFT AND VARY INCUMBRANCES

LAW See Halsbury's Laws (4th edn) vol 42 para 850 et seq

2529 What incumbrances included — Rentcharge

"Incumbrance" in Settled Land Act 1882 (c 38) s 5 (repealed), included a rentcharge created under Improvement of Land Act 1864 (c 114), and therefore where settled land was subject to such a rentcharge, the tenant for life could, on a sale of part of the land, effectually exonerate the part sold by obtaining the consent of the owner of the rentcharge to charging the whole of it upon the unsold land under Settled Land Act 1882 (c 38) s 5 (repealed), and the intervention of the Board of Agriculture under Improvement of Land Act 1864 (c 114) ss 68, 69, was unnecessary.

As the exoneration operated as an effectual discharge of the land sold, the purchaser was not liable under Improvement of Land Act 1864 (c 114) s 63, and Tithe Act 1842 (c 54) s 16, to contribution at the instance of owners of unsold land subject to the rentcharge.

Re Strafford (Earl) & Maples [1896] 1 Ch 235; 65 LJ Ch 124; 73 LT 586; 44 WR 259; 40 Sol Jo 130, CA

2530 What incumbrances included — Whether limited to incumbrances having priority over settlement

The beneficial operation of Settled Land Act 1882 (c 38) s 5 (repealed), was not limited to incumbrances having priority over the settlement under which a sale was made under the Act (repealed), but extended to incumbrances arising under the settlement which were overreached by the sale and attached to the proceeds of sale.

Therefore, on a sale under the Act (repealed) a tenant for life could under s 5 (repealed), with the consent of a jointress, transfer her jointure rentcharge attaching to the proceeds of sale to the unsold part of the settled estates.

The words "on a sale" in s 5 (repealed), were not limited to cases where a sale had been made, but also included a contemplated or intended sale.

Re Knight's Settled Estates [1918] 1 Ch 211; 87 LJ Ch 111; 118 LT 170; 62 Sol Jo 141

2531 What incumbrances included — Incumbrances overreached by sale — Attaching to proceeds of sale — Jointure rentcharge

Re Knight's Settled Estates no 2530 ante

2532 Consent of Ministry of Agriculture — Necessity for

Re Strafford (Earl) & Maples no 2529 ante

2533 Meaning of "sale" — Includes contemplated sale

Re Knight's Settled Estates no 2530 ante

xii MISCELLANEOUS POWERS

1 Power to deal with minerals and surface separately

LAW See Halsbury's Laws (4th edn) vol 42 para 855

2534 Incidents to power of leasing — Grant of right to let down surface

A tenant for life of settled land had power under Settled Land Act 1882 (c 38) s 6 (repealed), to grant a lease of a right to let down the surface of the land by mining operations.

By his marriage settlement S conveyed land of which he was owner in fee to uses under which he was now tenant for life. The deed contained an exception from the conveyance of all mines under the land in question with power to work the same; any person exercising those reserved rights was to make reasonable compensation to the trustees of the settlement for all damages caused to the inheritance, and also to the persons for the time being entitled to the surface of the land for damage to things upon the surface: *Held* S had no power under the exception to authorise lessees to work the mines so as to let down the surface of the settled land; but as a tenant for life he could under Settled Land Act 1882 (c 38) s 6 (repealed), grant them a lease of a right to do so.

Sitwell v Londesborough (Earl) [1905] 1 Ch 460; 53 WR 445; sub nom *Re Sitwell, Sitwell v Londesborough (Earl)* (1905) 74 LJ Ch 254

2 Power to create easements and impose restrictions

LAW See Halsbury's Laws (4th edn) vol 42 para 856

CROSS REFERENCE See EASEMENTS vol 19(1) (2nd reissue) no 300 et seq

2535 Exchange — Apart from exchange or partition of land

Settled Land Act 1890 (c 69) s 5 (repealed) authorised an exchange of easements, apart from any exchange or partition of land.

Re Bracken's Settlement [1903] 1 Ch 265; 72 LJ Ch 101; 87 LT 743; 51 WR 411

ANNOTATION **Consd** Re Brotherton, Brotherton v Brotherton, Re Markham's Settlmt (1907) 77 LJ Ch 58

2536 Exchange — Between two adjoining settled estates

The B Settled Estate and the M Settled Estate adjoined one another, and each had appurtenant to some part of it a right of way or easement over some part of the other. It was to the advantage of the respective owners of the estates, for the purpose of developing the same, that these appurtenant rights of way should be released so that each estate might be no longer incumbered with any easement in favour of the other. The question arose whether under Settled Land Acts (repealed) a tenant for life of a settled estate could by way of sale or exchange release an easement which was appurtenant to such estate, or could out of capital money purchase the discharge or release of a right of way or similar right to which the settled estate was subject: *Held* whether or not the proposed scheme for exchange of the easements could properly be carried out, the better course would be that cross sales of the easements should be effected, that course being within the powers conferred by Settled Land Act (repealed).

Re Brotherton, Brotherton v Brotherton, Re Markham's Settlement (1908) 77 LJ Ch 373; 98 LT 547, CA

2537 Cross sales of easements — Two adjoining settled estates

Re Brotherton, Brotherton v Brotherton, Re Markham's Settlement no 2536 ante

2538 Release of easement

Re Brotherton, Brotherton v Brotherton, Re Markham's Settlement no 2536 ante

3 Power to accept surrender of leases

LAW See Halsbury's Laws (4th edn) vol 42 para 858

2539 Duty of tenant for life — To act in interest of all persons concerned

An equitable tenant for life accepted the surrender of a lease, which she had granted under the powers of Settled Land Acts (repealed) and received from the lessee a certain sum as consideration for accenting the surrender: *Held* under settled Land Act 1882 (c 38) s 53 (repealed), the tenant for life was a trustee, and, if he accepted a surrender, he must do so for the interests not only of himself but for those of the remaindermen, and if he received a consideration for accepting it, then, on ordinary principles, a court of equity would distribute the money between the tenant for life and the remaindermen on principles which it thought fair.

Re Rodes, Sanders v Hobson [1909] 1 Ch 815; 100 LT 959; sub nom *Re De Rodes, Sanders v Hobson* (1909) 78 LJ Ch 434

ANNOTATION **Consd** Re Vix, Hardy v Lemon [1916] 1 Ch 279

2540 Effect of invalid notice by lessees — On new lease granted by tenant for life

Section 7 of the Settled Estates Act 1877 (repealed), did not authorise an equitable tenant for life, not being a lessor, to take a surrender which was not sanctioned by the court.

Certain customary freeholds were demised by a lease of 15 June 1877, to two lessees, for twenty-one years from Christmas, 1876, at a rental of £130. The lease was determinable at the expiration of the fourteenth year, on the lessor or lessees giving to the other of them, "or his or their representatives or assigns," a written notice of such intention. The lessor died in December 1877, having devised and bequeathed his customary freeholds and leaseholds to trustees in trust for his wife, M, during her widowhood, and then to other beneficiaries. On 21 December 1889, one of the two lessees gave notice to M of his intention to quit and yield up possession of the leasehold premises at Christmas, 1890. On 13 August 1890, M purporting to act under the provisions of Settled Estates Act 1877 (c 18) (repealed), granted a lease of the same premises to one of the two original lessees for seven years from Christmas, 1890, at the reduced rent of £100. The licence of the lord of the manor for this lease was not obtained. In an action by the trustees and beneficiaries of the original lessor against the two lessees: *Held* (1) the notice of 21 December 1889, not having been served on the lessor's representatives or assigns, was not a good notice; (2) the old lease was not surrendered by operation of law, inasmuch as it was voidable if not void; (3) the granting of the new lease could not be supported under either Settled Estates Act 1877 (c 18) (repealed), or Settled Land Act 1882 (c 38) (repealed), and the lessees were liable to pay the full rent of £130 under the old lease.

Easton v Penny (1892) 67 LT 290; 41 WR 72; 8 TLR 779

2541 Effect of grant of new lease — Operates according to its tenor

Where a tenant for life of settled property accepted the surrender of a lease of the settled property and granted a new lease at an increased rent, then, if that new lease was not open to question on the ground of impropriety or otherwise, Settled Land Act 1882 (c 38) (repealed), intended that it should be operative in accordance with its tenor. Unless the lease was so improper as to amount to an unlawful exercise of his powers by the tenant for life, it was quite in accord with the spirit of the whole Act (repealed) that the Legislature intended that the tenant for life should have kept for himself everything which under the terms of the instrument he had succeeded in retaining for himself and therefore the excess rent was payable to the tenant for life, and was not to be capitalised or accumulated for the benefit of the remaindermen.

Re Wix, Hardy v Lemon [1916] 1 Ch 279; 85 LJ Ch 192; 114 LT 455; 32 TLR 257; 60 Sol Jo 291

4 Power to dedicate land for streets and open spaces

LAW See Halsbury's Laws (4th edn) 42 para 864

CROSS REFERENCE See HIGHWAYS vol 26(2) (2nd reissue) no 149 et seq

5 Power to contract

LAW See Halsbury's Laws (4th edn) vol 42 para 868

2542 Contract to grant lease

Rycroft v Rycroft no 2296 ante

2543 Effect of contract

Re Ailesbury Settled Estates no 2071 ante

6 Power to complete transactions by conveyance

LAW See Halsbury's Laws (4th edn) vol 42 para 873

2544 Interests "subsisting or to arise" under settlement — Mortgage — On estate of tenant for life

Re Sebright's Settled Estates no 1979 ante

2545 Interests "subsisting or to arise" under settlement — Mortgage — On estate of tenant for life

It appears to me that it would be rather a strange result to hold that the tenant for life can sell only subject to the mortgage created by himself of his own life interest, or rather (to use the exact term again), without prejudice to that, and can at the same time convey his own mortgagee's estate. It is clear that he can convey the fee simple, if the fee simple is comprised in the settlement, but without prejudice to the mortgages on his own life estate (*per Chitty J*).

Cardigan v Curzon-Howe (1888) 40 Ch D 338; 58 LJ Ch 177; 60 LT 252; 37 WR 247; on appeal (1889) 41 Ch D 375, CA

ANNOTATIONS **Consd** Re Dickin & Kelsall's Contract [1908] 1 Ch 213; Re Davies & Kent's Contract [1910] 2 Ch 35; Re Peel's SE [1910] 1 Ch 389

2546 Interests "subsisting or to arise" under settlement — Mortgage — On estate of tenant for life

Where a life tenant sold settled land under the powers of Settled Land Acts (repealed), with the consent of the mortgagee of the life estate, the mortgagee's estate passed by the exercise of the statutory power, and his concurrence in the conveyance was not necessary.

Re Dickin & Kelsall's Contract [1908] 1 Ch 213; 77 LJ Ch 177; 98 LT 371

ANNOTATION **Apprvd** Re Davies & Kent's Contract [1910] 2 Ch 35

2547 Interests "subsisting or to arise" under settlement — Mortgage — By remainderman

Re Davies & Kent's Contract no 1725 ante

2548 Interests "subsisting or to arise" under settlement — Sale under compound settlement — Jointure charges

Re Ailesbury (Marquis) & Iveagh (Lord) no 1045 ante

2549 Interests "subsisting or to arise" under settlement — Sale under compound settlement — Jointure charges

Re Mundy & Roper's Contract no 1172 ante

2550 Interests "subsisting or to arise" under settlement — Sale under compound settlement — Annuities

Re Phillimore's Estate, Phillimore v Milnes no 1051 ante

2551 Interests "subsisting or to arise" under settlement — Jointure charges — Prior to estate of life tenant

By a will real estate was devised to A for life with remainder to his first and other sons successively in tail male, with like remainder to B and C and then over. A and C were dead, and B was tenant for life in possession. A, B and C had all executed jointure deeds under a power conferred by the settlement; that executed by A was in operation and constituted an existing charge on the settled property. Trustees of the will had been appointed for the purposes of Settled Land Acts (repealed), B having contracted, under the powers conferred upon him by those Acts (repealed), to sell a portion of the estate, the purchaser insisted that trustees should be appointed of the compound settlement created by the will and the several jointure deeds: *Held* (1) the jointures were not charges upon the estate of the tenant for life within Settled Land Act 1890 (c 69) s 4 (repealed); (2) the will by itself constituted a settlement within Settled Land Act 1882 (c 38) s 2 (repealed); (3) under Settled Land Act 1882 (c 38) s 20 (repealed), B could convey the land discharged from the jointures, they being "estates, interests, or charges subsisting under settlement" within that section; and B could make a good title to the property, and the trustees of the will could give a good discharge for the purchase-money.

If, for example, the settlement contained a power to charge portions, and those portions had been provided for by a mortgage of the property on the creation of a term or interest in the property, and such portions had been actually raised, then I apprehend they would fall within this exception [Settled Land Act 1882 (c 38) s 20(2) [repealed]] (*Stirling J*).

Re Keck & Hart's Contract [1898] 1 Ch 617; 78 LT 287; 46 WR 389; 42 Sol Jo 380; sub nom

Re Powys-Keck & Hart's Contract (1898) 67 LJ Ch 331

ANNOTATION As to (3) **Apld** Re Du Cane & Nettlefold's Contract [1898] 2 Ch 96

2552 Interest "having priority to" the settlement — Equitable right to redeem — Trustee for tenant for life

Grainge v Wilberforce (1889) 5 TLR 436

2553 Interest "having priority to" the settlement — Sale under compound settlement

Re Ailesbury (Marquis) & Iveagh (Lord) no 1045 ante

2554 Expressed or intended to operate — Lease by tenant for life acting as absolute owner

Mogridge v Clapp no 2047 ante

2555 Expressed or intended to operate — Invalid lease

A tenant for life of settled land could not grant a valid building lease of the surface of the land under the Settled Land Act 1882 (c 38) (repealed), with a reservation of the mines and minerals.

Where a tenant for life purported to grant such a lease, it would not be rendered a valid lease by virtue of Leases Act 1849 (c 26) (repealed).

The defect is said to be remedied in two ways. In the first place Settled Land Act 1882 (c 38) s 20 [repealed] provides that on a lease the tenant for life may as regards land leased, as intended so to be, convey or create the same by deed to the user and in the manner requisite for giving effect to the lease, and such a deed, to the extent and in the manner to or in which it is expressed or intended to operate and can operate under the Act [repealed], is effectual to pass the land conveyed. But to pray this in aid of the lease begs the whole question. If the lease can operate under the Act [repealed] there is no question at all.

In the second place, it is said that Leases Acts 1849 (c 26) 1850 (c 17) [repealed] apply to leases under Settled Land Act 1882 (c 38) [repealed]. But those Acts [repealed] only apply to forms and ceremonies of leases under powers, and not to matters of substance. To hold that they make a lease of this kind valid would be tantamount to saying that the tenant for life may grant any lease he likes in total disregard of all the provisions of Settled Land Act 1882 (c 38) [repealed]. The Leases Acts [repealed] do not touch a case like the present (*Kekewich J*).

Re Newell & Nevill's Contract [1900] 1 Ch 90; sub nom *Re Nevill & Newell's Contract* (1900) 69 LJ Ch 94; 81 LT 581; 48 WR 181; 44 Sol Jo 88

2556 "Securing money actually" raised — Portions charge

Re Du Cane & Nettlefold's Contract no 1066 ante

2557 "Securing money actually" raised — Portions charge

Re Keck & Hart's Contract no 2551 ante

2558 "Securing money actually" raised — Mortgage

Re Mundy & Roper's Contract no 1172 ante

2559 "Estate or interest the subject of the settlement" — Reversion

Re Hunter & Hewlett's Contract no 1025 ante

Scottish, Irish and Commonwealth Cases

2560 "Securing money actually" raised — Portions charge

By will, dated 17 October 1854, testator resident in Scotland devised his real estate, including the lands of B in Ireland, to his six daughters for life, with remainders over. Testator died in 1857, having prior to his death advanced the sum of £1,500 to the husband of one of his daughters, and £475 to the husband of another daughter. In 1882, by deed of family arrangement, the real estate of testator was conveyed to trustees, to hold on the trusts of the will, charged, as to the life estates of the two daughters therein, with repayment of the sums of £1,500 and £475 advanced to their husbands respectively. An order was subsequently made for administration of testator's real and personal estate in Ireland and the lands of B were sold to a purchaser: *Held* the sums of £1,500 and £475 were not money "actually raised" within the exception to Settled Land Act 1882 s 20.

Connolly v Keating [1903] 1 IR 353 (IR)

7 Power to complete predecessor's contracts and confirm past transactions

LAW See Halsbury's Laws (4th edn) vol 42 para 875

2561 Whether includes leases

Settled Land Act 1890 (c 69) s 6 [repealed], does not apply to leases (*North J*).

Re Kemeys-Tynte, Kemeys-Tynte v Kemeys-Tynte [1892] 2 Ch 211

8 Other express powers in instruments

2562 Whether execution of power valid — Power to charge — Assignment of life interest for small consideration

A *feme covert* having a power under her marriage settlement to create a term, and to raise money after the death of her husband, and being in distress, executes that power in the lifetime of her husband, and assigns her interest for a trifling consideration. The judges, upon a case sent to them, were of opinion it was a good execution of power, and so this court held it, on the judge's certificate.

Sutherland (Countess) v Northmore (1729) 1 Dick 56; 21 ER 188

2563 Whether execution of power valid — Power to charge — Necessity for reference to deed creating power

(1) Where a person having a power to charge an estate with £2,000 after the death of his wife gives her £1,000 payable with interest three months after his own death: *Held* the gift of the £1,000 was a good execution of the power though it could not be raised at the time appointed; and the interest

could not be made good until it amounted to £2,000, for that would be to charge the estate with the principal sum of £2,000.

(2) If a man has a power to charge an estate, it is not necessary, in the execution of it, he should refer to the deed out of which the power arises; for in a court of equity it is enough that his intent appears, and if in the execution he sufficiently describes the estate he had a power to charge, the estate is certainly bound, especially where the person charging is a purchaser of the power (*Lord Hardwicke C*).

Probert v Clifford (1739) West temp Hard 638; 27 ER 3, LC

2564 Whether execution of power valid — Power to charge — Prior limitations overreached

Power by marriage settlement to the husband to charge not confined to the immediately preceding limitation of the reversion to him: *Held* to overreach all the prior limitations. Construction of a charge by will, if the reversion should never fall to the testator, *viz*, if it should not come to him personally, in his life; the charge therefore, effectual, though the reversion came to his heir.

Stackhouse v Barnston (1805) 10 Ves 453; 32 ER 921

2565 Whether execution of power valid — Power to charge — Except by way of sale — Charge by way of mortgage excluded

A prohibition against raising a charge by sale: *Held* to prevent its being done by mortgage.

Devise of real estates to trustees in fee, upon trust, "out of the rents, issues, and profits" thereof, to pay two annuities. "And by same ways and means, or by such other ways and means, except a sale or sales, as they may think proper, to levy and raise" sufficient to pay off the charges on the estate. Subject to the trusts aforesaid, to A for life, with remainders over: *Held* the trustees could not raise the charges either by sale, by mortgage, or by leases on fines, but that they must be raised out of the rents and the profits of timber and mines, the trustees exercising a discretion, so as not to exhaust the whole income, and leave nothing for the tenant for life.

Bennett v Wyndham (1857) 23 Beav 521; 29 LTOS 138; 3 Jur NS 1143; 5 WR 410; 53 ER 205; on appeal (1862) 4 De GF&J 259, LJJ

ANNOTATIONS **Consd** Re Allan, Havelock v Havelock (1881) 17 Ch D 807 **Apld** Re Tyrell, Tyrell v Woodhouse (1900) 82 LT 675

2566 Whether execution of power valid — Power to charge — Given by will to tenant for life — Death before testator

A power of charging the inheritance given under a will to a tenant for life, who dies before testator, cannot be exercised by such tenant for life under Wills Act 1837 (c 26) s 33.

Griggs v Gibson, Maynard v Gibson (No 2) (1866) 35 LJ Ch 458; 14 WR 538

2567 Whether execution of power valid — Power to raise money — After death of wife — Gift to wife after death of donee of power

Probert v Clifford no 2563 ante

2568 Whether execution of power valid — Power to raise money — Annuity charged on estate till certain sum paid off — No reference to power

A tenant for life, having a power to raise a sum of money, granted an annuity charge on the settled estates till a certain sum should be paid off, without, in the annuity deed, referring to the power: *Held* this, under the particular circumstances of the case, was a good, though an informal, execution of the power.

Marnell v Blake (1816) 4 Dow 248; 3 ER 1153, HL

2569 Whether execution of power valid — Power to raise money — By mortgage annuity or otherwise — Sale by tenant for life

A being tenant in tail of an estate, in remainder expectant on the death of B, entered into articles on his marriage, by which, after reciting that it had been agreed that the estate should, subject to B's life interest therein and to the raising, by mortgage, or otherwise, of any sum or sums not exceeding 15,000 for A's use, be settled to the uses thereinafter expressed, he covenanted that he would, subject to the raising, by any ways or means and at any time or times he should think proper, of the sum or sums before-mentioned, by mortgage, annuity or otherwise, for his own benefit, and to any deed or deeds he might make for securing the repayment thereof and interest, do all necessary acts for settling the estate, subject to B's life interest, in the manner agreed upon: *Held* A was authorised to raise the £15,000 by sale; and he was justified in selling his interest in remainder in the whole of the estate, as the £15,000 was nearly the full value of such interest.

Tasker v Small (1836) 6 Sim 625; Donnelly 82; 5 LJ Ch 321; 58 ER 728; on appeal (1837) 3 My&Cr 63, LC

2570 Whether execution of power valid — Power to raise money — For benefit of

grandchildren of settlor — Exercise by parents on death of settlor

C, before the marriage of his daughter, conveyed certain lands to the use of himself for life, with remainder to trustees for a term of 200 years, upon trust for securing a rentcharge of £100 per annum to the husband and wife for their joint lives, and the life of the survivor; and from and after the expiration or sooner determination of that term, and in the meantime subject thereto and to the trusts thereof, to the use of other trustees for a term of 1,500 years, with remainder to C in fee. The trusts of the 1,500 years' term were declared to be as follows: That the trustees should, after the decease of C, but subject and without prejudice to the yearly rentcharge and the remedies for securing the same, by mortgage or sale or other disposition of the settled estates, or out of the rents thereof, levy and raise £2,600, in trust for all and every child and children of the marriage, or such one or more of them, exclusive of the others, and in such shares, etc, and with such annual or other sums of money for the maintenance of such children from and after the decease of C, as the parents should by deed appoint: *Held* that the 1,500 years' term did not wait for its commencement until the death of the survivor of the husband and wife, but commenced at the death of C; and therefore it was competent to the parents after the death of C, by deed executed in pursuance of their power, to direct an annual sum to be raised out of the estates for the maintenance of their children born and to be born.

Gough v Andrews (1844) 1 Coll 59; 2 LTOS 475; 8 Jur 305; 63 ER 321

2571 Whether execution of power valid — Power to enfranchise and convey to customary tenants — Conveyance to one equitably entitled — Erroneously admitted without surrender

Semble: power to a tenant for life lord of a manor to enfranchise, and for that purpose to convey the freehold to the customary or copyhold tenants, authorises a conveyance of the freehold to one who is equitably entitled, and has been erroneously admitted without a previous surrender by his trustee.

Wilson v Allen (1820) 1 Jac&W 611; 37 ER 501

2572 Whether execution of power valid — Power to lay out money in freehold land and fee simple and inheritance thereof — Purchase of fixed rentcharge — Purchase of freehold subject to 1,000 years' term

By a private Act, money was directed to be laid out in the purchase of freehold lands, tenements, or hereditaments, and the fee simple and inheritance thereof, which might be approved by this court: *Held* (1) the purchase of a fixed rentcharge was not a proper investment; (2) the purchase of a freehold estate, subject to a term of 1,000 years, at a fixed rent, was equally objectionable.

Ex p Gartside (1837) 6 LJ Ch 266, LC

2573 Whether execution of power valid — Power of sale and exchange to trustees — Conveyance on exchange by tenant for life — Execution of deeds to bring transaction within trustees' power

A being entitled under his marriage settlement, to a life interest in certain freehold estates, with remainder to the use of trustees for a term of 1,000 years, to secure a jointure and portions, with remainder to himself in fee, conveyed part of the lands to B in fee, in exchange for other lands. B's heir afterwards having contracted for the sale of the land, the purchaser refused to complete the contract, on the ground that A had no power to exchange the lands in fee. The vendor then procured the execution of certain deeds, with a view of bringing the exchange within the terms of a power of sale and exchange, given to the trustees under the settlement: *Held* under these circumstances, and likewise on the ground that the after-executed deeds were grossly inaccurate, the purchaser was not bound specifically to perform the agreement.

Semble: the after-executed deeds, although the surviving trustee of the marriage settlement was a party to them, did not make the transaction between A and B a due execution of the power.

Cowgill v Oxmantown (Lord) (1839) 3 Y&C Ex 369; 3 Jur 313; 160 ER 745

ANNOTATION **Distd** Garnett v Acton (1860) 28 Beav 333

2574 Whether execution of power valid — Power to exchange for lands of equal value — Inadequacy of value

Ferrand v Wilson no 1900 ante

2575 Whether execution of power valid — Power to substitute lands with consent of trustees — Consent to be signified by deed — Conveyance executed by trustees subsequent to its date

E being the tenant for life under a settlement of certain estates, had power to release the settled estates from certain charges by the substitution of other lands, which, however, was only to take place with the consent of the trustees of two separate terms, "to be signified by some deed to be duly executed by them respectively, and not otherwise." In 1857, E having agreed to sell a portion of the settled estates called M to plaintiff, conveyed same to him by a deed to which the two trustees were both made parties, as giving their consent to a substitution of other property, but the execution by one of them was

under a power of attorney dated six weeks after the deed, and the other did not execute it till nine months after its date. Plaintiffs having subsequently agreed to sell the property called M to defendant, the latter objected to the title, on the ground that this was not a good execution of the power, but plaintiff having produced an affidavit showing that the trustees had seen the draft of the deed before its execution, and were acquainted with the whole intended transaction: *Held* due execution had been sufficiently shown, and defendant was bound to accept the title.

Offen v Harman (1859) 1 De GF&J 253; 29 LJ Ch 307; 1 LT 315; 6 Jur NS 487; 8 WR 129; 45 ER 355, LJJ

2576 Whether execution of power valid — Power to surrender determinable life interest

The appointor was life tenant of a share of funds settled in 1907. Her life interest was determinable on alienation (as provided in clause 5), other than a surrender in accordance with clause 9. Clause 9 of the settlement provided that it should be lawful for the appointor to surrender her life interest "in the vested share of any child or other issue" of hers "in the trust fund in favour of such child or other issue so as to bring such share into possession". One of the appointor's daughters had three children, who would respectively attain thirty years of age in 1982, 1984 and 1986. By deed of appointment dated 6 March 1965, the appointor appointed (clause 2) that the trustees should stand possessed of a certain share of the trust fund on trust for the children of her daughter on attaining the age of thirty years or surviving twenty-one years from the date of the appointment, whichever should be the sooner, in equal shares as tenants in common absolutely. This was followed by a proviso that in the event of any of the grandchildren dying before attaining a vested interest, leaving a child or children surviving, the share which such beneficiary would have taken had he or she attained a vested interest should be held on trust for any such child or children living twenty-one years from the date of the appointment and, if more than one, in equal shares absolutely. By clause 4 the appointor assigned and surrendered her life interest to the trustees to the intent that it should be merged and extinguished and that the trustees should hold the trust fund on the trusts appointed to take effect after the appointor's death. If the interests of the grandchildren of the appointor were contingent, the assignment and surrender to the appointor's life interest by the deed of appointment would not have been in accordance with clause 9 of the settlement and so would not have been excepted from clause 5, with the consequence that the appointor's life interest would have been forfeited. On the questions whether the grandchildren had vested interests liable to be divested or had contingent interests and whether the surrender was in favour of the grandchildren within clause 9: *Held* the appointment and surrender were effective and no forfeiture was incurred for the following reasons: (1) the principle on which the rule of the construction, known as the rule in *Phipps v Ackers* (see vol 51 Digest (reissue) WILLS no 12256), was founded was based on intention ascertained as a matter of construction by reading together the prior gift and the gift over and ascertaining whether they indicated an intention that the prior donee should take, subject only to the subsequent contingency being satisfied; although this rule of construction would yield to a contrary intention, yet on the true construction of the will and the deed of appointment, particularly clause 2 of the deed, the intention shown accorded with the application of the rule in *Phipps v Ackers* (*supra*), and the grandchildren obtained, under the deed of appointment, interests that were vested subject to being divested; (2) the surrender was a surrender in favour of each grandchild of the appointor within clause 9 although it was made to the trustees, and, as it had the effect of accelerating their immediately succeeding interests and bringing them into possession, it was a surrender within clause 9 of the settlement, notwithstanding that the grandchildren's vested interests were liable to be divested.

Re Penton's Settlmts, Humphreys v Birch-Reynardson [1968] 1 All ER 36; [1968] 1 WLR 248; 112 Sol Jo 114

ANNOTATION **Consd** Re Harker's Will Trusts, Kean v Harker [1969] 3 All ER 1

2577 Power revocable — Contingent interest distinguished from vested interest liable to be divested

By an appointment made in September 1963, pursuant to a power in a settlement to appoint in favour of settlor's issue, the trust fund was appointed on trust for settlor's daughter "if she shall attain the age of 21 years and subject as aforesaid upon trust for such of [settlor's two other children] as shall attain the age of 30 years and if both in equal shares". Clause 3 of the appointment directed that s 31 of Trustee Act 1925 should apply. The appointment was revocable. Subject to the appointment, the trust fund was held on the powers and subject to the trusts of the settlement, which included a power to apply income for the benefit of settlor's issue, and a trust for such of his children who should be living on a defined perpetuity date and should attain the age of 21 years. The daughter, who was born in September 1947, married in July 1965. The appointment was revoked in September 1966, and the daughter

attained the age of 21 in September 1968. On a summons by the trustees of the settlement to determine the destination of the income of the property subject to the trusts accruing between October 1963 and September 1966, the daughter contended that, since the appointment and the settlement provided for remainders taking effect if her interest failed or was revoked, she had a vested interest liable to be divested and was accordingly entitled to the accumulations: *Held* for an interest to subsist as a vested interest liable to be divested rather than a contingent interest, there had to be an express gift over which spelt out the conditions on which the gift over would take place, and those conditions had to include the counterparts, though not necessarily identical counterparts, of the conditions applicable to the prior gift; under the appointment there was no such gift over the gift to the daughter; her interest was therefore a contingent one and accordingly the income accumulated during her minority was added to capital, to which she was not entitled in view of the revocation of the appointment.

Re Mallinson Consolidated Trusts, Mallinson v Gooley [1974] 2 All ER 530; sub nom *Re Mallinson's Consolidated Trusts, Mallinson v Gooley* [1974] 1 WR 1120; 118 Sol Jo 549

2578 "Same power of leasing, selling and exchanging as in will" — Power in will for trustees to sell and exchange only — Life tenant's power same as trustees

Testatrix, by her will, declared, that every person thereby made tenant for life should have such and the like power of leasing, selling, and exchanging any part of the devised estate as were by her father's will given to the tenants for life and in tail mentioned in his will, or to the trustees thereof. It appeared that the father's will did not give a tenant for life or in tail any power of leasing, selling, or exchanging; but gave trustees full power to sell and exchange the hereditaments therein comprised, and to give receipts for the purchase-money: *Held* tenant for life in possession of the estate devised by testatrix had the same power of selling and exchanging that estate as were by the father's will given to the trustees.

Cox v Cox (1855) 1 K&J 251; 69 ER 451

2579 Power to raise money — Interest payable from date of payment

Where any settlement or contract contains a provision that a certain fixed sum of money is to be charged on land and to be paid at the fixed time, then, as between the owner of the land and the person entitled to the money, the money, in the eye of a court of equity, bears interest from the date fixed for payment of the money, although nothing is said as to interest in the settlement or contract, unless there are circumstances negativing the presumption that interest is payable.

Re Drax, Savile v Drax [1903] 1 Ch 781; 72 LJ Ch 505; 88 LT 510; 51 WR 612; 47 Sol Jo 405, CA

ANNOTATION **Apld** Stoker v Elwell [1942] Ch 243

2580 Power to allot land as public way — Dedication of road as highway

In 1827 a tenant for life having power under a private estate Act to allot and set out a competent part of the settled land for public ways or otherwise for the use and convenience of the occupiers, had constructed a carriage road on the estate for the development of building: *Held* it was competent to the tenant for life dedicate the road as a highway for foot passengers under the estate Act.

Brockman v Folkestone Corpn (1912) 107 LT 483; 76 JP 443; 10 LGR 856, CA; on appeal sub nom *Folkestone Corpn v Brockman* [1914] AC 338, HL

2581 Grant by successive tenants for life of right to use adit — Confirmation by local Act — Successors of life tenant bound

A tenant for life of a settled estate and his brother, who was entitled contingently to a tenancy for life in remainder described as "the grantors," entered into an agreement in 1900, with a water company authorising the company to make beneath the estate an adit for the storage of water. The agreement provided that the works should be completed before 31 December 1914, or such later day as the grantors or their successors should, if they thought fit, appoint, that on completion the grantors or their successors would grant to plaintiffs the right in perpetuity to use the adit, and for payment to the grantors and their successors of a rent. The agreement was set forth in the schedule of a local Act, and by s 42 thereof the agreement "set forth in the schedule of the Act" was confirmed and made binding on the parties thereto, who were authorised to carry same into effect. The Act did not expressly confirm any powers given by the agreement to the grantors: *Held* there was sufficient confirmation of the powers vested in the grantors by the agreement; that the grantors were therefore empowered to extend the time for completion and to accept further considerations than those specified in the agreement and a grant by grantors to the company upon the completion of the works of a right in perpetuity to use the adit would bind the children or other successors of the tenant for life.

Westgate & Birchington Water Co v Powell-Cotton (1915) 85 LJ Ch 459; 113 LT 689

Scottish, Irish and Commonwealth Cases

2582 Whether execution of power valid — Power to charge

Where there was a power to charge a freehold estate "by any deed or deeds, writing or writings, or by last will and testament duly attested," with £2,000 for any purpose the donor pleased, the donor by a codicil referring to the power, but executed in the presence of two witnesses in order "to provide for his faithful servants A and P," gave and bequeathed £2,000 to trustees, etc: *Held* the power was not well executed.

Cooke v Nunn (1836) 4 Ir L Rec NS 136 (IR)

2583 Whether execution of power valid — Power to retain non-trustee securities

Fogo v Fogo's Trustees [1929] SC (Ct of Sess) 546 (SCOT)

xiii DEALINGS BETWEEN TENANT FOR LIFE AND ESTATE

LAW See Halsbury's Laws (4th edn) vol 42 paras 877, 878

2584 Power exercisable by trustees — Where tenant for life trustee

Re Pennant's Will Trust, Pennant v Ryland no 2212 ante

xiv EXTENSION OF STATUTORY POWERS

LAW See Halsbury's Laws (4th edn) vol 42 para 879 et seq

CROSS REFERENCES See no 2268 et seq ante (power to grant and accept leases generally); COMPULSORY ACQUISITION OF LAND vol 11(1) (2nd reissue) no 1146 et seq (purchase under compulsory purchase); HUSBAND & WIFE vol 27(3) (2nd reissue) no 10753 et seq (settlements of property in connection with matrimonial causes); INFANTS vol 28(3) (2nd reissue) no 1454 et seq (property of infant)

2585 Provision in settlement and statutory provision cumulative

The settlement gave the trustees power during the minority of any person entitled to possession to receive and apply rents and profits in management of estate and maintenance of infant, and to accumulate and apply the surplus in paying off charges or in purchase of real estate to be settled to the same uses: *Held* (1) the rents and profits received by the trustees during the minority were to be treated in manner directed by the settlement and without regard to the Act (repealed).

Power in the settlement to the trustees with the consent of tenant for life, if of age, and if not of his guardians, to sell or exchange: *Held* (2) this power was exercisable by the trustees during the minority at the request and by the direction of the guardians of the infant tenant in tail.

Power in the settlement for the guardians during minority to grant leases for twenty-one years, building leases for ninety-nine years, and mining leases for sixty years: *Held* (3) this power was exercisable during minority by the guardians with the consent of the trustees; (4) rents derived from mining lease were to be applied by the trustees in manner directed by the settlement, as coming within the term "contrary intention" expressed in s 11 of the Act (repealed); (5) there being no power in the settlement to sell surface land apart from minerals the trustees could exercise that power under s 17 of the Act (repealed); and this being an execution of a statutory power, the consent of the guardians would not be necessary.

(6) The meaning of Settled Land Act 1882 (c 38) s 56(2) (repealed), was that in all cases, notwithstanding anything contained in the settlement, the consent of the tenant for life should by virtue of the Act (repealed) be necessary to the exercise by the trustees of the settlement of any power conferred by the settlement for any purpose provided by the Act (repealed).

The meaning of s 60 (repealed) was that where the tenant for life was an infant, the option of consenting given to the tenant for life was conferred upon the trustees of the settlement.

It is not intended to take away from the trustees named in any settlement powers given to them by that settlement . . . but if the powers in the settlement are more restricted than the powers in the Act [repealed], then the Act says that the provisions of the Act or the powers given by the Act are cumulative, that is to say, that the powers in the Act so far as they give larger authority than is given by the trusts of the settlement may be exercised in the manner prescribed by the Act (*Pearson J*).

Re Newcastle's (Duke) Estates (1883) 24 Ch D 129; 52 LJ Ch 645; 48 LT 779; 31 WR 782

ANNOTATIONS As to (4) **Apld** Re Rayer, Rayer v Rayer [1913] 2 Ch 210. As to (6) **Apld** Constable v Constable (1886) 32 Ch D 233

2586 Conflict between powers in settlement and statutory powers — Necessity for consent of tenant for life to exercise of settlement powers — Infant tenant for life — Application of rents and profits

Re Newcastle's (Duke) Estates no 2585 ante

2587 Conflict between powers in settlement and statutory powers — Necessity for consent of tenant for life to exercise of settlement

powers — Infant tenant for life — Sale or exchange

Re Newcastle's (Duke) Estates no 2585 ante

2588 Conflict between powers in settlement and statutory powers — Necessity for consent of tenant for life to exercise of settlement powers — Infant tenant for life — Leasing

Re Newcastle's (Duke) Estates no 2585 ante

2589 Conflict between powers in settlement and statutory powers — Necessity for consent of tenant for life to exercise of settlement powers — Leasing

Re Atherton [1891] WN 85

2590 Conflict between powers in settlement and statutory powers — Necessity for consent of tenant for life to exercise of settlement powers — Absolute trust for sale

Testator devised all his real and personal estate to trustees upon trust after the death of his wife absolutely to sell the whole of his property in such manner as they should think fit, and pay one-fourteenth part of the proceeds to each of his fourteen children at twenty-one or marriage, with further provisions under which his daughters' shares were settled on them for life with remainders over. A suit having been instituted for the administration of the estate, and the wife being dead, an order was made in the suit for sale of part of the estate by the trustees: *Held* the concurrence of the children constituting the tenant for life under Settled Land Act 1882 (c 38) (repealed), was not necessary upon the sale by the trustees; but even if such concurrence would be necessary the order of the court was sufficient to enable the trustees to sell without joining the fourteen children or any of them in the conveyance to the purchaser.

Taylor v Poncia (1884) 25 Ch D 646; 53 LJ Ch 409; 50 LT 20; 32 WR 335

ANNOTATION **Consd** Re Harding's Estate [1891] 1 Ch 60

2591 Conflict between powers in settlement and statutory powers — Necessity for consent of tenant for life to exercise of settlement powers — Tenants for life of undivided shares — Power of sale of entirety in trustees

Re Osborne & Bright's Ltd [1902] 1 Ch 335; 71 LJ Ch 285; 86 LT 178; 50 WR 468; 46 Sol Jo 230

2592 Conflict between powers in settlement and statutory powers — Necessity for consent of tenant for life to exercise of settlement powers — Tenants for life of undivided shares — Power of sale of entirety in trustees

Re Morris' Settled Estates no 1789 ante

2593 Conflict between powers in settlement and statutory powers — Necessity for consent of tenant for life to exercise of settlement powers — Tenants for life of undivided shares — Power of sale of entirety in trustees

Re Hone & Parker's Contract no 1790 ante

2594 Conflict between powers in settlement and statutory powers — Necessity for consent of tenant for life to exercise of settlement powers — Power of purchaser to insist on concurrence of tenant for life — Consent not evidenced in writing

Where the trustees and the tenant for life both had powers of sale, and the consent of the tenant for life was required under Settled Land Act 1882 (c 38) s 56 (repealed), a purchaser was not entitled to insist on the tenant for life concurring in the conveyance, if there was evidence that he in fact consented, though his consent was not in writing.

Re Pope's Contract [1911] 2 Ch 442; 80 LJ Ch 692; 105 LT 370

2595 Conflict between powers in settlement and statutory powers — Necessity for consent of tenant for life to exercise of settlement powers — Sale

A testator who died in 1912, bequeathed his real estate and the residue of his personal estate to trustees in trust to pay out of the income thereof a life annuity of £150 to GM, after whose death they were to hold the property in trust for sale and to hold the proceeds of sale together with the accumulations of surplus income in trust to divide the same among certain hospitals. He also authorised the trustees, with the consent of GM during his life, to sell the real and leasehold property and to stand possessed of the proceeds upon the trusts therein declared of the net proceeds of sale of his residuary real and personal estate after the death of GM. After 1925 certain sales were made with that consent. No vesting deed under the Settled Land Act 1925 (c 18), had been executed. In 1933, GM being still living, the period within the accumulation of surplus income was permitted by Law of Property Act 1925 (c 20) s 164, expired: *Held* (1) there being no tenant for life, the trustees were statutory owners with the powers of a tenant for life by virtue of the Settled Land Act 1925 (c 18) s 23(1); (2) s 108(1) of the Act preserved powers exercisable by trustees with the consent only of a tenant for life and not of a person other than a tenant for life and, accordingly, the power here in question was not thereby preserved; (3) the provisions of the settlement giving the trustees a power of sale with the consent of GM were in conflict with the provisions of the Act giving them a power of sale without obtaining any such consent, and that, accordingly,

by virtue of s 108(2), the provisions of the Act prevailed; (4) as from 1 January 1926, the only power of sale vested in the trustees was that conferred by the Act and the effect of the exercise of that power was that the proceeds of sale were to be treated as capital moneys and to be subject to the same trusts as the land; (5) accordingly, the income of the proceeds of sale and of the accumulations was, as from the expiration of the period of accumulations, undisposed of and should be dealt with as on an intestacy.

Re Jefferys, Finch v Martin [1939] Ch 250; [1938] 4 All ER 120; 108 LJ Ch 123; 159 LT 542; 55 TLR 44; 82 Sol Jo 869

2596 Conflict between powers in settlement and statutory powers — Power of court to authorise sale by tenant for life

In a case where land was held on trust for sale and there were no trusts prior to the interests of tenants for life of the income, leave was given to the tenants for life under Settled Land Act 1884 (c 18) s 7 (repealed), to sell such of the land as remained unsold.

Re Harding's Estate [1891] 1 Ch 60; 60 LJ Ch 277; 63 LT 539; 39 WR 118

2597 Conflict between powers in settlement and statutory powers — Trustee's power of sale over whole estate — Held in undivided shares — Some shares settled

Re Hone & Parker's Contract no 1790 ante

2598 Conflict between powers in settlement and statutory powers — Settlement supplemented by private Act — Containing powers relating to property

Re Chaytor's Settled Estate Act no 2133 ante

2599 Conflict between powers in settlement and statutory powers — Settlement supplemented by private Act — Containing powers relating to property

Where land was by will vested in trustees in trust for persons by way of succession, a private Act of Parliament which merely conferred upon the trustees powers of developing and managing the land as a building estate, but did not incorporate the will, nor itself create any limitations to or in trust for any persons by way of succession, was not part of "the settlement" within Settled Land Act 1882 (c 38) s 56(2) (repealed); and no consent by the tenant for life to the exercise of those powers by the trustees was rendered necessary by that sub-section.

Talbot v Scarisbrick [1908] 1 Ch 812; 77 LJ Ch 436; 99 LT 46

ANNOTATION **Distd** Re Buttle's Will Trusts, Buttle v IR Comrs [1976] ER 289

2600 Conflict between powers in settlement and statutory powers — Settlement supplemented by private Act — Containing powers relating to property

(1) The cost of reconstructing the drainage of leasehold houses, forming part of a residuary estate bequeathed to trustees upon trust for tenant for life and remaindermen: *Held* to be payable out of capital money, as an improvement within Settled Land Acts (repealed), notwithstanding a direction in the will that pending a sale the rents, after payment of "all incidental expenses and outgoings" were to be paid to the tenant for life.

(2) Moneys in the hands of the trustees available for investment under this will are capital moneys within Settled Land Acts (repealed), as being moneys liable to be laid out in the purchase of land to be made subject to the settlement (*Byrne J*).

Re Thomas, Weatherall v Thomas [1900] 1 Ch 319; 69 LJ Ch 198; 48 WR 409

2601 Conflict between powers in settlement and statutory powers — Whether statutory power paramount — Express power for improvement

The power of a tenant for life under Settled Land Act 1882 (c 38) (repealed), to require capital moneys to be laid out, under a proper scheme, in improvements on the settled land, was paramount to the powers of the trustees of the settlement, notwithstanding an express power in the settlement under which, had they been so minded, they could have executed and paid for the improvements out of income; the position and power of the tenant for life was not affected in this case by the fact that there were no trustees of the settlement and that the capital moneys were in court at the time the expenditure was required.

Clarke v Thornton (1887) 35 Ch D 307; 56 LJ Ch 302; 56 LT 294; 35 WR 603; 3 TLR 299

ANNOTATIONS **Folld** Re Stamford's Estate (1887) 56 LT 484 **Consd** Cardigan v Curzon-Howe (1893) 9 TLR 244; Re Gee, Pearson Gee v Pearson (1895) 64 LJ Ch 606 **Distd** Re Partington, Reigh v Kane [1902] 1 Ch 711 **Expld** Re Keck's Settlmt [1904] 2 Ch 22 **Apld** Re Stamford & Warrington, Payne v Grey [1916] 1 Ch 404

2602 Conflict between powers in settlement and statutory powers — Whether statutory power paramount — Express trust for improvements — Payable out of income

Properties, the leases of which contained covenants by the lessees to do works which would be repairs and improvements within the meaning of Settled Land Acts (repealed), were bequeathed to trustees upon trust out of the rents and profits to pay the rents reserved by the leases and perform the lessees'

covenants, and subject thereto upon trusts under which K was tenant for life, with remainders to other persons. Without any scheme being submitted under Settled Land Act 1882 (c 38) s 26 (repealed), money was expended in making improvements: *Held* as there was a trust, providing for improvements out of income, and trust came before the trust for K, the expenses must be borne by income.

Re Partington, Reigh v Kane [1902] 1 Ch 711; 71 LJ Ch 472; 86 LT 194; 50 WR 388; 18 TLR 387; 46 Sol Jo 337

ANNOTATION **Distd** Re Stamford & Warrington, Payne v Grey [1916] 1 Ch 404

2603 Similar powers derived from two sources — Lands Clauses Acts and Settled Land Acts — Power of sale

Re Bentinck (Lady) & London & North Western Ry Co (1895) 12 TLR 100; 40 Sol Jo 130

2604 Similar powers derived from two sources — Settled Land Acts and power in settlement — Power in settlement more advantageous — Power to lease

(1) The provisions of Settled Land Act 1882 (c 38) s 56(2) (repealed) were provisions connected with the execution of any power under the Act—eg, the consent of a third person—and not with the results of such execution, and therefore where a tenant for life had a power of leasing under the settlement and also under the Act, and exercised the former and more advantageous power, the provisions of the Act would not override the provisions of the settlement under which the donee derived a greater benefit from the execution of the power than he would have done if he had exercised the power conferred upon him as tenant for life under Settled Land Act (repealed).

(2) When such a tenant for life grants the leases "in exercise of every power or authority enabling him," he will, in the absence of any contrary intention, be presumed to have exercised the power earlier in time and more favourable to himself.

(3) A power of leasing conferred by the settlement of each of several successive tenants for life "as and when he shall be entitled to the possession or the receipt of the rents and profits," is referable to the falling into possession of the several life interests, and not to the unincumbered beneficial enjoyment thereof, and is exercisable by the donee notwithstanding that he has aliened his life interest.

Lonsdale (Earl) v Lowther [1900] 2 Ch 687; 83 LT 312; sub nom

Lonsdale (Earl) v Crawfurd (1900) 69 LJ Ch 686; 16 TLR 509; 44 Sol Jo 626

2605 Exercise of "every power enabling him" — Presumption as to exercise — Power most beneficial and earlier in time

Lonsdale (Earl) v Lowther no 2604 ante

2606 Settlement granting powers in addition to or in aid of statutory powers — What powers within such provision — Powers of permanent improvement — Duty of trustees

Under a deed of settlement the tenant for life was granted "in addition to and in aid" of his statutory powers special powers of sale, enfranchisement, exchange, and partition and power also "to apply any money to arise by or upon such sale, enfranchisement, exchange or partition . . . in or towards the permanent improvement as to him . . . Shall seem advantageous" of the settled estates. There was also a provision in the settlement that capital moneys arising under Settled Land Acts (repealed) might be applied upon improvements authorised by those Acts without any scheme being first approved by the trustees and without an order of the court: *Held* (1) the power to apply any money to arise under the special powers in permanent improvements as to the tenant for life seemed advantageous was not an "additional or larger" power within Settled Land Act 1882 (c 38) s 57 (repealed), and was not therefore exercisable "in the like manner" as if conferred by the Act. It was a separate independent power differing entirely from the provisions as to improvements in the Act and not a mere extension of them. The trustees were accordingly bound to apply money arising under the special powers on such permanent improvements as to the tenant for life seemed advantageous without having a scheme submitted to them and without an order of the court.

(2) Capital moneys arising under the Act of 1882 (repealed) were by virtue of s 21(xi) (repealed) of the Act also applicable under the above power upon permanent improvements without the need for a scheme or an order of the court.

Re Westminster's (Duke) Settled Estates, Westminster (Duke) v Shaftesbury (Earl) [1920] 2 Ch 445; 90 LJ Ch 31; 124 LT 236; 65 Sol Jo 61

2607 Settlement granting powers in addition to or in aid of statutory powers — What powers within such provision — Powers of permanent improvement — Application of capital moneys

Re Westminster's (Duke) Settled Estates, Westminster (Duke) v Shaftesbury (Earl) no 2606 ante

2608 Settlement granting powers in addition to or in aid of statutory powers — What powers within such provision — Powers of

exchange — Accumulations of income resulting therefrom

Re Westminster's (Duke) Settled Estates, Westminster (Duke) v Shaftesbury (Earl) no 2606 ante

2609 Settlement granting powers in addition to or in aid of statutory powers — Injury possible to existing incumbrancer by exercise — Protection of incumbrances — Non-statutory investment or application of capital moneys

By an 1888 settlement now only subsisting by virtue of jointures and a portion charged thereunder, additional powers in extension of the statutory powers were given to the person in whom Settled Land Act powers should for the time being be vested. By a 1914 resettlement other additional powers were given to the person for the time being entitled to exercise a life tenant's powers. Both sets of these additional powers might prejudicially affect the security of the jointures and portion, but it was expressly provided that no non-statutory investment or application of capital money under the additional powers of the 1914 resettlement should be made without the consent of the 1914 resettlement trustees. The life tenant of the 1914 resettlement, though never a life tenant under the 1888 settlement, claimed as life tenant of the compound settlement, consisting of those deeds and an intermediate deed of disentail, to exercise both sets of additional powers without any consent: *Held* the life tenant was entitled to exercise both sets of additional powers, they having become statutory powers under Settled Land Act 1925 (c 18) s 109, and the jointresses and portioner being fully protected by the fact that the life tenant being a trustee for them under s 107(1), could only exercise his powers fiduciarily and after notice to the compound settlement trustees under s 101(1); but any non-statutory investment or application of capital money under the additional powers of the 1914 resettlement required the consent of the 1914 resettlement trustees.

Re Cowley Settled Estates [1926] Ch 725; 95 LJ Ch 477; 135 LT 568

xv PROTECTION OF TRUSTEES AND THIRD PERSONS

LAW See Halsbury's Laws (4th edn) vol 42 para 884 et seq

CROSS REFERENCE See no 1996 et seq ante (assignment of life interest by tenant for life: protection of purchaser under exercise of statutory powers)

2610 Lease at insufficient rent — Mala fides — Lessee party to transactions

Sutherland (Dowager Duchess) v Sutherland (Duke) no 2291 ante

2611 Lease at insufficient rent — Mala fides — Lessee party to transactions — Assignee for value not protected

Re Handman & Wilcox's Contract no 2469 ante

2612 Shifting of incumbrance — Exoneration of land sold from rentcharge

Re Strafford (Earl) & Maples no 2529 ante

2613 Sale at undervalue — Whether sufficient by itself to invalidate sale

In the case of a sale by a tenant for life under Settled Land Act (repealed) the mere fact that the purchaser had acquired the property at an undervalue was not, by itself, sufficient to invalidate the sale. If he had acted in good faith he was protected by Settled Land Act 1882 (c 38) s 54 (repealed), and he was not bound to inquire whether the tenant for life or the trustees had had the property valued.

The tenant for life of a freehold public-house which was let to a firm of brewers at a rent of £63 for a term of which there were twelve years to run, sold the property, subject to the lease, for £2,000. Immediately after the sale the purchaser contracted to resell the property for £3,000 to the brewers, to whom it had previously been offered for £2,750, but in vain. The remainderman brought an action to set aside the sale on the ground that the best price had not been obtained. There was no evidence that the purchaser had acted otherwise than in good faith: *Held* he was protected by Settled Land Act 1882 (c 38) s 54 (repealed).

Hurrell v Littlejohn [1904] 1 Ch 689; 73 LJ Ch 287; 90 LT 260; 20 TLR 198

2614 Sale at undervalue — Purchaser not bound to inquire

Hurrell v Littlejohn no 2613 ante

2615 Protection limited to persons dealing with limited owner as such

In 1921 a father sold certain property in fee simple to his son who, in 1927, sold it back to him in fee simple. By his will made in 1931 the father settled that and other property on his wife for life and, after her death, that particular property on his son for life with a contingent remainder to a grandson on attaining the age of twenty-five years. In 1931 the father died, and probate of the will was granted to the son and three other sons. In 1940 the widow died, and the four executors of the father's will executed a vesting assent, under Settled Land Act 1925, in favour of the son, to whom were handed over all the deeds relating to the property except the probate.

In 1944 the son charged the property by way of legal mortgage to secure certain advances, the charge reciting that he was seised in fee simple of it, and the schedule to the charge describing it and stating that it had been conveyed in fee simple to him by a conveyance dated 29 July 1921, subject to the covenants on the part of the grantee and conditions therein contained or referred to. In 1945 and 1946 he further charged it to secure further advances, both charges being endorsed on that of 1944. In 1946 he died. In 1947 what he had done was discovered, and in 1948 the grandson was granted letters of administration to the son's estate. In an action by the grandson for a declaration that the charge and further charges were void as against him, and for delivery up of the charges for cancellation and of the earlier title deeds relating to the property: *Held* (1) the son, in executing the charge and further charges and suppressing all the transactions to which the property had been subjected since 1921, had committed fraud, but not forgery; (2) Settled Land Act 1925 (c 18) s 18(1)(*a*), which in effect invalidates transactions not in accordance with the Act, was not in the present case to be read subject to s 112(2) of the Act and, accordingly, was not subject to the limitation that it should apply only to transactions by, or purporting to be by, a tenant for life as such; (3) s 110(1) of the Act, which protects a person dealing in good faith with a tenant for life or statutory owner, applied only to a person dealing with a tenant for life or statutory owner as such and who knew him to be a limited owner, and defendant was therefore not protected by it; (4) by virtue of s 18(1)(*a*) and (*b*) of the Act, the charge and instruments of further charge were void as against plaintiff; (5) the court would not order defendant to deliver up the charge and instruments of further charge for cancellation, since they gave no security as against the property and, as against the executors, were evidence of the advance of money in respect of which defendant could claim; (6) for the protection of plaintiff there should be endorsed on the charge the declaration that it and the further charges were void as against him.

Weston v Henshaw [1950] Ch 510

ANNOTATION **Consd** Re Morgan's Lease, Jones v Norsesowicz [1971] 2 All ER 235

2616 Agreement for lease with option to renew

By a document of 12 November 1960, described as a lease, M, who was the tenant for life of certain premises, purported to demise the premises to plaintiffs for the term of seven years from an unspecified day in November 1960 at a yearly rent of £475, and purported to covenant with them that he would, on their written request made three months before the expiration of the term, grant a lease for a further term of seven years, containing the same provisions, with the exception of the covenant for renewal. Plaintiffs believed M to be the absolute owner of the premises. Plaintiffs continued in possession and paid the rent of £475 in accordance with the 1960 document. M died in 1962, defendants being his successors in title. On 7 June 1967, plaintiffs applied to defendants for a new lease for a further seven years from 12 November 1967 at the yearly rent of £475, in accordance with the option clause. Defendants refused to grant the lease. Plaintiffs took out a summons claiming, *inter alia*, that the option to renew the lease had been validly exercised and that the resulting contract was enforceable by specific performance. It was common ground that the 1960 document was void as a lease, but operated as an agreement for a lease, taking effect as a present demise in equity, and that, on service of the notice exercising the option, an executory contract arose in accordance with the terms of the option. The question arose whether plaintiffs could bring themselves within Settled Land Act 1925 (c 18) s 110(1) as being purchasers dealing in good faith with a tenant for life and as such be conclusively taken to have paid the best rent that could reasonably be obtained by the tenant for life and to have complied with all the requirements of the Acts: *Held* plaintiffs were entitled to rely on s 110(1) of the Act and accordingly, their option to renew the lease had been validly exercised and was enforceable by specific performance for the following reasons: (1) s 110(1) was not limited to a case where the attack on a transaction was based solely on insufficiency of rent; (2) s 110(1) was not limited to completed transactions but included transactions which were the subject of an executory contract because: (*a*) the contract created by the exercise of the option created an assurance of the interest in the property, thereby, subject to good faith, constituting plaintiffs as purchasers who had acquired an interest in settled land for value; the transaction thus fell within the meaning of the word "disposition" and plaintiffs within the meaning of the word "purchaser" in s 110(1); (*b*) there was nothing in the history of the section and the clear meaning which, on its face, it carried, to suggest that it was intended to be restricted to a completed transaction to the exclusion of an executory contract; (3) plaintiffs were entitled to rely on s 110(1) irrespective of the fact that they were unaware that M was a tenant for life, provided that they acted in good faith; (4) since plaintiffs did not know that M was tenant for life but thought that he was the absolute owner, the fact that they might have known that the option rent was less than would be obtainable under a lease on the terms of the option lease did not establish lack of good faith.

Per *Ungoed-Thomas J*: where there is an option to renew a lease of settled land the date of ascertaining the best rent obtainable is the date when the option is granted; this is in accordance with Settled Land Act 1925 (c 18) s 51 which deals specifically with options and the best price or rent under them, and which may be read apart from or as prevailing over s 90(1)(iii) of the Act which deals only generally with executory contracts and the requirements of leases thereunder.

Re Morgan's Lease, Jones v Norsesowicz (or Norseowicz) [1972] Ch 1; [1971] 2 All ER 235; [1971] 2 WLR 1503; 115 Sol Jo 468; 22 P&CR 564

3 SETTLEMENTS OF LAND ON TRUST FOR SALE

1 Creation of trusts for sale

i IN GENERAL

LAW See Halsbury's Laws (4th edn) vol 42 para 896 et seq

2617 What constitutes "interest" — For purposes of requirement for memorandum

Plaintiff and defendant were joint tenants in fee simple of land which they held on trust for sale and on trust to hold the net proceeds of sale and the net rents and profits until sale for themselves as tenants in common in equal shares. They granted a lease of the land to a company in which each of them held one-half of the total issued share capital. Plaintiff and defendants entered into negotiations for the sale to defendant of plaintiff's interest in the property. Defendant ultimately declined to complete the proposed purchase. Plaintiff started proceedings for specific performance of a contract for the said sale alleged to have been constituted partly orally and partly by correspondence, and, among other defences defendant pleaded Law of Property Act 1925 (c 20) s 40: *Held* no binding contract had been agreed, but if a contract had been concluded for the sale by plaintiff of his interest to his co-owner defendant, it would have been a contract for the sale of an "interest in land" within Law of Property Act 1925 (c 20) s 40(1), and, as there was no sufficient memorandum in writing of the alleged contract, that section also constituted a good defence.

Per *Jenkins LJ*: I should be inclined to accept the general proposition that a share in the proceeds to arise from a sale of land is an interest in land within Law of Property Act 1925 s 40(1).

Cooper v Critchley [1955] Ch 431; [1955] 1 All ER 520; 99 Sol Jo 148, CA

2618 What constitutes "interest" — For the purposes of registration

Plaintiff and the first defendant were partners in a business of property owners in respect of a freehold house. The partnership deed dated 7 April 1970 contained an express provision that the partners would stand possessed of the property on trust for the partners in equal shares. The first defendant was registered as the sole proprietor of the house. On 29 October 1970 he executed a transfer of the property in favour of the second defendant who paid the purchase price to him. The second defendant had no notice of the partnership or plaintiff's interest at the time of the transfer. The second defendant failed to present the transfer for registration for several months. Meanwhile plaintiff had lodged a caution in respect of the house on 15 December. In an action by plaintiff against both defendants the question arose whether plaintiff had *locus standi* to lodge a caution under Land Registration Act 1925 (c 21) s 54(1) as a person "interested . . . in any land": *Held* plaintiff was entitled to lodge a caution. Since an interest in the proceeds of sale of land held on trust for sale was, for the purposes of the 1925 Act, a "minor interest" in land by virtue of the definition in s 3(xv) of the Act, it followed that a person interested in the proceeds of sale was a person interested in land for the purposes of s 54(1).

Elias v Mitchell [1972] Ch 652; [1972] 2 All ER 153; [1972] 2 WLR 740; 116 Sol Jo 15; 23 P&CR 159

2619 What constitutes "interest" — For purposes of "overriding interest"

Williams and Glyn's Bank Ltd v Boland [1981] AC 487; [1980] 2 All ER 408; [1980] 3 WLR 138; 124 Sol Jo 443; [1980] RVR 204, HL

ANNOTATION **Apld** Spectrum Investment Co v Holmes [1980] 1 All ER 6

2620 Proceeds of sale of land — Interest of mortgagor

A mortgagor's interest in the proceeds of sale of land held on trust for sale was an interest in "land" as defined by Real Property Limitation Act 1833 s 1 (repealed), and therefore, under s 34 (repealed) of the same Act and s 8 (repealed) of Real Property Limitation Act 1874, after the lapse of 12 years, in

the absence of any payment or acknowledgment, the title of the mortgagee was extinguished.

Re Fox, Brookes v Marston [1913] 2 Ch 75; 82 LJ Ch 393; 108 LT 948

ANNOTATION **Consd** Re Witham, Chadburn v Winfield [1922] 2 Ch 413

2621 Rights of co-tenants to enjoy property

In 1949 plaintiff and his mother, defendant, together purchased a freehold house, plaintiff contributing a larger part of the purchase price than defendant and the conveyance being taken in his name. The money contributed by defendant was not intended to be a gift from her to plaintiff, and defendant accordingly became entitled to an equitable interest proportionate to her contribution. The parties lived together in the house until April 1953, when plaintiff married and it was arranged that defendant should occupy two rooms and that plaintiff and his wife should occupy the rest of the house. Subsequently differences arose between the parties and plaintiff brought an action for possession of the rooms occupied by defendant: *Held* the effect of the purchase of the house in 1949 was that plaintiff and defendant became beneficial tenants in common of the proceeds of sale of the property which was subjected on the statutory trust for sale, defendant had a right to participate in the enjoyment of the property until it was sold, and plaintiff's action for possession failed.

Per curiam: the answer to the question what is to happen if, in such circumstances as those of the present case, the two equitable tenants in common disagree is that the property may be sold in exercise of the statutory trusts for sale, for which purpose there must be two trustees for sale to enable a good receipt to be given for the price; if the trustees wish to sell with vacant possession and the assent of one tenant in common is withheld the only course open is to apply to the court under Law of Property Act 1925 (c 20) s 30.

Bull v Bull [1955] 1 QB 234; [1955] 1 All ER 253; 99 Sol Jo 60, CA

ANNOTATIONS **Consd** Diwell v Farnes [1959] 2 All ER 379; Jones v Challenger [1900] 1 All ER 785; Cook v Cook [1962] 2 All ER 811; Robson-Paul v Ferrugia (1969) 20 P&CR 820 **Distd** Barclay v Barclay [1970] 2 All ER 677 **Consd** Irani Finance Ltd v Singh [1970] 3 All ER 199 **Apld** Jones v Jones [1977] 2 All ER 231; Cantliff v Jenkins [1978] 1 All ER 836

2622 Deed of appointment of new trustee

A testatrix by her will appointed three executors, two of whom were also appointed trustees thereof. She died on 21 November 1939, and her will was proved by the two executor trustees. They made assents in respect of certain properties specifically devised and retained other properties specifically devised and their administration account was brought in 1952. On 12 February 1951, one of the executors died. By a deed of appointment dated 20 June 1953, the sole surviving executor, C, appointed J, the third executor named in the will, who had not proved it, to be trustee jointly with himself. The deed of appointment recited that the property, the subject of the trusts of the will, consisted of freehold property and investments described in the two schedules thereto and that the investments described in the second schedule were to be transferred into the names of the two trustees. The first schedule set out the freehold properties still retained by and standing in the name of C. C died on 2 May 1958, and his will was proved by the sixth defendant and another executor, who died in 1959. By a deed of appointment dated 13 March 1959, J appointed plaintiff a trustee of the will of the testatrix jointly with himself. J died on 23 November 1962. Accordingly, the sixth defendant was the sole surviving personal representative of the testatrix by representation, and plaintiff was the sole surviving trustee to her will. There had never been any assent to the vesting of the properties retained by the executors, unless the deed of appointment of a new trustee dated 20 June 1953 operated as an assent. The question arose in whom the legal estate in these properties was vested: *Held* the deed of appointment was not an assent in writing signed by the personal representative within Administration of Estates Act 1925 (c 23) s 36(4), and thus was ineffective thereunder to pass a legal estate, for Trustee Act 1925 (c 19) s 40(*a*), (*b*), applied only where estates and interest formed part of existing trust property, not where, as here, the legal estate was vested in a person as personal representative, even though he was the personal representative of deceased trustee; accordingly, the legal fee simple estate in the properties was vested in the sixth defendant.

Re King's Will Trusts, Assheton v Boyne [1964] Ch 542; [1964] 1 ER 833; [1964] 2 WLR 913; 108 Sol Jo 335

ii METHOD OF SETTLING LAND UPON TRUST FOR SALE

LAW See Halsbury's Laws (4th edn) vol 42 para 897

iii TRUST FOR SALE ARISING BY STATUTE

LAW See Halsbury's Laws (4th edn) vol 42 para 898

2 Trustees for sale

i APPOINTMENT OF TRUSTEES FOR SALE

LAW See Halsbury's Laws (4th edn) vol 42 paras 899, 900

ii POWERS OF TRUSTEES FOR SALE

NOTE By virtue of the Trusts of Land and Appointment of Trustees Act 1996 s 4, 37(S) Halsbury's Statutes (4th edn) Real Property (Pt 1) every express trust for sale has implied into it a power for the trustees to postpone sale of the land. Where statutory provisions impose a trust for sale in certain circumstances, there is now a trust of the land without a duty to sell: 1996 Act s 5, Sch 2

1 Necessary consents to be obtained

LAW See Halsbury's Laws (4th edn) vol 42 para 901

NOTE The following cases are now of less importance due to the Trusts of Land and Appointment of Trustees Act 1996 Sch 4, 37(S) Halsbury's Statutes (4th edn) Real Property (Pt 3)

2623 When consent may be given — After investment

Power to trustees, with consent of A, under her hand, with two witnesses, to advance £1,500 to her husband. They advance the money, without the consent of A. Afterwards A, by an instrument under her hand, attested by two witnesses, testifies that the money was advanced with her consent. On a bill filed by A: *Held* the trustees must refund the £1,500.
Batemen v Davis (1818) 3 Madd 98; 56 ER 446

ANNOTATION **Distd** Stevens v Robertson (1868) 37 LJ Ch 499

2624 Exercise of statutory powers — Duty to consult beneficiaries

A summons in an administration action was taken out by the trustees for the purposes of the Settled Land Act 1925 (c 18), of a settlement of real estate made by the will of a testator for the determination of the question whether the provisions of Law of Property Act 1925 (c 20) s 26(3), as amended by the Law of Property (Amendment) Act 1926 (c 11) (by which they were directed to consult the wishes of beneficiaries), applied also to the exercise by them of their other statutory trusts and powers: *Held* it was the duty of the trustees to consult the wishes of the beneficiaries not only with regard to the exercise of the trust for sale, but also with regard to the exercise of all other trusts and powers arising under Settled Land Act 1925 (c 18), and Law of Property Act 1925 (c 20), and 1926 (c 11), and the additional or larger powers conferred by the settlement on the trustees thereof or otherwise.
Re Jones, Jones v Cusack-Smith [1931] 1 Ch 375; 100 LJ Ch 129; 144 LT 642

ANNOTATION **Apld** Crawley Borough Council v Ure [1996] 1 All ER 724

2625 Persons to be consulted

Re House, Westminster Bank v Everett no 1129 ante

2626 Status of wife's rights

A cottage, the matrimonial home, was conveyed in 1965 to the husband alone, but part of the purchase price was contributed by the wife. The husband (who was thus sole trustee of the cottage on trust for sale) agreed to sell it to a purchaser, and the wife applied for an injunction to restrain any sale or lease of the cottage without her consent: *Held* the wife was in no worse position, merely because the cottage was the matrimonial home and vested in the husband, than any other equitable tenant in common of the proceeds of sale of land held on trust for sale; accordingly the injunction sought would be granted, the wife undertaking to join the purchaser as defendant and he being given liberty to apply to discharge the order.
Waller v Waller [1967] 1 All ER 305; [1967] 1 WLR 451; 111 Sol Jo 94

2 Power to postpone sale

LAW See Halsbury's Laws (4th edn) vol 42 para 902

NOTE The following cases are now of less importance due to the Trusts of Land and Appointment of Trustees Act 1996 Sch 4, 37(S) Halsbury's Statutes (4th edn) Real Property (Pt 3)

2627 "Contrary intention" — What amounts to

By his will, dated 8 October 1948, a testator directed his trustees that "if my house farm lands and premises known as Woodhouses . . . and my live and dead stock have not been sold at the time of my decease to as soon as possible after my death sell the same and . . . the net proceeds shall fall into and form part of my residuary estate." He gave his residuary estate to his trustees "upon trust to permit and allow" his wife "to receive and enjoy the net income . . . thereof during the life" and on her death he directed the trustees "to sell call in and convert the same into money and . . . pay and divide the net proceeds . . . equally between" his brother S and his three sisters M, L, and G, and provided that "in case of either of my brothers or sisters shall be dead at the time of my

wife's decease I give their respective share of my residuary estate to their respective issue . . ." He directed further that his trustees during the life of the widow "may . . . have full power to sell or vary all or any part of my estate and may retain any investment that my estate may consist of at my death . . ." G, a spinster, survived testator but predeceased the widow: *Held* (1) the words of testator directing a sale of the farm were sufficiently imperative in their context to make them inconsistent with a discretionary power of postponement, and therefore, there appeared a "contrary intention" within Law of Property Act 1925 (c 20) s 25(1), sufficient to exclude the power to postpone sale to be implied under that section; (2) on the true construction of the will, the gift to the issue of testator's brother and sisters was merely substitutionary, and therefore, as the substitution was in favour of issue of the primary beneficiaries, the gift to G should be construed as being intended to remain vested unless the substitutionary gift took effect, and G never having had issue, her share of residue devolved on her personal representatives.

Re Rooke's Will Trusts, Taylor v Rooke [1953] 2 All ER 110; sub nom

Re Rooke, Rooke v Rooke [1953] Ch 716; [1953] 2 WLR 1176; 97 Sol Jo 388

2628 "Contrary intention" — What amounts to

By his will testator appointed the bank to be his executor and trustee. By clause 4 of the will he devised his farm to the bank on trust to allow his stepson to have the full use and enjoyment thereof and, on the stepson's death or when he ceased to work the farm, the bank was directed to sell the farm and to divide the net proceeds of sale equally and *per capita* amongst such of the following: (i) the grandchildren of his deceased brother, (ii) a named beneficiary, and (iii) "the four children" of his niece, "as shall be living at the date of the completion of the said sale". No time for sale was mentioned in the will and no express power to postpone sale was included. Clause 6 of the will contained a residuary gift to the bank on trust to sell, call in or convert into money "such parts . . . as shall not consist of ready money with power to postpone such sale in calling in and conversion". Testator died in 1957. The bank vested the farm in the stepson who occupied and worked it until his death in March 1972. Nine grandchildren of deceased brother as well as the other beneficiaries named in clause 4 were living at the date of the stepson's death and were living at all material times thereafter. The bank sold the farm, save for a small plot of 1.242 acres, in September 1972. On a summons by the bank seeking the determination (i) of the proper construction of the words "at the date of the completion of the . . . sale" in clause 4, and (ii) of the question whether the clause was void for perpetuity, it was contended by those interested in the residuary estate that the gift over on the stepson's death was void in that the gift might have failed to vest within 21 years of his death, since the sale of the farm might not have been completed within the period: *Held* (1) the expression "at the date of the completion of the . . . sale" in clause 4 denoted the date at which the sale was completed in accordance with the ordinary meaning of that word in the language of conveyancing, *ie* the execution of a conveyance and the payment of the purchase price; (2) the gift over on the stepson's death was not void of perpetuity because: (i) no power to postpone sale could be implied under s 25(1) of Law of Property Act 1925 in relation to the direction in clause 4 to sell the farm on the stepson's death, for a contrary intention was apparent from the terms of the will in that (*a*) testator could not have contemplated the bank retaining and continuing to work the land and there could be no question of the beneficiaries doing so, (*b*) the beneficiaries' shares were limited to arise on completion of the sale, and (*c*) on relation to the residuary estate there was an express power to postpone sale, (ii) accordingly the bank was bound to sell the farm immediately on the stepson's death, *ie* as soon as would be convenient in the proper course of realisation. By analogy with the executor's year that amounted to a duty to sell within one year of the stepson's death; (iii) although in determining whether a gift was void for perpetuity the court had to take into account the possibility of delay in consequence of physical causes, it could not properly take into account the possibility that a breach of trust by the bank might delay the vesting of the beneficiaries' interests beyond the perpetuity period. Since the sale had to be completed within one year of the stepson's death, the vesting would take effect within that year and there could be no question of perpetuity.

Re Atkins' Will Trusts, National Westminster Bank Ltd v Atkins [1974] 2 All ER 1; [1974] 1 WLR 761; 118 Sol Jo 391

2629 Implied power to postpone — Share of one beneficiary vested in possession

Where land is devised to trustees in trust for sale with a discretionary power of postponement, and the proceeds are settled in trust for various beneficiaries, the vesting in possession of the share of one of the beneficiaries does not put an end to the power of postponement, or entitle that beneficiary to call either for an immediate sale of the entirety or for a conveyance of an undivided share in the land.

Re Horsnaill, Womersley v Horsnaill [1909] 1 Ch 631; 78 LJ Ch 331; 100 LT 603

ANNOTATION **Apprvd** Re Kipping, Kipping v Kipping [1914] 1 Ch 62

2630 Implied power to postpone

Testator by will devised and bequeathed all his residuary real and personal estate to trustees upon trust for sale and conversion, with power to the trustees in their absolute and uncontrolled discretion to postpone the sale or conversion. The will contained a provision that until sale or conversion the rents, profits, and income arising from such part of the residuary estate as should for the time being remain unsold or unconverted should be paid or applied to the persons to whom and in the manner in which the dividends, interest and income arising from the investment of the proceeds of sale of the residuary estate would have been payable or applicable under the trusts declared concerning the same; and the trustees were to stand possessed of the proceeds of sale of the residuary estate in trust for testator's children who should attain the age of twenty-one years in equal shares as tenants in common.

Testator left seven children who were under twenty-one years of age; one of them on attaining twenty-one claimed that he was entitled to be paid his one-seventh share of the residuary estate or to have his share appropriate to him: *Held* he was not so entitled so long as the trustees in the *bonâ fide* exercise of their discretion determined to postpone the sale.

Re Kipping, Kipping v Kipping [1914] 1 Ch 62; 83 LJ Ch 218; 109 LT 919, CA

2631 Implied power to postpone — Trust prevails if no unanimity

(1) Where a will contains a trust for conversion with a power to retain investments existing at the date of the will, and the trustees are not unanimous as to the retention of some of the investments made by testator, the trust for sale prevails and the investments must be sold, although such investments are within the investment clauses in the will.

(2) Testator authorised his trustees to invest in the stocks, shares, or securities of "any company in the United Kingdom": *Held* a limited company registered in England and having its head office in England, where its directors met to manage the affairs of the company, was a "company in the United Kingdom" within the meaning of the investment clause, although its property was situate abroad and its operations were abroad.

Re Hilton, Gibbes v Hale-Hinton [1909] 2 Ch 548; 79 LJ Ch 7; 101 LT 229; 17 Mans 19

2632 Discretion of court — To order concurrence of dissenting trustees

Two of the trustees of a will, who were also trustees for the purposes of the Settled Land Acts, refused to concur with the remaining trustee in exercising the statutory powers of sale on which certain freehold property was held. The remaining trustee took out a summons under the Law of Property Act 1925 (c 20) s 30, for an order directing his co-trustees to concur with him in offering the property for sale in such manner as the court should think fit: *Held* the judicial discretion conferred on the court by the Law of Property Act 1925 (c 20) s 30, on an application of this kind "to make such order as it thinks fit" must be exercised in the same way as the discretion which is exercisable by the court in the case of an instrument containing an express trust for sale and a power of postponement, and the two trustees must be directed to concur with the remaining trustee in taking the necessary steps for the sale of the property.

Re Mayo, Mayo v Mayo [1943] Ch 302; [1943] 2 All ER 440; 59 TLR 395; sub nom *Re Mayo's Will Trusts* (1943) 112 LJ Ch 257; 169 LT 205

ANNOTATIONS **Apld** Re Steed's Will Trusts [1960] 1 All ER 487; Jones v Challenger [1960] 1 All ER 785

2633 Discretion of court — To order concurrence of dissenting partner

Re Foot & Hall Beddall & Co Ltd's Agreement, Hall Beddall & Co Ltd v Foot (1945) 89 Sol Jo 521

2634 Application for enforcement of power — By one joint tenant

In 1956 a husband and his wife purchased the remainder of a lease of a dwelling-house of which ten years remained unexpired. The lease was assigned to the husband and wife (who provided the purchase money in equal shares) on trust for sale with power to postpone sale and to hold the proceeds on trust for themselves as joint tenants. The house was intended to be and was used as the matrimonial home. In 1957 the wife left the husband who obtained a decree dissolving the marriage on the ground of the wife's adultery. The wife remarried, and the husband continued to live in the house which they had purchased. The wife applied under Law of Property Act 1925 (c 20) s 30, for an order that the house should be sold and the proceeds divided equally between her and her former husband: *Held* the wife was entitled to have the house sold because, the purpose for which the house was bought (*viz*, providing a matrimonial home) had ended, and the duty to sell under the trust for sale accordingly prevailed; moreover it was not inequitable for the wife to want to realise her investment, for that was the only way in which the beneficiaries could derive

equal benefit from their investment. Observations on the distinction between an application under Law of Property Act 1925 (c 20) s 30, and an application under Married Women's Property Act 1882 (c 75) s 17.

Jones v Challenger [1961] 1 QB 177; [1960] 1 All ER 785; [1960] 2 WLR 695; 104 Sol Jo 328, CA

ANNOTATIONS **Consd** Rawlings v Rawlings [1964] 2 All ER 804 **Apld** Re Citro (a bankrupt) [1990] 3 All ER 952

2635 Application for enforcement of power — By one joint tenant

Bedson v Bedson [1965] HUSBAND AND WIFE vol 27(1) (2nd reissue) no 1631

2636 Instruments before 1926 — Question of individual construction

Re Hotchys, Freke v Calmady no 3634 post

2637 Instruments before 1926 — Question of individual construction

Testator, who died in the year 1901, gave the residue of his estate real and personal, consisting of certain stocks and shares, freehold hereditaments, and leasehold houses held on leases expiring in the year 1924, to trustees upon trust either to allow the same to remain in its state of investment at his decease or, as and when his trustees should, in their absolute discretion, see fit so to do, from time to time to realise and sell and convert the same or any part thereof. Testator directed his trustees to reinvest the money when realised in trustees' securities and to hold the investments, whether original or substituted, upon trust to pay unto or permit his wife, F, who was one of the trustees, to receive the income of his residuary estate during widowhood, to be reduced to a moiety of the income on her remarriage, and subject to her life interest the testator gave his residuary estate to his son C to be paid to him as to a moiety at twenty-one and the residue on his attaining thirty, but should his son die under twenty-five the whole residue was given to F: *Held* the words of the will created a trust for sale.

Re Crips, Crips v Todd (1906) 95 LT 865

ANNOTATIONS **Consd** Re Johnson, Cowley v Public Trustee [1915] 1 Ch 435; Re White's Settlmt, Pitman v White [1930] 1 Ch 179

2638 Instruments before 1926 — Question of individual construction

Re Goodall's Settlement, Fane v Goodall no 1026 ante

2639 Instruments before 1926 — Question of individual construction

Testator devised and bequeathed his real and personal estate to trustees upon trust "either" to retain it in the same state as at his death "or" at such times as the trustees thought fit to sell and convert it into money and to invest the proceeds in certain securities and to hold the trust estate in trust to pay the income to plaintiff for life and subject thereto in trust for other beneficiaries. The will contained a common form power of postponement and the trusts were such as are ordinarily applicable to personal estate: *Held* the will created an immediate trust for sale with a mere power of postponement which was a trust for sale within Settled Land Act 1882 (c 38) s 63 (repealed).

Re Johnson, Cowley v Public Trustee [1915] 1 Ch 435; 84 LJ Ch 393; 112 LT 935; 59 Sol Jo 333

ANNOTATION **Distd** Re White, Pitman v White (1929) 46 TLR 30

2640 Instruments before 1926 — With consent of tenant for life

By a marriage settlement made in 1882 an undivided share of real estate passing under a will was settled, together with other property belonging to the wife, upon trust either to retain the same in its present condition, or with the consent of the tenant for life during her life, to sell, and after her death to sell at the discretion of the trustees. The settlement contained various powers to the trustees appropriate to the management of real estate, but no power to postpone conversion. In 1906 a partition of the entirety of the estate was effected, and certain hereditaments appropriated and conveyed to the trustees in satisfaction of the undivided share settled. On a summons to determine the question whether the land remaining unsold was settled land or held upon trust for sale: *Held* the settlement having been made before the coming into operation of Law of Property Act 1925 (c 20), under s 25(4) of which it would have created a trust for sale, the question was one of construction, and having regard to the trusts and powers in the settlement for the management of the property as real estate, the land remaining subject thereto was not held upon trust for sale but was settled land.

Re White's Settlmt, Pitman v White [1930] 1 Ch 179; 99 LJ Ch 49; 142 LT 279; 46 TLR 30

3 Powers under Settled Land Act 1925

LAW See Halsbury's Laws (4th edn) vol 42 para 903

NOTE The following cases are now of less importance due to the Trusts of Land and Appointment of Trustees Act 1996 Sch 4, 37(S) Halsbury's Statutes (4th edn) Real Property (Pt 3)

2641 Power to sell and invest — When purchase of land permissible

The trustees of a will were directed to hold the residue of the real and personal property of the testator on trust for sale and conversion and to invest the

proceeds of sale in any investments authorised by law. They took out an originating summons to determine whether they had power, under the Law of Property Act 1925 (c 20) s 28, to invest the proceeds of sale of the real property of the testator in the purchase of land: *Held* the trustees to the will were not trustees for sale, within the definition of s 205 of the Act of 1925, and did not possess any power to purchase land.

Re Wakeman, Re Trustee Act 1925, National Provincial Bank Ltd v Wakeman [1945] Ch 177; [1945] 1 All ER 421; 114 LJ Ch 145; 172 LT 226; 61 TLR 261; 89 Sol Jo 165

ANNOTATION **Consd** Re Wellsted's Will Trust, Wellsted v Hanson [1949] Ch 296

2642 Purchase as investment

Law of Property Act 1925 (c 20) s 28(1) has, by providing that "trustees for sale shall in relation to land . . . have all the powers of a tenant for life and the trustees of a settlement under Settled Land Act 1925 (c 18)," conferred on trustees for sale of land the power to apply the proceeds of sale of land in the purchase of other land; for the subsection gives the trustees for sale in respect of the proceeds of sale of land the same power to a acquire land as is conferred by Settled Land Act 1925 (c 18) s 73(1)(xi) in respect of capital moneys arising under the latter Act.

When trustees for sale have made investments of the proceeds of sale of land, they can, so long as the proceeds of sale can be traced, apply the realised amount of the investments in the purchase of land.

Re Wellsted's Will Trusts, Wellsted v Hanson [1949] Ch 296; [1949] 1 All ER 577; [1949] LJR 1153; 93 Sol Jo 216, CA

ANNOTATION **Apld** Re Simons Trusts, Simons v Public Trustee [1955] 3 All ER 818

4 Power to partition

LAW See Halsbury's Laws (4th edn) vol 42 para 904

NOTE The following cases are now of less importance due to the Trusts of Land and Appointment of Trustees Act 1996 Sch 4, 37(S) Halsbury's Statutes (4th edn) Real Property (Pt 3)

2643 Power to partition — Under Law of Property Act 1925 (c 20) s 28(3) — When exerciseable

(1) Law of Property Act 1925 (c 20) s 28(3), which enables trustees for sale to partition unsold land in cases where the net proceeds of sale have become "absolutely vested" in adult persons in undivided shares, does not apply where those proceeds are only vested in life tenants. A power of partition in a will-settlement is *pro tanto* inconsistent with the statutory trusts for sale, and cannot therefore be treated as an "additional or larger" power preserved by s 28(1) as amended by Law of Property (Amendment) Act 1926 (c 11), Schedule. It is therefore overridden by the statutory trusts.

(2) Where partition, though expedient, cannot be effected under any power vested in the trustees by the trust instrument or by law, the court can confer the necessary power for the purpose under Trustee Act 1925 (c 19) s 57.

Re Thomas, Thomas v Thompson [1930] 1 Ch 194; [1929] All ER 129; 99 LJ Ch 140; 142 LT 310

ANNOTATIONS As to (1) **Distd** Re Gorrine & Braybons Ltd's Contract [1934] Ch 614n. As to (2) **Consd** Re Brooker, Public Trustee v Young [1934] Ch 610

2644 Power to partition — Under Law of Property Act 1925 (c 20) s 28(3) — When exerciseable

Re Gorringe & Braybons Ltd's Contract [1934] Ch 614n; [1933] All ER 401; 151 LT 347n

ANNOTATION **Consd** Re Brooker, Public Trustee v Young [1934] Ch 610

2645 Power to partition — Under Law of Property Act 1925 (c 20) s 28(3) — Proceeds absolutely vested in trustees or personal representatives

The power of partitioning land given to trustees for sale by Law of Property Act 1925 (c 20) s 28(3), in cases where the proceeds of sale have "become absolutely vested in persons of full age in undivided shares," with the consent of the persons, if any, interested in possession of the net rents and profits of the land until sale, is exerciseable when the persons in whom the proceeds of sale are vested are trustees or personal representatives, and is not confined to the case where such persons are beneficially interested in the property.

Re Brooker, Public Trustee v Young [1934] Ch 610; [1934] All ER 703; 151 LT 345; sub nom *Re Brooker, Young v Public Trustee* (1934) 103 LJ Ch 247; 78 Sol Jo 447

2646 Power to partition — Whether court may confer

Thomas, Re, Thomas v Thompson no 2643 ante

5 Delegation of powers of leasing and management

LAW See Halsbury's Laws (4th edn) vol 42 para 905

6 Other powers

LAW See Halsbury's Laws (4th edn) vol 42 para 906

7 Application to the court

LAW See Halsbury's Laws (4th edn) vol 42 para 907

CROSS REFERENCE See BANKRUPTCY vol 5(2) (2nd reissue) no 13533

NOTE The following cases are now of less importance due to the Trusts of Land and Appointment of Trustees Act 1996 Sch 4, 37(S) Halsbury's Statutes (4th edn) Real Property (Pt 3)

2647 Whether receiver entitled to order for sale under Law of Property Act 1925 (c 20) s 30

A testator, who died on 15 December 1945, devised a freehold dwelling-house to A and A's wife, B in equal shares as tenants in common, and appointed A and B to be his executors. On 4 September 1946, A and B assented to the vesting of the house in themselves in fee simple on trust to sell the same, with power to postpone such sale, and to hold the net proceeds of sale on trust for themselves as tenants in common in equal shares. On 2 January 1951, C obtained judgment against A for £2,008 and costs, and on 25 January 1951, C obtained an order for the appointment of himself as receiver by way of equitable execution of A's interest in the house, which was occupied by A and B as the matrimonial home. C applied under Law of Property Act 1925 (c 20) s 30, for an order for the sale of the house: *Held* C, as receiver, had no proprietary right under the trust relating to the house and so was not a "person interested" therein within s 30 and was not entitled to an order for sale under that section; nor did he have a charge on the property under s 195 of the Act (under which a judgment operates as an equitable charge on every estate or interest, whether legal or equitable, in all land to which the judgment debtor is entitled) because, notwithstanding the definition of "equitable interests" in s 205(x), an interest in the proceeds of sale of land was not an equitable interest in land; and, therefore, the application must be dismissed.

Re No 39 Carr Lane, Acomb, Stevens v Hutchinson [1953] 1 All ER 699; sub nom *Stevens v Hutchinson* [1953] Ch 299; [1953] 2 WLR 545; 97 Sol Jo 171

ANNOTATIONS **Consd** Re Roehampton Swimming Pool Ltd [1968] 3 All ER 661 **Apld** Irani Finance Ltd v Singh [1970] 3 All ER 199 **Consd** Elias v Mitchell [1972] 2 All ER 153; Levermore v Levermore [1980] 1 All ER 1

2648 Whether receiver entitled to order for sale under Law of Property Act 1925 (c 20) s 30 — In name of co-owner

A husband was ordered to pay his former wife a lump sum of £2,000, but failed to do so. His only asset was an interest under a trust for sale as a tenant in common with his brother of a house, the former matrimonial home. The brother would not agree to a sale. The wife applied for the appointment of a receiver by way of equitable execution over the husband's interest in the property: *Held* the court had jurisdiction to appoint a receiver, who would be authorised to take any necessary proceedings in the husband's name to enforce a sale of the property.

Levermore v Levermore [1980] 1 All ER 1; [1979] 1 WLR 1277; 123 Sol Jo 689; 10 Fam Law 87

2649 Sale under trust for sale after divorce decree — Court to have regard to principles of matrimonial property legislation

The husband and wife were married in 1950 and had four children. In April 1970 they purchased a house for £7,275 which was conveyed into their joint names on trust for sale for themselves beneficially as tenants in common in equal shares. Of the purchase moneys £3,000 was advanced by way of mortgage while the balance was provided from the husband's savings. In September 1970 the marriage broke down and the wife petitioned for divorce on the ground of cruelty. She obtained a decree which was made absolute in November 1971. By that time the husband had left the matrimonial home but the wife remained there with the children. In June 1973 the husband issued a summons in the Chancery Division under s 30 of Law of Property Act 1925 seeking an order that the house be sold and the proceeds of sale divided equally between himself and the wife. At the hearing of the summons in June 1975, the wife contended that the sale should be postponed so that the youngest child, then aged 12, could remain in the house and continue to attend the same school. The judge however, made the order sought on the ground that the whole of the husband's available capital should not be tied up in the property until the youngest child left school. The wife appealed: *Held* in executing a trust for sale affecting the former matrimonial home of parties who had been divorced, the court was bound to have regard to the provisions of Matrimonial Causes Act 1973 relating to matrimonial property, and to consider the needs of the family as a whole and the fact that the property had been bought as a home in which the family was to be brought up. The primary object of the court should be to provide a home for the remaining partner and children and the court should endeavour to preserve the property as such although the out-

going partner should be given such compensation as was reasonable in the circumstances. Since the judge had failed to take all the relevant matters into account the appeal would be allowed and the case remitted for further consideration by a judge of the Family Division.

Per *Lord Denning MR* and *Roskill LJ*: applications to the court after decree absolute for an order affecting the matrimonial home should properly be made to the Family Division under the relevant provisions of Matrimonial Causes Act 1973 and if taken out in another Division should be transferred to the Family Division.

Williams v Williams [1976] Ch 278; [1977] 1 All ER 28; [1976] 3 WLR 494; 120 Sol Jo 434, CA

2650 Sale under trust for sale after divorce decree — Court to have regard to principles of matrimonial property legislation — Unmarried couples

A couple who were engaged to be married arranged to buy a house and to set up home together. The whole purchase price of £11,750 was raised on a mortgage and the property was conveyed into their joint names. There was no declaration of trust. The couple each paid some of the incidental expenses and thereafter each worked, their earnings enabling them to pay outgoings and buy food. In 1976 the plaintiff left, the defendant remaining in the house. In 1978 the defendant married another woman who then lived with him in the house. There were no children of either association. The plaintiff subsequently applied for the house to be sold and for half the proceeds of sale: *Held* the house was held on trust for sale within the Law of Property Act 1925 s 36(1). To ascertain the respective shares of an unmarried couple where property was in joint names and there was no express declaration of trust, the courts should normally apply the same principles as in a case of couples who were married. The task of the court was to look at the evidence and decide whether it indicated an intention by the parties that the beneficial ownership of the house should be held in other than equal shares. In the instant case, the evidence showed that the couple were to be regarded as having provided the purchase money in equal shares. Their joint income had been pooled and both contributed to the expenses involved in the purchase. Accordingly the beneficial interest was held in equal shares. To calculate the sum which the defendant should pay to the plaintiff, the price obtainable for the house if it were to be sold with vacant possession should be taken; from that should be deducted the sum payable to redeem the mortgage. One half of the amount provided by the defendant since the separation for mortgage instalments should be deducted; the defendant should only get credit for one half as he had the benefit of the plaintiff's half share. On this calculation, the sum payable to the plaintiff was £6,000. An order for sale in this amount would be made, but not to be enforced if the defendant paid the sum to the plaintiff within four months.

Lord Denning MR: considered that cases about the home of couples living together were so similar to those of husband and wife that they should be started in the Family Division, or transferred to it, rather than the Chancery Division.

Bernard v Josephs [1982] Ch 391; [1982] 3 All ER 162; [1982] 2 WLR 1052, CA

2651 Sale under trust for sale after divorce decree — Even if proceedings other than under Law of Property Act

The parties married in 1949. There was one child of the marriage, age twenty-six. The husband, aged fifty-four, was a chartered accountant in the Civil Service. The wife, aged fifty-one, had worked substantially throughout the marriage. In 1977, the husband left and went to live with another woman. The wife was granted a decree nisi of divorce in 1978, an agreement having been reached between the parties that the matrimonial home, a flat, should be transferred to the wife and that the agreement be made a rule of court. The husband was subsequently ordered to make periodical payments to the wife. The husband appealed, contending that the order was over the one-third fraction, the wife had received all the capital of the family under the previous agreement, and the judge was wrong in not crediting the wife with some earning capacity.

Ormrod LJ: after dismissing the husband's appeal against an order for periodical payments, considered the procedure to be followed when making an application for the sale of a matrimonial home. The judge had suggested that the husband should issue a *pro forma* summons under the Married Women's Property Act 1882 s 17 asking for sale. His Lordship stated that it was quite clear that s 17 of the 1882 Act gave the court power to order a sale in proceedings between husband and wife in connection with property, and that the Law of Property Act 1925 s 30 gave the court power to order a sale where there was a trust for sale; it could not matter what the nature of the proceedings were, but whether the circumstances were such as to bring the case within one or other of those Acts which gave the necessary power to the court to order the sale. The court had power to order sale of property under the Matrimonial Causes Act 1973 s 24 without specific application under the 1882 Act or the 1925 Act.

Ward v Ward and Greene (Note) [1980] 1 All ER 176; [1980] 1 WLR 4; 123 Sol Jo 838; 10 Fam Law 22, CA

ANNOTATION **Expld** (dictum Ormrod LJ) R v Rushmoor BC, Ex p Barrett [1987] 1 All ER 353

2652 Sale under trust for sale after divorce decree — Consent refused by tenant for life

Where in the case of a trust for sale "any requisite consent cannot be obtained," because the person from whom it must be obtained refuses it, the court, under Law of Property Act 1925 (c 20) s 30, and Trustee Act 1925 (c 19) s 57, can direct the trustees for sale to sell.

Re Beale's Settlmt Trusts, Huggins v Beale [1932] 2 Ch 15; [1931] All ER 637; 101 LJ Ch 320

2653 Sale under trust for sale after divorce decree — Sale required by one tenant

Where several persons take a conveyance of land as joint tenants and execute a deed of covenant, whereby they mutually undertake not to part with or deal with the land, except with the unanimous consent of all parties or by a majority vote, the court will not aid one of the parties to break his contractual obligations by ordering, on his application, a sale of the land under Law of Property Act 1925 (c 20) ss 35, 36.

Re Buchanan-Wollaston's Conveyance, Curtis v Buchanan-Wollaston [1939] Ch 738; [1939] 2 All ER 302; 108 LJ Ch 281; 160 LT 399; 83 Sol Jo 376, CA

ANNOTATIONS **Expld** Jones v Challenger [1960] 1 All ER 785 **Apld** Re Holliday (bankrupt), Ex p Trustee of Bankrupt v Bankrupt [1980] 3 All ER 385 **Consd** Re Evers's Trust, Papps v Evers [1980] 3 All ER 399

2654 Sale under trust for sale after divorce decree — Sale required by one tenant

Re Mayo, Mayo v Mayo no 2632 ante

2655 Sale under trust for sale after divorce decree — Sale required by one tenant

Jones v Challenger no 2634 ante

2656 Sale under trust for sale after divorce decree — Sale required by one tenant

Re No 39 Carr Lane, Acomb, Stevens v Hutchinson no 2647 ante

2657 Sale under trust for sale after divorce decree — Sale required by one tenant

Bull v Bull no 2621 ante

2658 Sale under trust for sale after divorce decree — Sale required by one tenant

Parties who were married in 1929 had one son, who was twenty-one years of age and who had always resided at home. In 1957 they purchased a bungalow which was conveyed into their joint names and became the matrimonial home; they both contributed substantial sums towards the cost, and the balance was borrowed on mortgage. It was agreed that the bungalow was owned jointly and equally by them. In 1962 the wife left the husband, leaving him in residence with the son in the bungalow, on which he thereafter paid the mortgage payments which she had previously paid. Two years later she applied by summons under Married Women's Property Act 1882 (c 75) s 17, and Matrimonial Causes (Property and Maintenance) Act 1958 (c 35) s 7(7), for an order for the sale of the bungalow; and the registrar made an order for sale. The summons did not mention possession, but it was accepted by the parties that the dispute was whether the husband could be required to give vacant possession of the bungalow. On appeal: *Held* (1) although proceedings under Married Women's Property Act 1882 (c 75) s 17, were not really appropriate (the appropriate course being an application under Law of Property Act 1925 (c 20) s 30, or for execution of the trust for sale), yet there was jurisdiction under s 17 (or, per *Harman LJ*, the court would not decline to deal with the case on the point of jurisdiction) in view of the dispute whether the husband could be required to give vacant possession; (2) in the circumstances, the marriage being at an end in fact though not in law, so that the bungalow was no longer in fact the matrimonial home, and there being no proceedings for divorce, the registrar had rightly exercised his discretion by ordering a sale of the property (in accordance with general principle, as there was here a trust for sale but only a power to postpone sale, exercise of which required the concurrence of both joint owners), notwithstanding that the conveyance of the bungalow into the joint names of the husband and wife constituted a post-nuptial settlement over which in any further divorce proceedings the court would have jurisdiction under Matrimonial Causes Act 1950 (c 25) (repealed), if no sale were made.

Per *Salmon LJ*: if there were young children the position would be different; one of the purposes of the trust would be to provide a home for them, and whilst that purpose still existed a sale would not generally be ordered.

Rawlings v Rawlings [1964] P 398; [1964] 2 All ER 804; [1964] 3 WLR 294; 108 Sol Jo 424, CA

ANNOTATIONS **Distd** Appleton v Appleton [1965] 1 All ER 44; Bedson v Bedson [1965] 3 All ER 307 **Apld** Re Debtor, Ex p Trustee v Solomon [1966] 3 All ER 255 **Consd** Jackson v Jackson [1971] 3 All ER 774

2659 Application by trustee in bankruptcy — Whose voice in equity should prevail

Matrimonial Homes Act 1967 (c 75) s 1 gives no rights to a wife who already has a proprietary, contractual or statutory right to occupy the home, but

an innocent wife, who is joint owner of the matrimonial home has: (*a*) if in occupation, a right not to be evicted or excluded from the dwelling-house or any part thereof by the other spouse, except by order of the court; (*b*) if not in occupation, a right, by order of the court, to enter into and occupy the dwelling-house.

Gurasz v Gurasz [1970] P 11; [1969] 3 All ER 822; [1969] 3 WLR 482; 113 Sol Jo 565, CA

2660 Application by trustee in bankruptcy — Whose voice in equity should prevail

The husband and wife lived together in the matrimonial home which belonged to them jointly at law and in equity, being held on the normal statutory trust for sale. The husband was adjudicated bankrupt. There were no realisable assets to meet the claims of creditors other than the matrimonial home. The husband's trustee in bankruptcy moved for a declaration that he was entitled against both the husband and wife to have vacant possession of the matrimonial home and an order that it should be sold, the proceeds to be divided between the trustee and the wife: *Held* the court had a discretion whether or not to order that the trust for sale should be carried into effect and was not bound to exercise that discretion in the trustee's favour. The question for the court was not whether the trustee or the wife was being reasonable but whose voice in equity ought to prevail. The claim of the trustee, based on his statutory duty, was the stronger in equity and accordingly the order sought by the trustee would be made.

Re Turner (bkpt), Ex p Trustee of Bkpt v Turner [1975] 1 All ER 5; sub nom *Re Turner (Bkpt), Ex p Trustee of Property of Bkpt v Turner (Bkpt)* [1974] 1 WLR 1556; 118 Sol Jo 849

2661 Application by trustee in bankruptcy — Whose voice in equity should prevail

The husband and wife married in 1950. Their only child, a son, was born in 1960. In 1963 the husband and wife acquired the matrimonial home which was conveyed to them on trust for sale for themselves as joint tenants. The house was mortgaged leaving an equity worth some £12,000. In March 1971 the husband left the wife and son. The wife was given custody of the son. The parties were divorced in 1974. In 1975 the husband was adjudicated bankrupt. His gross debts exceeded £4,000. His main assest was his half share in the house; his only other asset was £200. In May 1976 the husband's trustee in bankruptcy applied for an order for the sale of the house under s 30 of Law of Property Act 1925. The judge ordered that the sale should be postponed until 1 May 1977 provided that the wife paid £3,000 to the trustee in bankruptcy before 1 October 1976, and that if she did not pay the £3,000 by 1 October the order for sale should take effect on 1 November 1976. The wife, who was of modest means, was unable to raise the £3,000. The son was aged 16 and was due to re-sit O-level examinations in November 1976; he had also commenced studies for A-level examinations which he was to take in the summer of 1978. The wife appealed against the order that the property should be sold on 1 November and asked that the sale be postponed until August 1978, when the son would have finished his studies. She contended that the judge had failed to give sufficient weight to the temporary needs of herself, and of the son while he was studying, to remain in the property as their home, and that in the circumstances the claims of the trustee in bankruptcy should not prevail immediately over the claims of herself and the son: *Held* s 2(5) of Matrimonial Homes Act 1967 and s 39 of Matrimonial Causes Act 1973 made it plain that in relation to the matrimonial home, the claims of the creditors and the trustee in the bankruptcy of a spouse or former spouse were entitled to protection; in relation to those claims, therefore, the welfare of the children of the marriage was not an overriding factor in considering whether the matrimonial home should be sold. A bankruptcy court in exercising its discretion whether and when to order the sale of the matrimonial home should weigh the claims of the creditors and trustee against the claims of the other spouse and any children of the marriage. In the circumstances that the husband's share in the house was the only real asset in the bankruptcy; that on the sale the wife would receive about £6,000 as her half-share in the house; that there was only very slight evidence that the sale would disturb the son's studies and that, it being likely that the wife would be able to obtain other accommodation in the same area, the son would not have to change schools, the only conclusion which the court could reach was that the claims of the wife and the son did not suffice to outweigh the claim of the trustee in bankruptcy to an immediate sale of the house. Accordingly, the appeal would be dismissed.

Re Bailey (bkpt), Ex p Trustee of Bkpt v Bailey [1977] 2 All ER 26; 120 Sol Jo 753; sub nom *Re Bailey (Bkpt) (No 25 of 1975), Bailey v Trustee of Property of Bkpt* [1977] 1 WLR 278, DC

2662 Application by trustee in bankruptcy — Whose voice in equity should prevail

A husband and wife owned the matrimonial home jointly. On their divorce the wife applied for a property adjustment order. The husband was adjudicated bankrupt and trustee in bankruptcy sought an order for possession and sale under the Law of Property Act 1925 s 30. The wife claimed that the bankruptcy petition was merely a device to pre-

vent her from being granted a property transfer order: *Held* the husband was, in fact, unable to pay his debts, and his motive alone was not enough to amount to an abuse of the court's process. In exercising its discretion under s 30 the court had to consider whose claim prevailed in equity, without reference to the powers of property transfer, which were not available against the trustee in bankruptcy. Even though the children were not direct beneficiaries under the trust for sale their needs had to be considered as part of the wife's obligation to provide a home for them, and so the house should not be sold without her consent until the two eldest children had reached the age of seventeen.

Re Holliday (a bankrupt), Ex p the Trustee of the Bankrupt v The Bankrupt [1981] Ch 405; [1980] 3 All ER 385; [1981] 2 WLR 996; 125 Sol Jo 411

ANNOTATIONS **Consd** Harman v Glencross [1986] 1 All ER 545 **Expld** (dictum Goff LJ) R v Rushmoor BC, Ex p Barrett [1987] 1 All ER 353 **Distd** Re Citro (a bankrupt) [1990] 3 All ER 952

2663 Application by trustee in bankruptcy — Whose voice in equity should prevail — Exceptional circumstances

A husband's trustee in bankruptcy applied for an order for the immediate sale of the matrimonial home, which was held by the husband and wife on trust for sale in equal shares. An order for sale was made but was postponed, under the Law of Property Act 1925 s 30, on the ground that there were exceptional circumstances in that there were young children living in the house and that it would be difficult for the bankrupt husband to raise a loan for another home. The trustee appealed: *Held* these circumstances were generally present in such cases and did not amount to exceptional circumstances. Regard had to be given to the fact that the creditors would suffer hardship by the postponement and that the proposed payments could not be relied on to pay the debts within the postponement period. Also, the immediate sale of the house would leave the wife with £10,000 to put towards the purchase of a new home. The appeal would be allowed.

Re Lowrie (a bankrupt), Ex p the Trustee of the Bankrupt v The Bankrupt [1981] 3 All ER 353, DC

2664 Deserted wife's interest in matrimonial home

Freehold premises were purchased by a husband in 1949 as a matrimonial home, the transaction being effected by the wife under a power of attorney from the husband, who was in India. The premises were conveyed to the husband and the wife as joint tenants, accordingly were held on trust for sale. The initial payment was provided by the husband, who also kept down subsequent mortgage payments. The husband returned from India in 1952 and he and the wife occupied the premises as the matrimonial home until 1954, when he deserted her. She continued to live in the premises, but he never returned. On 22 February 1960, a consent order for maintenance was made in proceedings brought by the wife. The order included undertakings by the husband (*a*) to allow the wife during her life to occupy the property rent-free and to continue to pay all outgoings, (*b*) not to dispose of the premises without providing for the wife the right to live therein or to use the same. On 27 October 1964, the husband was adjudicated bankrupt. On an application by the trustee in bankruptcy for the sale of the premises, on the footing that he was entitled (as the court declared) to one half of the proceeds of sale of the premises: *Held* (1) the wife was not a contractual licensee of the premises and did not have, by virtue either of her being the deserted wife of her husband or of his undertakings contained in the order of 22 February 1960, any interest that was binding on the husband's trustee in bankruptcy for the husband's undertakings to the court were personal obligations which did not create an interest in land; (2) in exercise of the court's discretion under Law of Property Act 1925 s 30, a sale of the premises would be ordered having regard particularly to the following factors (*a*) that the trust's purpose of providing a matrimonial home was spent as the marriage was virtually at an end in fact though not in law, (*b*) that the purchase of the premises was not contemporaneous with the arrangement for providing a home for the wife on break-up of the marriage, (*c*) that the whole intial payment and the subsequent mortgage payments had been provided by the husband, and (*d*) that the sale was sought by his trustee in bankruptcy on behalf of the husband's creditors.

Re Debtor, Trustee v Solomon [1966] 3 All ER 255; sub nom

Re Solomon, Ex p Trustee of Property of Bkpt v Solomon [1967] Ch 573; [1967] 2 WLR 172; 110 Sol Jo 978

ANNOTATION **Apld** Re Turner (bkpt), Ex p trustee of bkpt v Turner [1975] 1 All ER 5

iii PROTECTION OF THIRD PARTIES

LAW See Halsbury's Laws (4th edn) vol 42 para 908 et seq

4 SETTLEMENTS OF PERSONALTY

1 Constitution of the settlement

LAW See Halsbury's Laws (4th edn) vol 42 para 912 et seq

CROSS REFERENCES See CHOSES IN ACTION vol 8(2) (2nd reissue) no 119 et seq (assignments of debts); no 229 et seq (assignment of expectancies); no 241 et seq (assignment of reversionary interests); GIFTS vol 25 (2nd reissue) no 4462 et seq (mechanics of making a gift); TRUSTS vol 47 (reissue) no 48 et seq (creation of trusts)

2665 Valid transfer — Property held on bare trust for settlor — Transfer at settlor's direction — No separate transfer of beneficial interest

In 1958 the taxpayer, who controlled a very successful private company, decided to give £150,000 to the Royal College of Surgeons to found a chair of pharmacology. The company's issued ordinary share capital was (i) five hundred thousand ordinary shares, substantially all of which were held by the taxpayer; (ii) one hundred thousand "A" ordinary shares held by a bank as nominee for the taxpayer; and (iii) 2,600,000 "B" ordinary shares, of which the taxpayer held 546,692 and the remaining 2,053,308 were held by VT Limited as trustees of a family settlement. Only the first class of shares carried voting rights. In order to achieve his purpose the taxpayer, through R his financial adviser, suggested giving to the college the one hundred thousand "A" ordinary shares, intending to pass to the college both the legal and beneficial interest in them. Subsequently, on the advice of R and by way of second thoughts in order to avoid any future difficulties if the company were to be converted into a public company, the taxpayer acceded to R's suggestion that the college should give an option to VT Limited to purchase the shares for £5,000 within five years. In November 1958, R delivered to the college the transfer by the bank of the "A" ordinary shares and an option deed. The college sealed these deeds and were registered as owners of the shares. Dividends on the "A" shares, amounting to £145,000 less tax at the standard rate, were paid to the college. On 11 October 1961, VT Limited exercised the option. The £5,000 was paid to the college. The taxpayer was assessed to surtax on the basis that the dividends in the years 1958–59 and 1959–60 which, with the £5,000 on the exercise of the option, made up the gift to the college, were his income or were required to be treated as his income under s 415 (repealed) of the 1952 Act. It was not disputed that there was a settlement within s 411(2) (repealed) of that Act. The taxpayer contended that he had by the settlement within s 411(2) (repealed) divested himself absolutely of the property and thus came within the exception provided by s 415(1)(*d*), (2) (repealed): *Held* (1) the option to purchase the "A" shares was vested in the trustee company in 1958, either as a matter of inference from the primary facts on such trusts as might be declared subsequently, or as a matter of interpretation of the evidence on trusts which were undefined, and on either basis the consequence in law was that the option was held on a resulting trust for the taxpayer; accordingly the taxpayer had failed to divest himself absolutely of the property which was the source of the dividends paid to the college, and had not brought himself within the exempting provisions of s 415(1)(*d*), (2) (repealed) of the 1952 Act, with the consequence that the assessments should stand; (2) since a transfer of the "A" shares had been executed by the bank, which was nominee for the taxpayer, and had been delivered on the taxpayer's behalf to the college, which became registered as owners of the shares, there had been no need for a separate transfer of the taxpayer's equitable interest in the "A" shares and Law of Property Act 1925 (c 20) s 53(1)(*c*) had no application.

Per *Lord Upjohn*: I do not agree that *prima facie* a transfer of the legal estate carries with it the absolute beneficial interest in the property transferred; this plainly is not so, eg, the transfer may be on a change of trustee, it is a matter of intention in each case. If the intention of the beneficial owner in directing the trustee to transfer the legal estate to "X" is that "X" should be beneficial owner, I can see no reason for any further document, or further words in the document assigning the legal estate, also expressly transferring the beneficial interest.

Vandervell v IR Comrs [1967] 2 AC 291; [1967] 1 All ER 1; [1967] 2 WLR 87; 110 Sol Jo 910; 43 Tax Cas 550; [1966] TR 315; 45 ATC 394, HL

2666 Valid transfer — Legal estate outstanding — Settlement effective transfer of settlor's equitable interest

The settlor, a widow, had two sons and a daughter. A voluntary settlement, dated 1 August 1939, and made between the settlor, of the one part, and her two sons as trustees, of the other part, contained a recital that the settlor was absolutely entitled to the investments specified in the schedule thereto and had

transferred them into the names of the trustees to be held on the trusts thereinafter declared. By clause 2 of the settlement the trustees were directed to hold the investments on trust to pay the income thereof to the settlor during her life and after her death on certain trusts for the daughter and the daughter's children. The schedule of investments contained forty-one items. At the date of the settlement twenty-one items (referred to hereinafter as the "A" investments) were registered in the sole name of the settlor, who was the absolute owner thereof. The other twenty items (referred to hereinafter as the "B" investments) were registered in the names of the settlor and her two sons, but the settlor was absolutely entitled to them beneficially. None of the investments was transferred to the trustees of the settlement in the settlor's lifetime. There was evidence that the settlement was made in view of the marriage of the settlor's daughter to a husband of whom the settlor did not approve. By a will which was dated the same day as the settlement the settlor divided her residuary estate between her two sons equally, and stated that she had made no provision for her daughter in the will as she had made suitable provision for her by a settlement. In 1942 the settlor made a new will revoking the previous will and leaving all her residuary estate to her three children equally, but not mentioning the settlement. The settlor's daughter left her husband in 1943 and subsequently they were divorced. In 1945 and subsequent years the settlor received the proceeds of certain of the "A" investments. She kept part of the moneys thus received for herself and gave the rest as presents to her three children. She often showed her wish to benefit the three children equally. On 5 November 1950, the settlor made a will whereby, after appointing the three children executors and trustees thereof, she gave her residuary estate to such of them as should survive her in equal shares absolutely. The settlor died on 17 October 1953, and the will of 5 November 1950 was proved by the three children. On a summons by the sons to determine which of the investments specified in the schedule to the settlement were, or had at any time been, subject to the trusts of the settlement: *Held* (1) the settlement was effective in regard to the "B" investments because it constituted, on its true construction, a good equitable assignment of the settlor's beneficial interest in the "B" investments to the trustees of the settlement, and the court would direct the surviving legal owners of the investments (*viz*, the two sons) to deal with the legal interest in the "B" investments in accordance with the settlor's intention shown in the settlement; but the settlement was ineffective as regards the "A" investments since in relation to them it was an imperfect gift; (2) the initial ineffectiveness of the settlement in relation to the "A" investments was not cured by the fact that the "A" investments became vested in the settlor's daughter and the sons as her personal representatives, since, on the facts, the settlor had forgotten the existence of the settlement before she died, and thus had not evinced such continuing intention to give the "A" investments for the benefit of her daughter as would, if shown, have validated the settlement of the "A" investments in accordance with the principle established in *Strong v Bird* ((1874) LR 18 Eq 315) and stated by *Neville J*, in *Re Stewart, Stewart v McLaughlin* ((1908) 2 Ch 251).

Re Wale, Wale v Harris [1956] 3 All ER 280; [1956] 1 WLR 1346; 100 Sol Jo 800

2667 Mortgages vested in trustees — Mechanics of transfer — Rights to production of deeds

Three mortgages on the estates of distinct mortgagors were vested in the same trustees by one deed, which was prepared in the master's office, in a suit for executing the trust. Upon the application of one of the mortgagors for liberty to redeem and to have his mortgage deed delivered up to him: *Held* he was entitled to have the deed, on his executing to the trustees a covenant to produce it, and paying the costs of the application; and the costs properly incurred in preparing and settling the covenant should be borne by the mortgagee's estate.

Capper v Terrington (1844) 1 Coll 103; 13 LJ Ch 239; 8 Jur 140; 63 ER 340

2668 Mortgages vested in trustees — Mechanics of transfer — Rights to production of deeds

(1) Where mortgagees declared trusts of the mortgage moneys, and transferred the mortgages by the same deeds: *Held* on redemption, the trust deeds must be delivered to the mortgagor, or in the case of the one of them, being a marriage settlement, the mortgagees retaining it, by his consent, were bound to furnish him, at their expense, with attested copies and a covenant for production.

(2) Mortgagor had, before mortgagees entered into possession, indorsed to the mortgagees bills of exchange for the arrears of interest. The bills fell due after possession was taken and were dishonoured: *Held* the interest was in arrear when possession was taken so as to preclude the mortgagor from claiming to have the accounts of the receipts of the mortgagees taken with rests.

Dobson v Land (1851) 4 De G&Sm 575; 64 ER 963

2669 Contingent interests in personalty — Definition of interests put into settlement

Re Newbolt's Trust no 632 ante

2670 Contingent interests in personalty — Definition of interests put into settlement
Parkinson v Dashwood no 634 ante

2671 Contingent interests in personalty — Definition of interests put into settlement
Edwards v Broughton no 635 ante

2672 Contingent interests in personalty — Definition of interests put into settlement
Smith v Osborne no 639 ante

2673 Contingent interests in personalty — Definition of interests put into settlement
Re Walpole's Marriage Settlement, Thomson v Walpole no 615 ante

2674 Contingent interests in personalty — Definition of interests put into settlement
Re Dowie's WT, Barlas v Pennefather no 512 ante

2675 Contingent interests in personalty — Definition of interests put into settlement — Fund subsequently obtained under appointment
A marriage settlement made in 1864 gave the husband and wife or the survivor, power to appoint the settled funds among the children of the marriage. In 1904 one of the daughters, on her marriage, executed a settlement which contained a recital that, under the settlement of 1864 and a deed poll executed by her parents, she was entitled in reversion expectant upon the death of the survivor of her parents, both then living, to one-third part of £6,500 of the trust funds of the settlement of 1864, and witnessed that the daughter assigned to trustees "all that the third part or share" to which she was entitled in reversion expectant as aforesaid. The mother survived the father and died in 1917, having by her will, made in 1916, appointed £2,000, part of the funds settled in 1864, to the daughter. There was no evidence of any other appointment by deed poll or otherwise: *Held* the appointed sum of £2,000 was caught by and subject to the settlement of 1904.
Re Harper's Settlement, Williams v Harper [1919] 1 Ch 270; 88 LJ Ch 245; 120 LT 439

2676 Settlement of insurance policies — Covenant to effect policy — Insurance becoming impossible
By a Scotch marriage settlement dated 18 August 1873, the husband assigned to trustees two policies on his life for £5,000 each, expiring respectively on 2 July and 3 July 1875; and he covenanted "on or before 2 July 1875," to insure his life in the names of the trustees in the sum of £10,000; the existing and future policies to be held upon trusts of his wife and children. The husband took no steps towards effecting a new policy until 1 July 1875, shortly before which date his health, which had previously been good, had become so bad, that he was unable to effect an insurance, and in September following he died: *Held* the life having become uninsurable on 1 July 1875, did not relieve the husband from the obligation to insure or pay damages, and accordingly his estate was answerable in damages to the trustees of the settlement.
Re Arthur, Arthur v Wynne (1880) 14 Ch D 603; 49 LJ Ch 556; 43 LT 46; 28 WR 972

2677 Settlement of insurance policies — Policy containing condition against assignment — Whether subject to settlement
A marriage settlement contained a covenant by the settlor to settle his estate and interest in any property or estate of or to which he should become possessed or entitled during the marriage by devise, bequest, purchase, or otherwise. He afterwards effected some policies of insurance on his life, one of which was subject to a condition that "it should not be assignable in any case whatever": *Held* (1) the policies were property to which the settlor had during the marriage become entitled by purchase within the specific words of the covenant, and the covenant was divisible, and could be enforced as to that property by a court of equity; (2) the effect of the condition against assignment was merely to make the policy non-assignable at law, as it would have been prior to the Policies of Assurance Act 1867 (c 144), and did not prevent the settlor from dealing with the beneficial interest in it in accordance with his covenant.
Re Turcan (1888) 40 Ch D 5; 58 LJ Ch 101; 59 LT 712; 37 WR 70, CA

2678 Bonus — Whether subject to trusts of settlement
A policy of insurance for £3,000 on A's life was assigned to trustees, and, by a deed of even date, trusts were declared of it by the description of "the sum of £3,000 for which A's life was insured," and power was given to B to dispose of it by will. B after reciting the settlement, bequeathed £1,000 part of the sum of £3,000 to A and the remaining sum of £2,000 to C. At A's death, £9,000 was received under the policy: *Held* the whole fruits of the policy were subject to trusts of the settlement, and passed by the bequests to A and C in proportion to their legacies.
Courtney v Ferrers (1827) 1 Sim 137; 5 LJOS Ch 107; 57 ER 530

ANNOTATION **Distd** Simpson v Mountain (1835) 4 LJ Ch 221

2679 Bonus — Whether subject to trusts of settlement

In pursuance of the provisions of a marriage settlement, the husband insured his life in the names of the trustees, in a specified insurance office, for a certain sum, which, upon his death, was to be received and applied by the trustees upon the trusts of the settlement. Additions were made to the policy by the insurance company, as profits or bonus. The husband became bankrupt, and died uncertificated: *Held* the assignees of the husband were not entitled to the sums so added to the policy, but the same were to be held by the trustees upon the trusts of the settlement.

Parkes v Bott (1838) 9 Sim 388; 8 LJ Ch 14; 59 ER 407

ANNOTATION **Consd** Domville v Lamb (1853) 1 WR 246

2680 Bonus — Whether subject to trusts of settlement

The trustees of a marriage settlement were directed to pay the premiums and other expenses of a policy of insurance to be effected in some office in England or Ireland on the life and in the name of B the husband, out of the income of the property forming the subject of the settlement. They were further directed to stand possessed of the policy and of a sum of £4,000 thereby to be raised and secured upon trust, after the death of B, for the wife and the children of the marriage. B, on his part, covenanted to execute an assignment of the policy "together with the sum of £4,000 sterling, to be insured upon the trusts and for the purposes aforesaid." Prior to the date of the settlement B had effected an Irish policy for £4,000, Irish currency, on his life, and after the execution of the settlement he assigned this policy to the trustees. Subsequently the trustees allowed the Irish policy to drop, and in its place effected an English policy, on the life of B, but in their own names, for £3,666 13*s* 4*d*, which sum they were advised was equivalent to £4,000 Irish currency. This later policy was to be held by the trustees on the same trusts as those declared concerning the Irish policy and the trustees paid the premiums, as directed by the settlement, out of B's life estate. Many years afterwards the trustees, on discovering that it was doubtful whether they had acted in compliance with the actual trusts of the settlement, obtained from B a deed of indemnity. B by his will bequeathed all the bonuses on the policy upon certain trusts. On a bill filed by some of the children of the marriage: *Held* the bonuses were subject to the trusts of the settlement and did not pass by the will of B.

Warren v Wybault (1866) 15 LT 155; 12 Jur NS 639

2681 Bonus — Whether subject to trusts of settlement — Option to apply bonus in reduction of premiums

Bonuses on a policy: *Held* to be subject to the trusts of a marriage settlement.

Upon the construction of a settlement: *Held* a policy effected in the names of trustees was itself settled; but under the covenant of the husband and the rules of the company, the husband was entitled to an option to have any bonus applied in reduction of the premiums. Bonuses having been declared, the husband continued to pay the full premiums: *Held* on his death, the bonuses were accretions to the trust, and did not belong to his executors.

Gilly v Burley (1856) 22 Beav 619; 28 LTOS 55; 2 Jur NS 897; 4 WR 769; 52 ER 1247

2682 Bonus — Whether subject to trusts of settlement — Option to apply bonus in reduction of premiums

Hughes v Searle [1885] WN 79

2683 Bonus — Whether subject to trusts of settlement — Option to apply bonus in reduction of premiums — Bond given for face value of policies

A marriage settlement recited that the settlor, the husband, had in pursuance of agreement effected insurances on his life for the sums of £2,000 and £5,000, and had given a bond to secure the sum of £7,000, and provided that the trustees should stand possessed of the sums of £2,000 and £5,000 so assured on the trusts of the settlement: *Held* the bonuses did not pass.

Domville v Lamb (1853) 1 WR 246

2684 Bonus — Whether subject to trusts of settlement — Express exclusion from settlement — Whether available for settlor's defalcations

A policy on the life of a *cestui que trust*, the settlor, was vested in trustees and settled, bonuses being excluded. The settlor misappropriated some of the trust funds, and died insolvent. The trustees were not allowed to retain bonuses received after the death of the settlor to make good the settlor's defalcations.

Hallett v Hallett (1879) 13 Ch D 232; 49 LJ Ch 61; 41 LT 723; 28 WR 321

ANNOTATIONS **Apld** Re Gregson, Christison v Bolam (1887) 36 Ch D 223 **Distd** Re Weston, Davies v Tagart [1900] 2 Ch 164

2685 Bonus — Covenant to keep policy on foot — Suicide of assured whereby policy moneys forfeited

Testator previously to his marriage, covenanted with certain persons as trustees to pay, during his life, all premiums and other moneys, and do and perform

all such acts, matters, and things as should be requisite for keeping on foot a policy of assurance previously effected by him on his own life; and the policy contained a proviso, declaring that it should be void in case the party should die by his own hands. The party was afterwards drowned in the River Thames; and by the verdict of a jury returned in an action at law, directed by the court to be brought by the executors of the settlor against the assurance company, it was found "that the settlor threw himself into the River Thames, intending to destroy himself, but that at the time of committing the act he was incapable of judging between right and wrong": *Held* the trustees of settlement were not entitled to claim as against the settlor's estate the sum secured by the policy.
Dormay v Borrodaile (1847) 10 Beav 335; 9 LTOS 449; 11 Jur 379; 50 ER 611; previous proceedings 5 CB 380

ANNOTATION **Apld** Dufaur v Professional Life Insce (1858) 4 Jur NS 841

2686 Bonus — Payment by trustees — Right to reimbursement
The husband in a marriage settlement covenanted (*inter alia*) to pay the premiums on a policy of life insurance. In default of his doing so, the trustees paid the premium and sought to recover the amount so paid from the covenantor. The settlement expressly empowered the trustees to apply the income in making any payments for keeping on foot the policy, and provided that it should not be obligatory on them to enforce the husband's covenants. There was no covenant by the husband to reimburse the trustees in respect of any payment so made by them: *Held* (1) it was an implied term that the husband should reimburse the trustees; (2) the claim of the trustees was not in debt but for damages for breach of covenant, and therefore they could not specially indorse their writ; (3) the damages were substantial and not merely nominal, and the trustees were entitled to recover the full amount paid by them.
Schlesinger & Joseph v Mostyn [1932] 1 KB 349; 101 LJKB 62; 146 LT 326; 48 TLR 111

2687 Bonus — Covenant to effect new policy to replace existing one — Failure to perform
By the terms of a marriage settlement, £1,000, secured by a policy of insurance on the life of the intended wife's father, was to be paid to the intended husband, provided he had previously effected an insurance on his own life for a similar amount; if not, it was to be paid to the wife. It then directed that if the insurance should not have been effected, or if the husband and wife should be both dead when the £1,000 should be received by the trustees, it should be paid to the issue of the marriage. The husband covenanted to effect an insurance within six months after the decease of the wife's father, to secure the payment of the sum of £1,000 at his decease. By a clause at the end of the settlement, it was directed that in default of the husband effecting the insurance the £1,000 should be invested, and the interest paid to the husband until he effected it, and then he was to receive the principal. The insurance was not effected within the time mentioned: *Held* the husband might effect the insurance at any time during his life.
Bush v Watkins (1851) 14 Beav 425; 51 ER 199

2688 Bonus — Policy settled without covenant to pay the premiums — Mortgage of policy — Mortgagees priority to cestui que trust
A voluntarily assigned a policy on his life to trustees for his infant son, if he attained twenty-five, but if he died under that age and A should think proper to keep up the policy, upon trust for C. A covenanted to pay the premiums during the life of his son only, and in the event of A ceasing to pay the premiums, he should be at liberty to sell the policy and retain the money. The son died under twenty-five, A mortgaged the policy, covenanting to pay the premiums, which he did: *Held* on the death of A, the produce of the policy belonged to the mortgagees, and not to C.
Pedder v Mosely (1862) 31 Beav 159; 7 LT 205; 54 ER 1099

2689 Settlement of fixtures and fittings with house — Household furniture not included
Simmons v Simmons no 570 ante

2690 Settlement of furniture — Right to pledge
A woman on her marriage settled, among other property, furniture on trustees in trust to allow her to use it during life and to dispose of it by will or deed to operate after death: *Held* she had no power to pledge the furniture, and her trustees might recover it from the pawnbroker.
Worsnop v Benassi (1873) 21 WR 684

2691 Settlement of furniture — What included
Re Torrington's Settled Estates (1924) 157 LT Jo 408

2692 Settlement of furniture — What included
Dean v Brown no 568 ante

2693 Settlement of furniture — What included
Lane v Grylls no 569 ante

Scottish, Irish and Commonwealth Cases

2694 Bonus — Whether subject to trusts of settlement
Sparks v Burnett (1890) 17 R (Ct of Sess) 997; 27 Sc LR 798 (SCOT)

2 Beneficial interests in personalty

i LIFE INTERESTS

1 In general

LAW See Halsbury's Laws (4th edn) vol 42 para 920 et seq

CROSS REFERENCE See HUSBAND AND WIFE vol 27(1) (2nd reissue) no 1573 et seq (effect of divorce or separation)

2695 Settlement during joint and natural lives — Effect of

The words "during their joint and natural lives" in a settlement, held to mean "during their joint lives and the life of each of them."

Smith v Oakes (1844) 44 Sim 122; 3 LTOS 318; 60 ER 304

2696 Power of tenant for life to surrender life interest — And contingency in absolute fund — To son entitled in default of appointment

By a settlement made upon the intended marriage of CG and JW certain stock was transferred into the joint names of the two trustees, upon trust to pay the dividends thereof to JW the intended wife, during her life, for her sole and separate use, and after her decease, in trust for the said CG during his life, if he should survive her, and after the decease of the survivor of them, in trust to pay the principal sum of money among the child and children of the marriage in such a manner as JW should direct or appoint; and, in default thereof, then upon trust for all and every the children of the marriage, if more than one, who should be living at the decease of the said CG and JW and the lawful issue then also living of such of the said children as should be then dead. If there should be but one child of the said intended marriage living at the decease of them, the said CG and JW and no lawful issue of any other child, then to transfer the whole of the Bank Annuities to such only child; and if there should be no children of the said intended marriage living at the decease of the survivor of them, the said CG and JW but only lawful issue of some one of the said children, then to transfer the whole to such issue at twenty-one. There was afterwards a proviso that if the said CG should survive the said JW and without leaving any child or issue of any child or children, that the whole fund should be transferred to the said CG absolutely. The marriage took place, and JW, the wife, died without making any appointment, leaving CG and one son, the only issue of the marriage, who attained his age of twenty-one years, her surviving. CG being willing to give up his life interest, together with his contingency in the absolute fund, over to his son, at once, for the son's benefit, in order that the son might have the whole absolute fund in himself, application was made to the court for that purpose: *Held* the trusts were not exhausted, nor had CG and CJG together power to deal with the *corpus* of the fund, they not having in themselves the whole title thereto, but there was a contingent interest in favour of such issue; and therefore, CG the tenant for life, being still living, the trustee must continue to retain the stock in his own name and pay the dividends to CG until his decease.

Gardner v Smith (1844) 3 LTOS 238

ANNOTATION **Apld** Re Bellville's Settlmt, Westminster Bank Ltd v Bellville [1963] 3 All ER 270

2697 Executor taking life estate — Right to payment of land

Payment to executor taking limited beneficial interest. A sole executor, who is tenant for life of a fund, is not entitled to have the fund paid to him.

Marston v Guillet (1864) 10 LT 292

2698 Administration of fund by court — As against tenant for life — Fund in danger

The rule that if personal property consisting of money or stock is limited to A for life and after his death to B, absolutely, it will be ordered into court for administration in an action by B, for the purpose is not absolute and will only be enforced as against A, where there is reasonable ground, such as danger to the fund, for the application.

Re Braithwaite, Braithwaite v Wallis (1882) 21 Ch D 121; 52 LJ Ch 15; 48 LT 857; 31 WR 180

ANNOTATION **Expld** Re Harari's Settlement Trusts, Wordsworth v Fanshawe [1949] 1 All ER 430

2699 Trust for wife's next of kin — On death or marriage of husband — Ascertainment at death of wife — Cesser of prior interests on remarriage after divorce

A fund was settled on marriage in trust, after a life interest to the wife and other limitations, for the wife if she should survive her husband, but if she should die in his lifetime, in trust for the husband for life, or until he should marry again, and upon his decease or marriage as aforesaid, in trust for such persons as at the time of his death or marriage should be the next of kin of the wife. The marriage was dissolved by decree; both husband and wife married again, and the wife died: *Held* (1) the next of kin of the wife at her death were entitled to the fund, the words "his death or marriage" being read as meaning the determination of the prior interests; (2) the husband's

interest was destroyed by his second marriage in the lifetime of the wife.

Re Mathew's Trusts (1876) 24 WR 960

2700 Accruer clause — Construction of

By a settlement dated 3 January 1903, the settlor created trusts of four funds for each of three daughters and a son. Each of the daughter's funds was settled on trust for her life with remainder over for her issue on the usual trusts. As regards the son's fund, it was provided that when he should attain the age of thirty years the trustees were to stand possessed thereof in trusts for him absolutely, with certain intermediate trusts meanwhile. An accruer clause in the settlement provided that ". . . in case the trusts . . . concerning any of the said trust funds . . . shall fail or determine . . . such trust fund . . . shall . . . accrue . . . to the others or other of the said trust funds of which the trust hereinbefore declared shall not then have failed or determined and if more than one in equal shares and proportions and every such accruing share shall be held upon the trusts . . . herein declared and contained concerning the said trust fund to which the same shall be added or as near thereto as circumstances will permit. . . ." On 22 October 1914, the son attained the age of thirty years and became absolutely entitled to his original fund which was paid over to him. On 7 July 1944, he died. On 20 January 1948, one of the daughters died a spinster. On a summons to determine, *inter alia*, whether the property for the time being representing or held on the same trusts as that daughter's fund accrued on her death to and equally between the other two daughters' and the son's funds or the other two daughters' funds alone: *Held* in deciding that it accrued to and equally between the other two daughters' and the son's funds: (1) the settlor, when using in the accruer clause the expressions "shall fail or determine" and "shall not then have failed or determined," could not have meant to include determination merely by payment to someone absolutely entitled, since he could not have meant the clause to operate to take away the share of someone who had become absolutely entitled; (2) the words "or determine" had probably been added to meet what might be termed a partial failure—*ie*, a failure after the trusts had operated up to a point—and the words made it clear that a partial failure would bring the accruer clause into operation; (3) the use of the double expression "fail or determine" could be accounted for in that way, without so pressing the meaning of "determine" as to make it apply to a share—such as the son's—which had become absolutely and finally vested and had been paid out; (4) the trusts of the son's share had not "failed or determined," since the trust for him "absolutely" still subsisted and the payment over of his original fund to him by the trustees had not brought about a failure or determination of the trust for the purposes of the accruer clause.

Re Huntingdon's Settlement Trusts, Struthers v Mayne [1949] Ch 414; [1949] 1 All ER 674; [1949] LJR 1185; 65 TLR 249; 93 Sol Jo 217

2701 Substitutional gift

Under a marriage settlement dated 8 December 1915, made between (i) the husband, (ii) his father, the settlor, (iii) the wife, and (iv) the trustees, the husband took the first life interest followed by a life interest to the wife. Thereafter the capital and income were to be held for the children or remoter issue of the marriage and if, as in fact happened, there were no children of the marriage the funds were to be held in trust for the brother and sister of the husband and the issue of either of them who might have predeceased the husband. The settlement further provided that if either died in the lifetime of the husband without issue then the funds should be in trust for the survivor and his or her issue, but if both died during the husband's lifetime leaving no issue, as in fact happened, "*then in trust* for the Uncles and Aunts of the [husband] being children of [the settlor's father] and the issue of any who may have predeceased the [husband] such issue taking equally between them if more than one his, her or their parents share only". In the events which had happened the trustees sought the directions of the court as to the correct method of distributing the trust fund among the issue of uncles and aunts of the husband: *Held* (1) the word "issue" in the ultimate trust meant issue through all degrees and was not confined to children; it followed that the gift was *per stirpes* and not *per capita* for to treat it as capital on the basis that the gift was to issue equally between them would involve giving an artificial meaning to the word "parent" as "ancestor"; (2) the gift over to the issue of uncles and aunts who might predecease the husband was a substitutional gift since the original gift was vested in that the uncles and aunts took immediate vested interests liable to be divested; (3) a substitutional gift to issue through all degrees, in contrast to a substitutional gift to children only, was *per se* contingent since the gift to remoter issue was necessarily contingent and therefore that contingency was to be reflected back to issue of the first degree; when the substitution was to take place was always a question of construction; the substituted issue had to survive both their parents and the date of substitution which might be the same or different, and which might or might not be the period of distribution; on the terms of the present settlement the time for substitution was the death of the husband; it followed that the gift over was to the issue living at the

date of the death of the husband through all degrees *per stirpes* of each aunt and uncle who was living at the date of the settlement and who had predeceased the husband.
Re Earle's Settlmt Trusts, Reiss v Norrie (or Merryweather) [1971] 2 All ER 1188; [1971] 1 WLR 1118; 115 Sol Jo 529

Scottish, Irish and Commonwealth Cases

2702 Alimentary liferent provided by wife in own favour — Validity
The trustees under an ante-nuptial contract of marriage were directed to hold a fund contributed by the wife and to pay the income "to her during all the days of her life for her alimentary use only." On her death, in the event of there being no children of the marriage, the fund became payable to her heirs and assignees. The husband having died, and there being no children of the marriage, the wife called on the trustees to denude in her favour: *Held* the wife entitled to payment of the fund, in respect that it is not competent for a wife, by ante-nuptial contract, to provide herself with an alimentary liferent which will continue to be protected during viduity.
Dempster's Trustees v Dempster [1949] SC 92 (SCOT)

2 Protected interests

A Acts involving forfeiture

LAW See Halsbury's Laws (4th edn) vol 42 para 921 et seq

CROSS REFERENCES See BANKRUPTCY vol 4(2) (2nd reissue) no 5937 et seq (whether forfeiture incurred)

2703 Bankruptcy
A legacy for life, with a proviso against alienation, held to be forfeited, by the legatee taking the benefit of the Insolvent Act of New South Wales, upon his own petition, and surrendering his estate accordingly, although the legacy was not mentioned in the schedule to his petition.
Townsend v Early (No 2) (1864) 34 Beav 23; 4 New Rep 489; 10 LT 897; 10 Jur NS 860; 12 WR 1132; 55 ER 540

2704 Bankruptcy
By a settlement made on the second marriage of a widow of her property, a life estate for her separate use was given to the wife, followed by an estate to the husband for his life or until his bankruptcy. Provisions were then made for the children of the marriage and a son of the wife's former marriage, and it was declared that, if the son of the former marriage should die under twenty-one, and if there should be no child of the marriage who should attain twenty-one or marry under that age, then, subject and without prejudice to the trusts before declared, and after the death of the husband, and of the son of the former marriage under twenty-one, and the default or failure of children of the marriage, "which shall last happen," the trustees should hold the property, if the wife should survive the husband, in trust for her absolutely, but, if the husband should have survived the wife, in trust for such persons as the wife should by will appoint, and, subject thereto, in trust for her next of kin as if she had died intestate and "without having been married." The wife died first, without having exercised the power of appointment. There were no issue of the marriage. The son of the former marriage survived his mother, but died under twenty-one. Before the wife's death the husband had filed a liquidation petition: *Held* (1) the infant son was entitled, as sole next of kin of his mother, to the trust fund; (2) the trust for the next of kin did not arise until after the death of the husband, and consequently he was entitled to the income of the trust fund for his life, and this interest had vested in the trustee under his liquidation.
Upton v Brown (1879) 12 Ch D 872; 48 LJ Ch 756; 41 LT 340; 28 WR 38; subsequent proceedings (1884) 26 Ch D 588

ANNOTATIONS As to (1) **NF** Emmins v Bradford, Johnson v Emmins (1880) 13 Ch D 493 **Distd** Re Watson's Trusts (1886) 55 LT 316 **Consd** Re Arden's Settlmt (1890) WN 204 **Apld** Stoddart v Saville [1894] 1 Ch 480 **Follld** Re Forbes, Errington v Sempell [1899] WN 6 **NF** Re Brydone's Settlmt, Cobb v Blackburne (1903) 88 LT 614; Re Smith's Settlmt, Wilkins v Smith [1903] 1 Ch 373

2705 Bankruptcy
By a settlement made in 1893 the settlor assigned property to trustees on trust to pay to him the annual income until he was declared bankrupt; thereafter his rights were to cease, and the trustees were to have power to apply at their discretion the income or any part thereof for his personal maintenance and support, and were to apply the residue for the benefit of his children, if any, or to accumulate it and add it to the *corpus*, which was ultimately to go to his relatives. In 1900 the settlor was adjudicated bankrupt, and the trustee in bankruptcy applied to set aside the settlement, and it was set aside so far as was necessary to pay the bankrupt's debts provable in the bankruptcy. The trustees of the settlement by consent raised a sufficient sum to pay bankrupt's debts in full and the costs, but the bankruptcy was not annulled. In 1960 the settlor was adjudicated bankrupt for the second time, and the trustee in that bankruptcy applied again to set aside the settlement, but was refused on the ground that at the time of making

the settlement the bankrupt was in a position to pay his debts without the aid of the settled property. The trustee in bankruptcy then applied for a declaration that bankrupt's life estate under the settlement vested in the trustee in bankruptcy. Throughout these transactions bankrupt was unmarried: *Held* the first bankruptcy had operated under the settlement as a forfeiture of the settlor's life estate, and it did not, therefore, vest in the trustee of the second bankruptcy.

Re Johnson Johnson, Ex p Matthews & Wilkinson [1904] 1 KB 134; 73 LJKB 220; 90 LT 61; 52 WR 304; 11 Mans 14, DC

ANNOTATION **Consd** Re Burroughs-Fowler, Burroughs-Fowler's Trustee v Burroughs-Fowler [1916] 2 Ch 251

2706 Assignment or incumbrance

By a marriage settlement an annuity for the life of the wife's mother was assigned to trustees, for the wife for life, remainder for the husband for life, remainder for the issue of the marriage. Provided that if the husband should, during the life of the wife or of her mother, become bankrupt, compound with, or assign his effects for the benefit of his creditors, or should do any act with a view to charge the annuity, his interest should be for the benefit of the issue. The husband, after his wife's death, sold an annuity to one of the trustees of the settlement, and signed an unstamped agreement to deposit the settlement with him, and authorising him to retain the annuity so sold out of the settled annuity: *Held* the husband had forfeited his interest in the settled annuity.

Stephens v James (1831) 4 Sim 499; 58 ER 186

2707 Assignment or incumbrance — Charging order

Under a settlement the dividends of the trust fund were payable to B for his life, or until he should assign or incumber the same, or until he should do or suffer any act whereby the dividends should become payable to another person. A judgment creditor of B obtained a charging under against the trust fund: *Held* under the words "shall suffer any act," a forfeiture had accrued of B's life interest.

Roffey v Bent (1867) LR 3 Eq 759

ANNOTATIONS **Apld** Re Throckmorton, Ex p Eyston (1877) 7 Ch D 145 **Consd** Sutton, Carden v Goodrich (1899) 80 LT 765

2708 Assignment or incumbrance — Charging order

By a marriage settlement the annual income of the trust fund was given to the husband "and his assigns" for his life or until he should make, or attempt to make, any assignment of the income, or any part thereof, or to charge or incumber or attempt to charge or incumber, the same, or until he should be found or declared a bankrupt, or should take the benefit of any Act of Parliament for the benefit of insolvent debtors, or until he should make any assignment of his effects for the benefit of his creditors. The settlement contained limitations over, and a direction that upon the husband's death, or sooner determination of his estate, payment should be made to those entitled in remainder. The husband mortgaged his life interest and judgments had been signed against him for costs incurred in certain litigation and charging orders made against his life interest in certain consolidated stock comprised in the trusts of the settlement. It was contended that the effect of the addition of the word "assigns" was that the husband's life interest was absolute, and the forfeiture clause void: *Held* the result of giving so wide a meaning to the word "assigns" would be to render nugatory the rest of the proviso, which was aimed against alienation; the charging orders were not within the clause; and it was possible to give effect to the clause against alienation and at the same time to give effect to the word "assigns," therefore the charging orders would be valid against the income up to the date of the mortgage, but the mortgage operated so as to work a forfeiture of the life interest.

Re Kelly's Settlement, West v Turner (1888) 59 LT 494

2709 Assignment or incumbrance — Contingent charge in favour of creditors

Under a proviso against assigning or charging or attempting to assign or charge a life interest, so as not to be entitled to the personal receipt and enjoyment of the property, an agreement to charge a debt on the estate in the event of the deficiency of another estate, a power of attorney authorising the receipt of the rents and payment in discharge of debts, and an authority to a creditor to receive future rents, for which anticipated receipts were given, were each declared sufficient to determine the life interest.

Wilkinson v Wilkinson (1819) 3 Swan 515; 2 Wils Ch 47; 36 ER 958

ANNOTATIONS **Consd** Oldham v Oldham (1867) LR 3 Eq 404 **Apld** Re Spearman, Spearman v Lowndes (1900) 82 LT 302

2710 Assignment or incumbrance — Separation deed

By a settlement, dated in 1859, and made upon the marriage of A and B certain property of the husband was vested in trustees upon trust to invest the same, and to pay the interest, dividends, and annual produce thereof unto or permit the same to be received by the husband until he should be outlawed, or be found or declared a bankrupt, or become an insolvent debtor within the meaning of some Act of Parliament

for the relief or relating to insolvent debtors, or should do or commit any other act, or any other event should occur whereby the income or any part thereof would or might if thereby settled absolutely upon or in trust for him become alienated by law or vested in any other person or persons; and from and after the decease of the husband, or the sooner determination of the trust thereinbefore declared for his benefit, upon trust to pay the whole of such interest, dividends, and annual produce unto, or permit the same to be received by the wife and her appointees or assigns during her life for her separate use; and subject thereto upon trust for the children of the marriage as therein mentioned. A receiving order was made against the husband in 1885, but was rescinded in February 1886. By a separation deed dated in September 1886, and made between the husband and the wife, the husband covenanted that he would during their joint lives, if they should so long live separate from each other, allow the wife to receive for her own benefit the interest, dividends, and annual income of the property therein mentioned, being the property brought into the marriage settlement by the husband: *Held* the covenant in the separation deed operated as an equitable assignment of the husband's life interest, and consequently a forfeiture had occurred.

Re Spearman, Spearman v Lowndes (1900) 82 LT 302; 44 Sol Jo 377, CA

2711 Assignment or incumbrance — Judgment

By a marriage settlement property was settled on the wife, for her separate use, for life, and after her decease on the husband for life, and it was provided that if the husband, either during his wife's life or afterwards, should do or permit any act whereby the income of the property might become payable to any person other than himself, then his life interest should be forfeited. During the marriage, judgment was recovered against the husband by a creditor, and a writ of execution was issued, but no further proceedings were taken until after the wife's death, when the husband having filed a bill against the trustees of the settlement to enforce his life interest, the creditor sued out a writ of *elegit*, and obtained a garnishee order, which, however, the court of law refused to make absolute pending the proceedings in equity: *Held* there had been a forfeiture of the husband's interest, and his bill must be dismissed.

Stockwell v Yeates (1868) 19 LT 328; 17 WR 22

2712 Assignment or incumbrance — Judgment

A marriage settlement of the settlor's own property was made on trust to pay the income to himself "during his life or till he shall become bankrupt or shall assign, charge or incumber the income or shall do or suffer something whereby the same or some part thereof would through his act default, or by operation or process of law, if belonging absolutely to him, become vested in or payable to some other person or persons" and from and after the determination of the trust in favour of the settlor upon trust to pay the income to his wife during her life: *Held* the limitation over to the wife was valid in the event of an involuntary alienation by process of law of the income in favour of a judgment creditor of the husband.

Re Detmold, Detmold v Detmold (1889) 40 Ch D 585; 58 LJ Ch 495; 61 LT 21; 37 WR 442

ANNOTATIONS **Apld** Re Tetley, Ex p Jeffrey (1896) 66 LJ QB 111 **Distd** Re Spearman, Spearman v Lowndes (1900) 82 LT 302 (See 82 LT p 305) **Apld** Re Johnson Johnson, Ex p Matthews & Wilkinson [1904] 1 KB 134; Re Perkins' Settlmt Trusts, Leicester, Warren v Parkins (1912) 56 Sol Jo 412

2713 Assignment or incumbrance — Mortgage

Re Kelly's Settlement, West v Turner no 2708 ante

2714 Assignment or incumbrance — Mortgage

A settlor made a settlement of his property by which certain income was to be paid to himself for life or until he should attempt to alienate it. Subsequently he executed a mortgage upon the income payable to him under the settlement: *Held* the settlor's life interest in the fund was forfeited by operation of the charge.

Re Perkins' Settlement Trusts, Leicester, Warren v Perkins [1912] WN 99; 56 Sol Jo 412

2715 Assignment or incumbrance — By convict in anticipation of conviction

B, by a voluntary settlement, limited real and personal property to trustees upon certain trusts therein mentioned, and subject thereto, to pay an annuity of £150 to his wife for her life, and another annuity of £200 to his daughter for life, for her separate use, and subject to these trusts, to apply all or any part of the income towards the maintenance and education of his daughter's six children, and accumulate the surplus income until the death of the survivor of his wife and daughter, and until the youngest child should attain twenty-one, and when the youngest child attained twenty-one, if his wife and daughter should be then dead, or if living, then immediately after the death of the survivor, to convey the property to the six children, or such of them as should be then living, as joint tenants, if more than one, and not as tenants in common. He also declared that if any of the children should alienate his or her share it should be forfeited and belong to the others. Four of the

children lived to attain twenty-one, and one of the sons having committed felony, assigned his share of the trust premises to his two brothers and his sister. He was afterwards convicted, and transported for life, but on the expiration of some years received a conditional pardon. B's daughter being dead, her children agreed, with the consent of the widow, to divide the annuity of £200, reserving a fourth part for their brother, the convict; they at the same time executed deeds severing the joint tenancy, and settling their respective shares. The widow having died, a suit was instituted to administer the trusts of the voluntary settlement: *Held* the assignment by the convict was a forfeiture to his brothers and sister, and even if this alienation had not taken place the Crown could not have claimed his interest, as it was not vested until after the conditional pardon had been granted to him.

Barnett v Blake (1862) 2 Drew&Sm 117; 62 ER 566; sub nom

Blake v Barnett (1862) 31 LJ Ch 898; 6 LT 886; 26 JP 692; 8 Jur NS 812; 10 WR 767

ANNOTATION **Consd** Talbot v Jevers (1917) 117 LT 430

2716 Assignment or incumbrance — Direction to trustees to pay to third person

Under a settlement, O was entitled to a life interest in an annuity, with a clause of forfeiture if he should enter into a composition with his creditors, or charge, assign, or in any manner by way of anticipation dispose of the annuity, or until anything should happen whereby it should vest or become liable to be vested in another person. O, being indebted to his bankers to a large amount, in pursuance of an agreement with them, gave the trustees a written authority to pay the annuity, as it should become due, to his bankers, who were to apply it partly in payment of interest and in reduction of the debt. It was alleged that there was an agreement with the bankers that the authority should be revocable: *Held* this occasioned a forfeiture of the life interest.

Oldham v Oldham (1867) LR 3 Eq 404; 36 LJ Ch 205; 15 WR 300

ANNOTATION **Distd** Re Swannell, Morice v Swannell (1909) 101 LT 76

2717 Assignment or incumbrance — Authority to attorney to receive moneys

S was entitled for life to the income bequeathed by a will which provided that if he should commit or suffer any act or default or process whatsoever which but for that proviso would have the effect of vesting the right to receive the interest in any person whomsoever the life interest of S should cease and be void and the income be paid as on his death. S being about to go to South Africa executed a general power of attorney to his solicitor W, who was a trustee of testator's will, and on W's going abroad and retiring from the trusteeship in 1906 executed a power of attorney appointing his then solicitor K in his name and on his behalf to recover and receive all sums of money in respect of the interest under the will: *Held* the power of attorney being a mere authority to receive the income of S's interest under the will and apply it for his benefit and not a colourable transaction giving his creditors an equitable charge it did not constitute a forfeiture within the meaning of the will.

Re Swannell, Morice v Swannell (1909) 101 LT 76

ANNOTATION **Consd** Re Baring's Settlement Trusts, Baring Bros & Co v Liddell [1940] Ch 737

2718 Assignment or incumbrance — Divorce Court order

In 1887, F, on his marriage settled the proceeds of property as to the income upon himself for life determinable on his bankruptcy or until he suffered any act or thing or any event happened whereby, if payable to him absolutely, he would be deprived of the right to receive the income or any part thereof. By an order in 1895 after the dissolution of F's marriage, the President of the Probate Division ordered that the trustees should set apart the whole of the income of the settled funds which was then payable by him, and apply it for the children of the marriage until majority. F became bankrupt in 1904, and his youngest child attained twenty-one in 1910: *Held* the order of the Probate Division was an act or event antecedent to his bankruptcy by which F's interest in the whole income was determined for a substancial period, and therefore a forfeiture took place at the time the order was made and nothing passed in the trustee in his bankruptcy.

Re Carew's Trusts, Gellibrand v Carew (1910) 103 LT 658; 55 Sol Jo 140

ANNOTATION **Overd** General Accident Fire & Life Assce Corpn Ltd v IR Comrs [1963] 3 All ER 259

2719 Assignment or incumbrance — Post-nuptial settlement by beneficiary and husband — Settlement inoperative against beneficiary

Testator by his will gave the residue of his estate to trustees, on trust to pay an annuity of £50 to his widow in case she should marry again, which she did, during her life, and subject thereto to pay the income to his two sisters in equal shares, during their lives, and to pay the whole to the survivor during the remainder of her life, and after her death to divide the fund equally between testator's nephews and nieces, to be paid to them at twenty-one, the share or shares of any of them dying under that age leaving issue to go to such issue, and the share or shares of any of them dying under that age without leaving

issue, or leaving issue in case such issue should all die under twenty-one, to go to testator's surviving nephews and nieces, and to the issue, if any, of such of them as should be then dead, such issue to represent their respective parents, and to take equally amongst them, if more than one, and, if but one, such one only, the same share as his, or their deceased parent would have taken if he or she had then been living and had been a surviving nephew or niece; and testator declared that if any of his nephews or nieces should, during the lives of his two sisters or the survivor of them, assign his or her expectant share, or any portion thereof, or should attempt so to do, then he or she so assigning his or her expectant share, or any portion thereof, or attempting so to do, should forfeit all benefit under testator's will; and the assignment, so far as it should purport to affect any part of the trust moneys, should be null and void, and the share of the person so assigning, or attempting so to do, should go, as if he or she had never been born, to the other nephews or nieces. The survivor of testator's two sisters died in 1890. In 1876 one of testator's nieces, who had attained twenty-one, married in Australia a domiciled Australian. No settlement was made on her marriage; but in 1879 she and her husband executed a post-nuptial settlement, which purported to assign (*inter alia*), her reversionery interest under the will of testator to trustees upon certain trusts. By the law of Australia this assignment was inoperative except to the extent of the husband's interest, if any, in the wife's reversionary share: *Held* (1) the forfeiture clause was valid notwithstanding that the reversionary interest were originally vested but liable to be divested; (2) although the settlement was inoperative as regarded the wife, it was, within the meaning of the clause, an attempt to assign her reversionary share, and the forfeiture had taken effect.

Re Porter, Coulson v Capper [1892] 3 Ch 481; 61 LJ Ch 688; 67 LT 823; 41 WR 38; 36 Sol Jo 626; 3 R 19

ANNOTATIONS As to (1) **Distd** Re Smith, Smith v Smith [1916] 1 Ch 369. As to (2) **Distd** Re Tancred's Settlmt, Somerville v Tancred, Re Selby, Church v Tancred [1903] 1 Ch 715; Re Adamson, Public Trustee v Billing (1913) 109 LT 5

2720 Assignment or incumbrance — Equitable assignment — Covenant to pay portion of income to third party — Within three days of receipt

A marriage settlement provided that the wife, if she survived the husband, might appoint all or part of the income of the settled property to be paid to any subsequent husband who might survive her, until he should (*inter alia*) assign it. A second settlement comprised property subject to the trusts, and a third gave the wife power to appoint to any subsequent husband with or without restriction. An agreement between the wife's second husband, the wife, and a lender, for a loan to be applied by the second husband and the wife in paying certain debts, provided that, while money was owing under the agreement, the second husband and the wife should within three days after receiving any income of the settled property, pay half of it into a specified account, that the money so paid should be used in paying the debts and repaying the loan, and that what remained should be handed to the second husband and the wife or the survivor as they should direct. A later agreement provided that the second husband and the wife, so long as any money then owing by them remained owing, would pay income into a specified account within three days after receiving it, and that when so paid it should be held in trust for payments to other parties to the agreement as well as to the second husband and the wife. The wife died, having by her will appointed, within the terms of the first settlement, an interest to the second husband in the income of the property comprised in the three settlements, until he should (*inter alia*) assign it: *Held* (1) the covenants in the agreements for payment into specified accounts effected an equitable assignment of the income; (2) after the wife's death the second husband became a trustee of the income, as soon as he received it, for those intended to benefit under the agreements, although he was not obliged to pay it over immediately; (3) although no assignment was intended, the second husband, on the true construction of the agreements, had forfeited his interest.

Re Gillott's Settlement, Chattock v Reid [1934] Ch 97; [1933] All ER 334; 102 LJ Ch 332; 149 LT 419; 77 Sol Jo 447

ANNOTATION As to (1) **Apld** Re Haynes, Pitt v Haynes [1948] 2 All ER 423

2721 Assignment or incumbrance — Rentcharge in respect of improvements — Some improvements not authorised by statute

A tenant for life with a life interest defeasible on alienation carried out improvements in the principal mansion house. The Settled Land Act trustees agreed to discharge the cost out of capital moneys, and required him to execute, under Settled Land Act 1925 (c 18) s 85, a deed creating a rentcharge to secure repayment of the cost to capital, which he did. On a summons to determine whether, if some of the improvements were not within the Act, so that more had been spent on improvements and a larger rentcharge created than the Act authorised, the defeasible interest of the tenant for life ceased on the execution of the deed: *Held* the trust giving to

the tenant for life a life interest defeasible on alienation did not cease upon the execution of the deed.
Re Liberty's Will Trusts, Blackmore v Liberty [1937] Ch 176; [1937] 1 All ER 399; 106 LJ Ch 118; 156 LT 270; 53 TLR 323; 81 Sol Jo 99

2722 Assignment or incumbrance — Marriage settlement

Testator WH by his will, dated 11 August 1882, directed his trustees to hold his residuary estate for all his children living at his death who being sons attained the age of twenty-one years, but so that "if such son shall at the . . . time of distribution have been or be outlawed or a bankrupt or have done or suffered anything whereby his said share in my said residuary estate would through his act or by operation or process of law or otherwise if belonging absolutely to him have become vested in or payable to some other person" certain other dispositions should take effect. Testator died on 19 September 1884. One of his sons, THH, on 17 April 1888, entered into a marriage settlement whereby he covenanted "when the share in the residuary estate of [WH] to which he . . . may become entitled at the time of distribution . . . shall have been paid or transferred to him . . . forthwith [to] pay, or transfer one-third part of such share" to the settlement trustees: *Held* (1) the covenant in the marriage settlement, on its true construction, was tantamount to an equitable assignment of part of the interest of THH under the will; (2) although the forfeiture clause did not contain words providing that the beneficiary's interest should be forfeited if "any part thereof" should become vested in another person, those words had to be supplied by necessary implication; (3) by his covenant in the marriage settlement THH had brought into operation the forfeiture clause attached to his interest under the will.
Re Haynes' Will Trusts, Pitt v Haynes [1949] Ch 5; [1948] 2 All ER 423; [1948] LJR 1745; 92 Sol Jo 456

2723 Income payable to another — Writ of sequestration

Under a settlement executed in 1921, certain funds were held upon protective trusts, the trustees being directed to pay the income to CL during her life until she should become bankrupt or assign or charge the income or any part thereof or until some other act or event should happen whereby the income or any part thereof, if belonging absolutely to her, would become vested in or payable to or charged in favour of some other person. It was further directed that after the determination in the lifetime of CL of the trust in her favour, the trustees should during the remainder of her life or such shorter period as they should in their absolute discretion think fit, apply the income for the maintenance, personal support and benefit of any one or more of a defined class of persons comprising CL her husband and her children or remoter issue. In 1935, CL being abroad with her infant children, failed to comply with an order of the court to bring them within the jurisdiction and a writ of sequestration was issued empowering sequestrators to take possession of all her real and personal estate until she should do so. The sequestrators gave the trustees notice not to pay further moneys to her and required that the income should be paid to them but the trustees retained it in their hands. In 1939 CL brought the children within the jurisdiction and the writ of sequestration was dissolved: *Held* the settlor intended that there should be a continuous benefit to the beneficiaries and, inasmuch as CL had been deprived of the personal enjoyment of the income, an event had happened which determined her life interest.
Re Baring's Settlement Trusts, Baring Bros & Co Ltd v Liddell [1940] Ch 737; [1940] 3 All ER 20; 109 LJ Ch 337; 163 LT 403; 56 TLR 777; 84 Sol Jo 382

2724 Income payable to another — By supplemental deed

By a settlement made in 1923 by a father in favour of his son, then under age, the trustees were directed to hold the stocks and securities transferred to them on protective trusts for the benefit of the son, that is, to pay or apply the income to or for the benefit of the son during his life until any act or event should happen whereby the income would, if belonging to him absolutely, become vested in or charged in favour of some other person or persons. The trustees applied part of the income towards the maintenance and education of the son, and accumulated the balance. In 1935 the son attained the age of twenty-one, and a supplemental deed was then entered into between the parties, by which it was provided (*inter alia*) that for the following six years the trustees should pay to or apply for the benefit of the son not more than £1,000 a year out of the income and should accumulate and invest the balance and hold the capital of the fund including all accumulations of surplus income in trust for the son if he should be living at the expiration of the six years and if no such act or event should have happened as aforesaid, and, subject thereto, on the trusts provided by the principal settlement in the event of the son's death or the happening of any act or event by which the income should be vested in or charged in favour of some other person: *Held* the effect of the supplemental deed was to vest the right to receive part of the income, subject to a contingency, in some person other than the son, and, therefore, it brought the forfeiture clause in the principal deed into operation.

Re Dennis's Settlement Trusts, Dennis v Dennis [1942] Ch 283; [1942] 1 All ER 520; 111 LJ Ch 166; 166 LT 243; 58 TLR 405; 86 Sol Jo 119

ANNOTATION **Apld** Re Haynes, Pitt v Haynes [1948] 2 All ER 423

2725 Extinction of life interest by order of Divorce Division

Re Allsopp's Marriage Settlmt Trusts, Public Trustee v Cherry no 85 ante

2726 Effect of doctrine of election

Testatrix had a son, V, and two granddaughters, J and S. In her will, made in 1967, she appointed a bank as her executor and trustee. By clause 4 of the will she bequeathed to V such of her furniture and effects as he should select, the remainder to form part of her residuary estate. By clause 5 she gave him a legacy of £1,000. By clause 6 she bequeathed to the bank her residence (the Old Rectory) on trust for sale and directed (i) that they should not sell it without V's consent, (ii) that until the sale they should allow him to live in it rent free, (iii) that on the sale of the Old Rectory the bank might utilise part or all the proceeds in the purchase of another residence and permit V to occupy it, and (iv) that on his ceasing to reside in any such property the bank should hold it and the proceeds of sale thereof until sale on the trusts declared in clause 7. By clause 7 she disposed of her residuary estate on trust for sale and directed the bank to hold one-half (V's share) on trust for V, one-quarter on trust for J (J's share) and one-quarter on trust for S (S's share). Under clause 7 the bank were to hold the income of V's share on statutory protective trusts for the benefit of V for the period of his life although they could at their discretion at any time during his lifetime by deed waive the statutory protective trusts and hold his share on trust to pay the income to him beneficially free from the trusts. On his death his share was to be divided and one-half held on the trusts of J's share and one-half on the trusts of S's share and those two shares were, by operation of the will, settled on trust for J and S and their respective issue, with cross-accruals between them in the event of the issue not taking a vested interest. Testatrix died in 1970. She had in fact bought the Old Rectory jointly with V and it had been conveyed to them as joint tenants, so that on her death V became the owner by survivorship of the whole beneficial interest in it. She therefore had no power to dispose of the Old Rectory as she had purported to do in clause 6 of her will. V, acting under clauses 4 and 5 of the will, selected the furniture and effects which he wanted and took the pecuniary legacy but he elected against the will in respect of the Old Rectory by selling it and treating the proceeds of sale as his own money. In consequence he was bound to compensate the other residuary legatees to the extent of the value of the furniture and effects and the pecuniary legacy but that was inadequate to compensate them fully. The question therefore arose what effect, if any, his election against the will in respect of the Old Rectory had on his protected life interest in his settled share of the residue. The bank referred the matter to the court. The judge considered that he was bound to hold that, in consequence of his election, V had forfeited his determinable life interest in the settled share of the residue. V appealed: *Held* the circumstances were such that the equitable doctrine of election did not apply. The essential feature of that doctrine was the compensation of disappointed parties out of some beneficial interest of the elector; it was not concerned with the forfeiture of the elector's beneficial interest. Testatrix's intention in bequeathing to V a determinable life interest was to create an interest of a kind that could not be made available in law for compensation under the equitable doctrine of election. It followed that he could not be made to submit to that interest being applied in compensating the other residuary legatees. Appeal allowed.

Per curiam: the fact that those who are beneficially interested under the trusts of J's share and S's share are included in those who are the objects of the discretionary trust which comes into play if V's determinable life interest is terminated and might therefore benefit from the termination of it by the acceleration of their interests under the discretionary trusts is immaterial. Anything which the bank might decide to pay them will be received not as compensation for being disappointed of their interests in the Old Rectory but by reason of an exercise of the bank's discretion under the discretionary trust and in right of their position as objects of that discretion.

Re Gordon's Will Trusts, National Westminster Bank Ltd v Gordon [1978] Ch 145; [1978] 2 All ER 969; [1978] 2 WLR 754; 122 Sol Jo 148, CA

Scottish, Irish and Commonwealth Cases

2727 Bankruptcy

Lewis v Butler (1868) 16 WR 681 (IR)

2728 Bankruptcy

Frank v Mackay (1873) 7 IR Eq 287 (IR)

2729 Bankruptcy

O'Donoghue v O'Donoghue [1906] 1 IR 482 (IR)

2730 Assignment or incumbrance — Judgment

Re Ryan (1887) 19 LR Ir 24 (IR)

2731 Assignment or incumbrance — Judgment

Douglas's Trustees v Cochrane (1902) 5 F (Ct of Sess) 69; 40 Sc LR 103; 10 SLT 328 (SCOT)

2732 Assignment or incumbrance — Mortgage
Re Walsh's Estate [1905] 1 LR 261 (IR)

B Acts not involving forfeiture

LAW See Halsbury's Laws (4th edn) vol 42 para 921 et seq

CROSS REFERENCE See BANKRUPTCY vol 4(2) (2nd reissue) no 5877 et seq (proviso against assignment or incumbrance in case of bankruptcy: funds not belonging to settlor)

2733 Proviso against assignment or incumbrance — Settlement by beneficiary on marriage

L was entitled under a voluntary settlement to a life interest in one-fourth part of certain funds, with remainder to his children who should attain twenty-one, or die under that age leaving issue with remainder over. The settlement contained a proviso for the determination of his life interest, and the acceleration of the subsequent remainders, if he should alienate, dispose of, mortgage charge, or in anywise incumber his life interest, or if by reason of his bankruptcy, insolvency, or otherwise the income of the funds could be no longer personally enjoyed by him, but would, but for that proviso, become vested in, or payable to any person or persons other than him.

By a subsequent settlement made on his marriage, L, amongst other property, assigned to trustees the share to which he was entitled under the former settlement, upon trust to continue the trust funds in their then present investments, or upon the written request of L, and after his death upon such request, or at such discretion as therein mentioned, to sell the same, and pay the income of the proceeds to L during his life and after his death, to his wife during her life, with remainder for the issue of the marriage as L and his wife jointly, or the survivor should appoint, and in default for all the children of the marriage in equal shares, sons at twenty-one, daughters at twenty-one or marriage, and in default of such issue for L absolutely.

The question arose whether the marriage settlement produced a forfeiture of L's life interest under the voluntary settlement: *Held* no such forfeiture was produced, for the assignment contemplated by the forfeiture clause was one by reason of which the income of L's share would become payable to some person other than him, whereas by the marriage settlement the life interest was assigned to trustees for his benefit.

Lockwood v Sikes (1884) 51 LT 562

2734 Proviso against assignment or incumbrance — Settlement by beneficiary on marriage

A person entitled to a life interest, determinable if he should dispose or attempt to dispose of it, assigned it to the trustees of his marriage settlement upon trusts under which he was to receive the income for life. By the settlement he appointed the trustees his attorneys to receive the income, and gave them power to pay the expenses of managing the trusts: *Held* this was not a disposition or attempted disposition of his life interest so as to cause it to be forfeited.

Re Tancred's Settlement, Somerville v Tancred, Re Selby, Church v Tancred [1903] 1 Ch 715; 72 LJ Ch 324; 88 LT 164; 51 WR 510; 47 Sol Jo 319

ANNOTATIONS **Consd** Re Baring's Settlement Trusts, Baring Bros & Co v Liddell [1940] Ch 737 **Distd** Re Custance, Keppel v Douglas [1945] 2 All ER 441 **Consd** Re Westby's Settlement, Westby v Ashley [1950] Ch 296

2735 Proviso against assignment or incumbrance — Existing incumbrance

A settlement contained a trust for payment of the income of the trust fund to A for life "or until he shall assign, charge or incumber, or effect to assign, charge or incumber" the same: *Held* under the circumstances this trust had not a retrospective operation so as to include past acts.

West v Williams [1899] 1 Ch 132; 68 LJ Ch 127; 79 LT 575; 47 WR 308, CA

2736 Proviso against assignment or incumbrance — Inoperative assignment

A life interest was liable to forfeiture if "some event shall have happened or shall happen whereby if the same income belonged absolutely to" the life tenant "she would be deprived of the personal enjoyment thereof or of any part thereof." The life tenant made an equitable assignment of part of her life interest, but this subsequently became inoperative before any money came to her trustees as part of her life interest: *Held* no forfeiture had been incurred of the life interest.

Re Mair, Williamson v French [1909] 2 Ch 280; 78 LJ Ch 711; 101 LT 70

2737 Proviso against assignment or incumbrance — Release of interest to effect advancement

By a marriage settlement made in 1865 the income of the wife's fortune was settled upon trust, as to part thereof for the wife for life, and as to the other part thereof for the husband for life or until bankruptcy or alienation or his doing some act whereby the same or some part thereof would become vested in or payable to some other person. Subject to the trusts aforesaid the husband's and wife's fortunes were settled upon trust, in the events which happened, for

their children in such shares "and with such provisions for their respective maintenance, education, and advancement as the husband and wife should by deed jointly appoint, and in default of such appointment for the children equally at twenty-one or marriage. Then followed the usual advancement clause.

In 1896 the husband and wife by deed appointed one equal ninth share of the trust funds to a son on his marriage and the appointed share was settled and in 1897 they by deed appointed another equal ninth share to another son on his marriage, and the appointed share was settled. Neither of these appointments contained an advancement clause. Subsequently the trustees of the 1865 settlement in exercise of their power of advancement raised £4,000 out of their trust funds in respect of each appointed share and paid the same to each of the son's marriage settlement trustees, and the husband and wife released their respective life interests in each of the sums so advanced: *Held* (1) the appointments must be read into the original settlement and the advancement clause applied to appointed as well as to unappointed share; (2) the husband by releasing his life interest in the sums advanced did not thereby forfeit his life interest under the settlement.

Re Hodgson, Weston v Hodgson [1913] 1 Ch 34; 82 LJ Ch 31; 107 LT 607; 57 Sol Jo 112

ANNOTATIONS As to (1) **Consd** Re Winch's Settlmt, Winch v Winch [1917] 1 Ch 633. As to (2) **Folld** Re Shaw's Settlement Trusts, Shaw v Shaw, Re Wisely's Settlement Trusts Wisely v Public Trustee [1951] Ch 833 **Apld** Re Rees' Will Trusts, Lloyds Bank Ltd v Rees [1954] 1 All ER 7 **Consd** Re Forster's Settlement, Michelmore v Byatt [1954] 3 All ER 714

2738 Proviso against assignment or incumbrance — Order to raise capital money for benefit of tenant for life — Policy on tenant's life assigned to trustees — Premiums paid by tenant

The tenant for life of a settled legacy whose life interest was protected against any assignment or charge "whereby the income or some part thereof would if belonging absolutely to him become payable to some other person or a corporation," with a gift over upon failure of such trust, applied to the court under the powers of Trustee Act 1925 (c 19) s 57, for an order to authorise the trustees to raise £15,000 out of the capital of the settled legacy, which amounted to £150,000, and to apply the same in payment of his debts and generally for his benefit.

An order was made authorising the trustees to raise the money and to apply it accordingly, upon the terms that the tenant for life should effect a policy for £15,000 upon his own life and assign the same to the trustees to secure repayment of the capital raised, and that the trustees should pay the premiums on the policy out of the income unless plaintiff should within seven days of each renewal date produce to the trustees a receipt for the amount of the premium paid to the insurance company. On a summons taken out to determine the question whether the tenant for life by applying for and obtaining this order had forfeited his life interest: *Held* so long as the tenant for life paid the premiums on the policy and produced the receipt for them to the trustees, so that the trustees were not called upon to apply any part of the income of the legacy in payment of the premiums, the order would not effect a forfeiture of the life interest.

Re Salting, Baillie-Hamilton v Morgan [1932] 2 Ch 57; 101 LJ Ch 305; 147 LT 432; 76 Sol Jo 344

ANNOTATIONS **Consd** Re Baring's Settlement Trusts, Baring Bros & Co v Liddell [1940] Ch 737; Re Downshire's Settled Estates, Downshire (Marquis) v Royal Bank of Scotland, Re Chapman's Settlement Trusts, Chapman v Chapman, Re Blackwell's Settlement Trusts, Blackwell v Blackwell [1953] 1 All ER 103

2739 Proviso against assignment or incumbrance — Order to raise capital money for benefit of tenant for life

An order of the court under Trustee Act 1925 (c 19) s 57, giving power to trustees to raise capital moneys for benefit of life tenants will not cause a forfeiture of protected life interests, because the section is an overriding section, the provisions of which are to be deemed to be read into every settlement.

Re Mair, Richards v Doxat [1935] Ch 562; [1935] All ER 736; 104 LJ Ch 258; 153 LT 145

ANNOTATIONS **Expld** Re Downshire's Settled Estates, Downshire (Marquis) v Royal Bank of Scotland, Re Chapman's Settlement Trusts, Chapman v Chapman, Re Blackwell's Settlement Trusts, Blackwell v Blackwell [1953] 1 All ER 103

2740 Proviso against assignment or incumbrance — Discretionary trusts — Charge created by Lunacy Act 1880 (c 5)

By two settlements made at the same time in 1910, real and personal estates were settled for the benefit of D, then an infant, during his life, after he should attain the age of twenty-five, except during such period as his estate or interest if absolute would have become by reason of any act or event, other than the exercise of a power, vested or charged in favour of some other person or persons or a corporation. During such excepted period the trustees of the settlement were to enter into possession of the rents, profits and income, and hold the same upon discretionary trusts for the benefit of D or of his wife or children, if any, and subject thereto to apply the surplus of the said income to or for the persons to whom

the same would be payable, if D were then dead. D was unmarried, and before twenty-one had become mentally defective, and receivers of his income had been appointed under the Lunacy Act 1890 (c 5). A receiver, who had acted without remuneration, died in 1944, and another receiver was appointed, and an order made for the payment to him of the fees and percentage on income payable under s 148 of the Act: *Held* a charge on the income was thereby created, causing a forfeiture and the bringing of the discretionary trust into effect.

Re Custance's Settlements, Keppel v Douglas [1946] Ch 42; [1945] 2 All ER 441; 114 LJ Ch 293; 173 LT 195; 61 TLR 541; 89 Sol Jo 381

ANNOTATIONS **Consd** Re Oppenheim's Will Trusts, Westminster Bank Ltd v Oppenheim [1950] 2 All ER 86 **Overd** Re Westby's Settlement, Westby v Ashley [1950] Ch 296

2741 Proviso against assignment or incumbrance — Discretionary trusts — Charge created by Lunacy Act 1880 (c 5)

The trustees of a settlement dated 18 December 1918, held certain investments upon trust to pay the income to plaintiff during her life without power of anticipation: "Provided nevertheless that if . . . any act or event shall happen whereby the income of the trust fund would if belonging absolutely to her become vested in or charged in favour of or payable to some other person or persons or a corporation then and in any such event the trust hereinbefore contained of such income in favour of the said [plaintiff] shall cease as if she were dead." After her death, or on the failure of her life interest, the trustees were directed to hold the trust fund in trust for defendant. By an order dated 11 October 1935, made under Lunacy Act 1890 (c 5), the Official Solicitor was appointed to be receiver of plaintiff's estate, and accordingly, under Lunacy Act 1890 (c 5) s 148(1), a percentage and fees became payable out of the lunatic's estate: *Held* the payment of the fees levied under s 148 of the 1890 Act out of plaintiff's income did not constitute such a charge as was contemplated by the forfeiture clause, and accordingly no event had happened whereby plaintiff's income would, if belonging absolutely to her, have become charged in favour of some other person.

Quaere: whether the fees payable under Lunacy Act 1890 (c 5) s 148, are by sub-s (3), and the Management of Patients' Estate Rules 1934 r 148, made a charge on the estate of a lunatic.

Quaere: whether the court is entitled to take into account Law Reform (Miscellaneous Provisions) Act 1949 (c 100) s 8 (which shows that Parliament then considered that s 148 of the 1890 Act imposed a charge on the estate of a lunatic) in construing s 148.

Re Westby's Settlement, Westby v Ashley [1950] Ch 296; [1950] 1 All ER 479; 66 (pt 1) TLR 515, CA

ANNOTATION **Consd** Re Oppenheim's Will Trusts, Westminster Bank Ltd v Oppenheim [1950] 2 All ER 86

2742 Proviso against assignment or incumbrance — Exercise of power of advancement

The owner under a settlement of a determinable life interest declared to be forfeitable if the income payable to him should become vested or charged in favour of some other person does not forfeit his life interest by consenting to the exercise of an express power of advancement contained in the settlement.

Quaere: whether the position would be different if the settlement contained no express advancement clause and no use were made of the protective trusts set out in Trustee Act 1925 (c 19) s 33.

Re Shaw's Settlement, Shaw v Shaw, Re Wisely's Settlement, Wisely v Public Trustee [1951] Ch 833; [1951] 1 All ER 656; [1951] 1 TLR 470

2743 Proviso against attempt to prevent wife from appointing to objects of power — Joint appointment by husband and wife nominally to child — Actually for benefit of husband

Construction of a clause of forfeiture of the interest of a husband, on his doing, or attempting to do any act whereby the wife should be prevented executing a power or the property be prevented devolving on her heirs.

By a settlement, the husband and wife had a joint power of appointment over part of the property in favour of the children; the wife had, in one event, a general power to appoint by deed or will, and in another event, by will only, over the other part.

The ultimate remainder, in default of issue, etc, was to the wife's heir and next of kin. The deed contained a proviso of forfeiture of the husband's interest, in case he should do or "attempt" to do any act which would prevent or hinder the wife executing her powers, or prevent the property devolving on her heir, etc. The husband and wife appointed a part of the fund nominally to a child, but really for the husband's benefit, which was set aside: *Held* the husband's interest had not been thereby forfeited, and the proviso pointed to the separate power of the wife and not the joint power of husband and wife.

Wade v Hopkinson (1855) 19 Beav 613; 52 ER 488

3 Life interests by implication

LAW See Halsbury's Laws (4th edn) vol 42 para 925

CROSS REFERENCES See REAL PROPERTY vol 38 (reissue) no 4405 et seq (implication of life interests inter vivos); WILLS vol 51 (reissue) no 14621 et seq (implication of life interests in wills)

2744 Settlement in trust for wife during coverture — Life interest in wife

By a marriage settlement a portion to which the wife was entitled was assigned in trust, for her separate use during the coverture, and in case she should die in her husband's lifetime, then in trust for him during his life, and after the death of the survivor, in trust for the issue of the marriage living at the death of the survivor, as the wife should appoint, and in default of such issue, in trust for such persons as the wife should by deed or will appoint; the wife survived the husband: *Held* she was entitled to the interest of the portion for her life.

Tunstall v Trappes (1830) 3 Sim 286; 57 ER 1005

2745 Settlement in trust for wife during coverture — Life interest in wife

A marriage settlement declared the trusts of a sum of stock to be that, during the joint lives of the husband and wife, the dividends should be paid to the wife for her separate use; and, if she should die in the husband's lifetime, the principal sum should be transferred to him absolutely; and if the husband should die in the wife's lifetime, then the same should be held in trust for such person as the wife should by will appoint. The wife survived the husband: *Held* the wife took, by implication, a life interest in the trust fund.

Allin v Crawshay (1851) 9 Hare 382; 21 LJ Ch 873; 68 ER 555

2746 Settlement in trust for wife during coverture — Life interest in wife

By the second clause of marriage articles, it was agreed, that a sum should be settled on the wife, not stating how, and the husband renounced his marital right over it during the coverture. The fourth clause provided that, in case of her death leaving issue, it should belong to the husband and children successively; the fifth gave her a power of appointment, if she died without issue; and the sixth provided that the income should, "in all cases," belong to the husband during his life. There was no express life estate given to the wife: *Held* the wife, by implication, took an immediate life estate to her separate use.

Byam v Byam (1854) 19 Beav 58; 24 LJ Ch 209; 1 Jur NS 79; 3 WR 95; 52 ER 270

2747 Settlement in trust for wife during coverture — On construction wife taking greater interest

It is declared by a marriage settlement, that a trustee is to lay out a sum of money, which the husband had agreed to settle, in the purchase of any public stocks, or funds, or annuities for the life of the intended wife, in his own name in the trust for her, and that he is, during her life, to pay to her the dividends and other produce of the stock or annuity so to be purchased, to her separate use during her life: *Held* the wife was entitled absolutely to a sum of 3 per cent stock purchased with the money, and not merely to a life interest in it.

Smith v King (1826) 1 Russ 363; 38 ER 141

2748 Gift to parent and children — Life interest in parent

A devises several leasehold estates to two trustees, in trust, if his granddaughter married without their consent, to convey the premises to two other trustees, in trust for her separate use during her life, and after her death for the use and benefit of her issue. Though she had no children by the first husband, she has only a right for her life, for the issue by any husband are provided for by this settlement.

Champion v Pickax (1737) 1 Atk 472; 26 ER 301, LC

2749 Gift to parent and children — Life interest in parent

Settlement of a sum of money upon trust, to be transferred to the surviving parent, for the benefit of him or her, and any child or children of the marriage: *Held* upon construction of the whole instrument, that the surviving parent took for life, with remainder to the children.

Chambers v Atkins (1823) 1 Sm&St 382; 1 LJOS Ch 208; 57 ER 153

2750 Gift to parent and children — Life interest in parent

A, having been indebted to the estate of B in a sum of money, but from which he had been discharged under a commission of bankruptcy voluntarily executed to C, the widow of B, a bond for the payment of part of such debt, for the use of herself and children, but at her disposal. Two years afterwards, A executed to C another bond for the payment of the remainder of such debt, for the use and benefit of herself and children only, in what proportions among the latter she may think proper to direct, but for no other use, purpose, or intent whatsoever: *Held* the widow took a life interest in the money secured by the bonds, and the principal, after her decease, became payable among the children, in such manner, and in such proportions, as she should direct.

Fowler v Hunter (1829) 3 Y&J 506; 148 ER 1279

2751 Gift to parent and children — Life interest in parent

A letter, in the nature of a declaration of trust of a sum of £2,000, was as follows: "The interest to be retained by me during my life, and after my decease, to be applied to the maintenance of H and her daughter. After my decease I wish the interest of the above sum to be applied to their maintenance during their joint lives; and at the decease of her mother, if the child survives and lives until she has attained the

age of twenty-one years, then the principal sum I bequeath to her, but in the event of both their deaths before the child shall have attained the age of twenty-one years, then the principal sum to be paid to my brothers and sisters." The daughter lived to attain twenty-one, but died in the lifetime of the mother: *Held* the mother was entitled to the interest of £2,000 during her life, and the daughter upon attaining the age of twenty-one, acquired an absolute vested interest in the principal sum.

Moor v Abbott (1857) 26 LJ Ch 787; 30 LTOS 70; 3 Jur NS 551

2752 Gift to parent and children — Life interest in parent

In 1860 S by deed settled leasehold property of his own in trust for his daughters M and R "for and during the terms of their natural lives as tenants in common and not as joint tenants" and "from and immediately after the decease of the survivor of them . . . then to the use of their respective child or children of the said M and R share and share alike as tenants in common and not as joint tenants." M died in 1867 leaving children. R died in 1914 without having had a child: *Held* on the death of M, R took a life estate by implication in the moiety of M, and on the death of R the children of M took the whole of the settled property.

Re Stanley's Settlement, Maddocks v Andrews [1916] 2 Ch 50; 85 LJ Ch 809; 114 LT 933; 60 Sol Jo 478

ANNOTATION **Apld** Re Davies, Public Trustee v Davies [1950] 1 All ER 120

2753 Failure of purpose of trust

By a settlement a fund was directed to be held upon trust to pay the income to an officer in the army until an opportunity should occur of applying it for or towards his promotion in the army, and then to sell out the same and apply the proceeds for or towards such promotion; but if the officer should happen to die before such promotion, leaving his wife him surviving then to hold the fund in trust for her, but if she should be then dead, then in trust for her father. The wife having died, and promotion by purchase having been abolished: *Held* the officer was not entitled to the fund, except for his life.

Cator v Drew (1874) 22 WR 248

2754 Resulting trust

By a post-nuptial settlement dated 17 August 1898, certain assets called "the wife's part" and further assets called "the husband's part" were vested in trustees on trust to invest the same and pay the income thereof to the wife for life "so long as she shall continue to reside with the husband" and after her death "or the prior determination of the trust in her favour" to the husband for life if then living and from and after the decease of the survivor of them in trust for their issue as they should jointly appoint and in default of such appointment as the survivor should appoint and in default of such appointment for all their children who should attain the age of twenty-one in equal shares. There was issue of the marriage two daughters who attained the age of twenty-one. The wife, during the subsistence of the marriage, ceased to reside with the husband and her interest thereupon ceased. The husband died in January 1953, his wife surviving him. On a summons to determine whether on the husband's death the children of the marriage became entitled to the income during the life of the wife: *Held* although there was an omission by the draftsman of the settlement in that there was no limitation to cover the events that had happened, *viz*, the cessor of both interest during the life of the survivor of the spouses, it was impossible to fill the gap by reading in a trust in favour of the children because it could not be said with certainty what was the trust which had been omitted, having regard particularly to the fact that during the life of the wife her power of appointment as the survivor still remained and she could by the exercise of that power alter the beneficial interests in remainder: during the remainder of her life there were resulting trusts in favour of the estate of the husband and in favour of the wife of the income of their respective parts of the trust fund.

Re Cochrane's Settlement Trusts, Slaw v Cochrane [1955] Ch 309; [1955] 1 All ER 222; 99 Sol Jo 96

4 Acceleration of subsequent interests

LAW See Halsbury's Laws (4th edn) vol 42 para 926

CROSS REFERENCE See WILLS vol 50 (reissue) no 3380 et seq (acceleration of gifts in wills)

2755 Invalidity of primary trust — Whether acceleration of secondary trust

By a settlement dated 13 April 1936, made between the settlor of the one part and his wife and three children as trustees of the other part, it was provided that the trustees should stand possessed of the trust funds during the life of the settlor to use, apply and pay the residue "for the charitable and benevolent purposes as follows: In each year during the life of the settlor to pay and apply the income of the trust funds for such charitable and benevolent purposes as the trustees may from time to time direct with power within the statutory limits to accumulate any income not so paid or applied and to pay and apply such accumulations for the like purposes as those for which the income of the trust funds were applicable." It was expressly declared that the said trust was not confined to purposes charitable in law, and that the payments might be by way of gift or loan

"with power for the trustees to enter into contracts for the payment of subscriptions or gifts for any term of years but determinable on the death of the settlor." It was provided that no payment was to be made which would benefit the settlor or any of the trustees. After the death of the settlor the trustees were to hold the trust funds "(1) Upon trust to pay the net annual income thereof to the [settlor's wife] for her life and (2) On the death of the survivor of them the settlor and [his wife] to hold the capital . . . and . . . income . . . for [the settlor's three children] in equal shares." On 15 January 1946, the settlor's wife died, and on 22 November 1950, the settlor died. It was common ground that the discretionary trust during the settlor's life was void for uncertainty. For the purposes of ascertaining whether estate duty was payable in connection with the death of the settlor in respect of the trust funds, it became necessary to decide whether the result of the invalidity of the discretionary trust was to accelerate the interests expressed to take effect after the death of the settlor (in which case the trust funds did not pass on the settlor's death), or to give rise to a resulting trust in favour of the settlor (in which case the trust funds passed on his death): *Held* the interest of those beneficially entitled after the death of the settlor were not accelerated because the character of the disposition made by the settlement showed that the settlor's intention was that during his life neither he nor his wife nor his children should have any beneficial interest in the trust fund; therefore there was a resulting trust in favour of the settlor and the fund passed on his death for the purposes of s 1 of the Finance Act 1894.

Semble: the principle of the cases decided on the doctrine of acceleration is applicable to settlements *inter vivos*; but it may be more difficult in the case of a settlement than in the case of a will to collect the intention necessary to bring the doctrine of acceleration into play.

Re Flower's Settlement Trusts, Flower v IR Comrs [1957] 1 All ER 462; [1957] 1 WLR 401; 101 Sol Jo 189; [1957] TR 29; 50 R&IT 150; 36 ATC 22, CA

ANNOTATIONS **Consd** Re Young's Settlmt Trusts, Royal Assce v Taylor-Young [1959] All ER 74; Re Dawson's Settlmt, Lloyds Bank Ltd v Dawson [1966] 3 All ER 68; Re Harker's Will Trusts, Kean v Harker [1969] 3 All ER 1

2756 Disclaimer — Effect of

By a voluntary settlement property was settled on trusts under which one-third of the income was to be held on trust for each of three sons of the settlor for life, after the death of a son for his wife during widowhood, and subject thereto (by clause 2(*b*)) for each son's children equally, with a proviso, if a child died before distribution, for the substitution of his issue *per stirpes*. The trusts of capital (clause 2(*d*)) were "upon the determination or failure of the last surviving life interest in any part of the income of the trust fund" to divide the trust fund equally *per capita* amongst the sons' children at twenty-one or, if female, marriage under that age. In August 1958, when two of the sons had died without leaving wives entitled to income, but adult children and infant grandchildren of sons were living, the surviving son and his wife by deed surrendered and disclaimed their interest in income of the trust fund to the intent that the income and capital of the trust fund should be held on the trusts that would be applicable thereto if they were dead. On the question whether the last surviving life interest had determined or failed so that capital would have become distributable among adult children of the settlor's sons, and, if not, how the disclaimed income should be treated: *Held* (1) on the true construction of clause 2(*d*) of the settlement the direction for distribution on the determination or failure of the last surviving life interest meant after the lives in question (or, in the case of a widow, her widowhood) should have come to an end; (2) the doctrine of acceleration was inapplicable, because it applied only where an intention on the part of a settlor to bring about its result could be inferred, and in the present case the result of applying it would be to alter vested interests and to deprive a grandchild of a chance of inheriting income if his father predeceased the settlor's surviving son or his wife; accordingly, capital of the trust fund had not become distributable on the execution of the deed of 1958; (3) the one-third share of income of the trust fund comprised in the deed of surrender and disclaimer of August 1958, should, until the time for distribution of capital arrived, be paid to the children or remoter issue of the surviving son of the settlor on the footing that clause 2(*b*) of the settlement remained operative in relation to the income, and should not be paid equally among the children of all three sons of the settlor under clause 2(*d*).

Re Young's Settlmt Trusts, Royal Exchange Assce v Taylor-Young [1959] 2 All ER 74; [1959] 1 WLR 457; 103 Sol Jo 328

2757 Annuity subject to life interest — Disclaimer by tenant for life

Testatrix by her will directed that annuities should be paid to two annuitants subject to a life interest in the residuary income, the first payments to be made three months after the death of the tenant for life. The tenant for life having disclaimed his life interest: *Held* the annuities were accelerated so as to take effect as from the death of testatrix.

Re Hodge, Midland Bank Executor and Trustee Co Ltd v Morrison [1943] Ch 300; [1943] 2 All ER 304; 112 LJ Ch 241; 169 LT 155; 59 TLR 373; 87 Sol Jo 274

ANNOTATION **Consd** Re Flower's Settlement Trusts, Flower v IRC [1957] 1 All ER 462

2758 Failure of prior interest — Contingent interest

Funds were settled in 1944 or trust (by clause 3 of the settlement) to pay the income during the joint lives of the settlor and his wife, D, to the settlor and "after the death of such one of them . . . as shall first die" to the survivor of them for life and "after the death of such survivor" to hold the settled funds on beneficial trusts for the children of the settlor and his wife, D, and in default of the exercise of special powers of appointment in favour of such children, then in trust for such of the said children as should attain twenty-one, or, if female, marry under that age, in equal shares. There were two such children, born in 1940 and 1943, the younger being a daughter. The settlor's wife, D, never became his widow, as she and the settlor were divorced in 1959. The settlor died in September 1962. His wife, D, survived him. She took no interest under the trusts of clause 3 of the settlement, but a special power of appointment by deed or will conferred by that clause on her still continued: *Held* (1) on the true construction of the settlement and in the events which had happened, the settlor's wife, D having had a potential interest in the income of the settled funds and there being no dichotomy in clause 3 between the trusts of income and capital, there was a sufficient context to indicate that there should be acceleration of the interests in default of appointment, *viz*, that the words "after the death of such survivor" should be read as equivalent to "subject to any interest of the survivor"; accordingly the income and capital of the settled funds after the death of the settlor were held on trust for the two children of the settlor and of his wife, D, equally, subject to any exercise of the special power of appointment by D; (2) there was no distinction for the purposes of the doctrine of acceleration between vested and contingent interests where (as here) the child whose interest remained contingent at the settlor's death was *in esse* at the date of the event causing acceleration, in the present case, the death of the settlor's wife.

Re Dawson's Settlement, Lloyds Bank Ltd v Dawson [1966] 3 All ER 68; [1966] 1 WLR 1456; 110 Sol Jo 689

2759 Power of tenant for life to release interest — In favour of contingent reversions

Re Shand Kydd's Settlmt Trusts, Shand Kydd v Shand Kydd (1970) 114 Sol Jo 789

ii TRUSTS FOR ISSUE

1 Nature and form of powers of appointment among issue

LAW See Halsbury's Laws (4th edn) vol 42 para 927 et seq

CROSS REFERENCES See POWERS vol 37(2) (reissue) (general nature of powers); WILLS vol 51 (reissue) no 8583 et seq (power of appointment of class)

2760 Power of appointment in survivor of husband and wife — Joint appointment in favour of husband

On marriage a sum of £9,000 was vested in trustees upon trust to pay the interest to the husband for life, and after his death, to the wife for life and after the death of the survivor, to pay the principal to such persons as the survivor should direct. The husband having occasion for money, the wife joined him in executing a deed poll, whereby they appointed the money immediately to the husband; but the trustee declining to act without the directions of the court, this bill was filed; and upon personal examination of the wife, the court directed the trustees to pay the money to the husband and to deliver up the settlement to be cancelled.

Macarmick v Buller (1787) 1 Cox Eq Cas 357; 29 ER 1202

ANNOTATIONS **Apld** Chesslyn v Smith (1803) 8 Ves 183 **Dbtd** Sperling v Rochfort (1803) 8 Ves 164; Richards v Chambers (1805) 10 Ves 580

2 Hotchpot clause

A In general

LAW See Halsbury's Laws (4th edn) vol 42 paras 929, 930

CROSS REFERENCES See EQUITY vol 20(3) (2nd reissue) no 1740 et seq (satisfaction and ademption generally); WILLS vol 51 (reissue) no 14499 et seq (hotchpot clauses in wills)

2761 Effect of omission of clause — All appointees share in unappointed portion

£4,000 settled on marriage in trust after the decease of the husband and wife to pay among all and every the child and children other than an eldest or only son at such times and in such proportions as he, or she, or the survivor, should appoint by deed or will; for want of appointment, among such child and children, other than, etc, equally to be divided; if but one, to that one; payable at twenty-one or marriage, or as soon after, as the life interests should drop; the

shares of any dying before payable in the £4,000, or so much, as should not be appointed, to go to the survivors at the same time. There were four younger children: the marriage settlement of one recited, that she was entitled to £1,000 part of this fund; one-fourth of it was appointed to another on his marriage; and to a third £1,000 as her share of that portion; the fourth died above twenty-one before his father, who survived his wife, and died without any further appointment: *Held* £3,000 was well appointed; and the remainder vested in all equally according to the direction for want of appointment.

Wilson v Piggott (1794) 2 Ves 351; 30 ER 668

ANNOTATION **Consd** Foster v Cautley (1855) 6 De GM&G 55

2762 Effect of omission of clause — All appointees share in unappointed portion

By a marriage settlement, a sum of £4,000 was to go, after the decease of the husband and the wife and the husband's father and subject to the father's power of appointment, to the children of the marriage equally; and the real estates of the wife were charged with a sum of £8,000, which was to be divided among the children, in such shares and manner as she should appoint. The wife, by her will, appointed £100 to the eldest son of the marriage, and the remaining £7,900 to the other children of the marriage, directing the shares to vest in sons on their attaining twenty-one, and in daughters on their attaining that age or marriage with their father's consent; she, likewise, created a further charge, in order that each younger child's share of the £8,000 might be augmented to £5,000; and by the same instrument she, in exercise of a power of appointment which she had under the will of C, appointed C's residuary property to the first and other sons of the marriage successively, who should attain twenty-one; and if there were no such sons, to the daughters of the marriage who should attain twenty-one. Afterwards, by a codicil, she directed that the same fortune should be given to any child or children of whom she might be delivered, as was given by her will to each of her daughters, and that if no son of the marriage should live to attain twenty-one or be married, each of her daughters should be entitled to have from her fortune £10,000, to be paid in the manner and at the times mentioned in her marriage settlement or will respecting the fortunes of her daughters. The wife died in the husband's lifetime, leaving a son and three daughters her surviving; and in the events which happened, two daughters, the only surviving children of the marriage, became entitled under the settlement to the £4,000, and, under their mother's appointment, to the residuary property of C: *Held* they were entitled to receive £10,000, exclusive of, and in addition to, their shares of the £4,000, and of the residuary property of C.

Whyte v Kearney (1827) 3 Russ 208; 6 LJOS Ch 22; 23 ER 555, LC

2763 Effect of omission of clause — All appointees share in unappointed portion

An appointment to one of a class of a part of a fund as "her part, share, and proportion," does not prevent her participating in the unappointed fund, limited to the class equally in default of appointment. A mother had a power of appointing a reversionary fund to her daughters. A daughter, who was under age, being about to marry, the mother appointed that a moiety of the fund should, on the marriage, become the portion of the daughter, and be vested in her or her intended husband in her right, and to be paid to the husband, his executors, administrators, or assigns, on the death of the tenant for life: *Held* (1) although the husband was not an object of the power and the fund was reversionary and the daughter an infant, there was valid appointment; (2) the daughter took her share of the unappointed portion of the fund, in default of appointment.

Wombwell v Hanrott (1851) 14 Beav 143; 20 LJ Ch 581; 18 LTOS 60; 51 ER 241

ANNOTATION As to (2) **Consd** Foster v Cautley (1855) 6 De GM&G 55

2764 Effect of omission of clause — All appointees share in unappointed portion

A term of years was limited by will to trustees upon trust, if there should be two or more younger children of T, to raise for their portions such sum or sums, not exceeding £8,000 as T should appoint, and, in default of appointment, the sum of £8,000 to be paid to such of the children and in such shares as T should appoint, and in default of appointment, to all the children equally. T, by his marriage settlement, directed that £6,000 should be raised for the younger children of that marriage if two or more, and that if he should survive his intended wife and die without being married again, or if so married, should not have any issue of any future marriage who should take an interest in the sum provided by the will for younger children, then the further sum of £2,000 should be raised for the younger children of the first marriage, if there should be two or more. Neither the will nor the settlement contained a hotchpot clause. Afterwards T appointed to one of his daughters "the sum of £2,000 part of the sum of £8,000 made raisable by the will in the event which has happened, of there being two or more younger children." T died in the lifetime of his wife: *Held* the appointee of £2,000 was entitled to participate in the unappointed £6,000.

Walmsley v Vaughan (1857) 1 De G&J 114; 26 LJ Ch 503; 29 LTOS 204; 3 Jur NS 497; 5 WR 549; 44 ER 666, LC

2765 Effect of omission of clause — All appointees share in unappointed portion

By a settlement, made in 1842, certain lands were conveyed to trustees on trust to raise, after the death of M, or during his life with his consent, £12,000 for the benefit of E and L, daughters of M, in such shares as M should appoint, and in default of appointment for E and L equally on attaining twenty-one or marriage, to be paid to them at that age or time after the death of M or by his consent in writing during his life. M, by a deed poll in 1844, appointed £5,000 to be raised and paid to E at once, and £1,000 to be paid to her after his death, to the intent that the payment of her portion, under the deed of 1842, might be accelerated. M died without making any further appointment: *Held* E was entitled to share equally with L in the unappointed portion of the £12,000.

Re Alfreton's Trust Estates (1883) 52 LJ Ch 745; 31 WR 702

2766 Effect of omission of clause — Contrary intention appearing from appointment

Power of appointment among three persons executed by a transfer of one-third to one under an order on petition; stating, that the person having the power was desirous, that the fund might be equally divided. That person dying, without any further execution, the court gave the two remaining thirds respectively to another of the objects and to the administratrix of the third; who was dead; but had survived the person having the power.

Fortescue v Gregor (1800) 5 Ves 553; 31 ER 734, LC

ANNOTATIONS **Consd** Wombwell v Hanrott (1851) 14 Beav 143; Foster v Cautley (1855) 6 De GM&G 55; Lee v Head (1855) 1 K&J 620

2767 Effect of omission of clause — Contrary intention appearing from appointment

Under a marriage settlement, the husband and wife had a power of appointing a fund among their children, and in default of appointment, or so far as it did not extend the fund was to go to the children equally. There were three children of the marriage. An appointment of one-third of the fund was made in favour of one of the children, yet so as not to affect the same power further than to the extent specified, and also, in case of no complete exercise or execution of the same power or authority as to the share of the fund not affected by the appointment, so as not to prejudice or affect the right or contingent interest of the appointee under the proviso for accruer, in case of the death of any or either of the other children, in such manner as specified in the settlement and notwithstanding that in case of no complete appointment the then "appointment was intended to be made in lieu of all claims and demands" of the appointee to or for any original or principal share of the fund: *Held* the appointors must be taken by necessary implication to have appointed the other two-thirds to their two other children, and the appointee was not entitled to share in such two-thirds.

Foster v Cautley (1855) 6 De GM&G 55; 26 LTOS 249; 2 Jur NS 25; 43 ER 1150, LC

ANNOTATION **Consd** Walmsley v Vaughan (1857) 3 Jur NS 497

2768 Effect of omission of clause — Contrary intention appearing from appointment

A lady, under a special power for the purpose in her father's will, appointed by will £10,000 equally among her three children. Subsequently by deeds poll she appointed sums equal to one-third to one daughter: *Held* on the facts the appointments by deeds poll were intended to be in satisfaction of the daughter's share in the £10,000, and she was not entitled to share in the unappointed residue equally with the other children.

Re Ashton, Ingram v Papillon [1898] 1 Ch 142; 67 LJ Ch 84; 77 LT 582; 46 WR 231, CA

ANNOTATION **Consd** Re Eardley's Will, Simeon v Freemantle [1902] 1 Ch 397

2769 Effect of omission of clause — Portion of appointed fund paid to trustees — Subsequent deficiency of fund

Trust funds comprised in a marriage settlement which contained no hotchpot clause were, in pursuance of a power in the settlement, appointed to the children of the marriage. Portions differing in amount of the sums so appointed having been paid over to the various appointees, the remaining trust funds afterwards, in consequence of an unforeseen loss, became insufficient to satisfy the appointments: *Held* the payments actually made must be treated as final and not as to be brought into account, and the sums still due to the appointees must bear the loss rateably.

Re Bacon's Settlement Trusts, Hutton v Anderson (1889) 42 Ch D 559; 58 LJ Ch 823; 61 LT 458

2770 To what persons clause extends — Remoter issue than children

R, under his marriage settlement, appointed to W, his son, more of the settled property than he would have been entitled to in default of appointment. R, by his will, gave to his son W the proceeds of all the policies of assurance on his life, and also all other property which he might have at the time of his death, and proceeded as follows: "He will have to

bring into hotchpot that portion of the fund settled on the marriage of his dear mother, which has already been received by him, and then, as I make no further appointment under the power for that purpose, the whole settled fund will be divided equally between him and my little grandson": *Held* this was no appointment to the grandson.

Langslow v Langslow (1856) 21 Beav 552; 25 LJ Ch 610; 2 Jur NS 1057; 52 ER 973

2771 Valuation — As at time of distribution

By the marriage settlement of Mr and Mrs K stocks were assigned to trustees upon trust for Mrs K for life, and after her death, in the events which happened of her surviving her husband and no joint appointment by them having been made, then upon trust for such of the issue of the marriage as the survivor of them should by deed or will appoint, and in default of such appointment in trust for the children of the marriage in equal shares. The settlement contained a hotchpot clause in common form. Mrs K on the occasion of the marriage of one of her daughters appointed that certain sums of stock forming part of the settlement trust fund should immediately after the marriage be held in trust for the daughter for her absolute benefit, and Mrs K assigned and surrendered her life interest in the appointed stocks to the daughter. The stocks were accordingly transferred to the trustees of the daughter's settlement immediately after their marriage. Mrs K died and the trust funds became divisible: *Held* the daughter must bring into hotchpot the share appointed to her at its value at the date of the death of Mrs K.

Re Kelly's Settlement Trusts, Gustard v Berkeley [1910] 1 Ch 78; 79 LJ Ch 60; 101 LT 555; 54 Sol Jo 12

2772 Valuation — As at time of distribution

Clause 51 of a deed of resettlement, dated 24 June 1924, contained the trusts of a term of 900 years created by clause 6 thereof which were as follows: "(1) Upon trust . . ." [after the death of three named persons to raise for the portion or portions of the younger children of a marriage and their issue] "such a sum as with the value of the share of each such younger child in the trust fund subject to the trusts of" [a marriage settlement dated 7 August 1914] "if such trust funds were presently divisible equally among all such younger children would make up such share to £10,000, but not exceeding in the whole in any event the sum of £20,000, such portion or portions to be vested in and payable to such child or children or issue" in manner therein mentioned. The survivor of the three named persons above referred to died on 10 December 1938. Part of the property subject to the marriage settlement consisted of the wife's reversionary interest under the marriage settlement of her parents and that reversionary interest was reversionary to the life interest of her mother, who died on 27 October 1941. A summons was taken out by the Public Trustee (the sole trustee of the resettlement) to determine whether, in making the calculation, which the settlement directed should be made, the marriage settlement funds, including the reversion, ought to be valued in the light of the facts as they existed on 10 December 1938, and without regard to the subsequent events; or whether the death of the wife's mother in 1941 having become known, the value of the reversion in 1938 should consequently be calculated with greater accuracy: *Held* this was a very special case in which no principle of valuing life interests, or anything of that kind in general, was involved; the question how much the younger children were entitled to have by way of portions depended on the answer to the problem as presented on 10 December 1938; and, in the special circumstances, it would be wrong to suppose that the rights were liable in any way to variation by reason of subsequent events.

Re North Settled Estates, Public Trustee v Graham [1946] Ch 13; 115 LJ Ch 138; 174 LT 303

ANNOTATION **Consd** Re Thomson Settlement Trusts, Robertson v Makepeace [1953] 1 All ER 1139

2773 Valuation

By a marriage settlement dated 12 July 1875, it was provided that after the death of the survivor of the spouses the trust fund should be held (in the events which happened) as the survivor should by deed or will or codicil appoint, and, in default of appointment, in trust for the child or children of the marriage if more than one in equal shares. It was further provided that no child who or whose issue should take any part of the trust property under any appointment should, in default of appointment to the contrary, have any share of the unappointed part of such trust property without bringing the share appointed to him or her issue into hotchpot. On 22 March 1933, the husband, the survivor of the spouses, died, having by his will appointed life interests to his three daughters and his three grand-daughters, the appointment being otherwise invalid. On 29 March 1941, a daughter, Edith, died: *Held* for the purposes of the application of the hotchpot provision, Edith's life interest ought to be valued actuarily as at 22 March 1933, and not according to the benefit which Edith actually received, and the value so ascertained ought to be brought into hotchpot without interest.

Re Thomson Settlement Trusts, Robertson v Makepeace [1953] Ch 414; [1953] 1 All ER 1139; 97 Sol Jo 334

Scottish, Irish and Commonwealth Cases

2774 Effect of omission of clause — All appointees share in unappointed portion
Close v Coote (1880) 7 LR Ir 564 (IR)

B Application of clause

CROSS REFERENCES See EQUITY vol 20(3) (2nd reissue) no 1770 et seq (presumption against double portions); INFANTS vol 28(3) (2nd reissue) no 1208 et seq (advancement generally)

2775 To what funds applicable — Reversionary and life interests — Necessity for valuation
The donees of a power, authorising the appointment of personal estate amongst the children of the donees or the issue of such children born during the lives of the donees or the life of the survivor, appointed it "upon the trusts following; that is to say," trusts for the benefit of some of the children, and to pay the interest to them for life; and after the decease of each child, to dispose of her share amongst her children. The settlement giving the power contained the usual hotchpot clause: *Held* the life interest given by the appointment, as above stated, must be valued, and brought into hotchpot.
Rucker v Scholefield (1862) 1 Hem&M 36; 32 LJ Ch 46; 9 Jur NS 17; 11 WR 137; 71 ER 16

ANNOTATIONS **Consd** Re Oliphant's Trusts, Re Dixon's Will, Phillips v Phelps (1917) 86 LJ Ch 452; Re West, Denton v West [1921] 1 Ch 533 **Apld** Re Johnson's Settlement Trusts, McClure v Johnson [1943] Ch 341

2776 To what funds applicable — Reversionary and life interests — Necessity for valuation
Re Heathcote, Trench v Heathcote [1891] WN 10

ANNOTATIONS **Consd** Re West, Denton v West [1921] 1 Ch 533; Re Thomson Settlement Trusts, Robertson v Makepeace [1953] 1 All ER 1139

2777 To what funds applicable — Reversionary and life interests — Necessity for valuation — On inquiry in chambers where disagreement
Life and reversionary interests must be brought into hotchpot under the usual hotchpot clause.

Life interests and reversionary interests must be brought into hotchpot. The value of them must be ascertained in the best way you can: and if you cannot agree, there must be an inquiry at chambers on the subject (*Jessel MR*).
Eales v Drake (1875) 1 Ch D 217; 45 LJ Ch 51; 24 WR 184

ANNOTATION **Consd** Re West, Denton v West [1921] 1 Ch 533

2778 To what funds applicable — Reversionary and life interests — Necessity for valuation
The donee of a limited power died in 1886 having by her will appointed the entire fund, producing about £270 a year, in trust for T for life, and after her death on the usual trusts for her issue and children and in default of such issue or children, in trust as to one moiety for G for life with further trusts that failed. Under the deed creating the power T and G each took £1,000 in default of appointment, subject to the usual hotchpot clause. G died in 1915 without issue. T died in 1920 without issue, and the fund became distributable: *Held* (1) T's estate must bring her life interest in the entirety into hotchpot; (2) G's estate was not liable to bring anything into hotchpot for two reasons:

(*a*) because G being only given a defeasible reversionary life interest, did not at any time "take" any appointed part or share within the meaning of the hotchpot clause.

(*b*) even if she theoretically did so at the appointor's death in 1886, it would be unfair and inequitable now to assess a retrospective actuarial value thereon without regard to the actual fact that her defeasible reversionary life interest had never fructified.
Re West, Denton v West [1921] 1 Ch 533; 90 LJ Ch 342; 125 LT 117; 37 TLR 433; 65 Sol Jo 379

ANNOTATIONS **Consd** Re North Settled Estates, Public Trustee v Graham [1946] Ch 13; Re Thomson Settlement Trusts, Robertson v Makepeace [1953] 1 All ER 1139

2779 To what funds applicable
By his will testator directed his trustees to hold one-half of his residue on trust (subject to a life interest to his widow) for his two sons on protected life interests, and after their deaths in trust for their wives, children and remoter issue as they should by deed or will appoint. The will contained a proviso that at the period of division (*ie*, the death of the testator's wife) the shares should be brought into hotchpot. One of the sons by his will, in exercise of the power of appointment conferred on him by his father's will, appointed a life interest to his wife and, subject thereto, directed that his share should be held in equal shares for his children and that the portion of each of his daughters should be held on trust to pay the income to them for life, and that the share of each daughter should be held after her death in trust for all or any of her children who being male should attain the age of twenty-one years or being female should attain that age or marry and if more than one in equal shares. In case the trusts should fail, he directed that the share of a daughter so failing should be held in trust for such person or persons as such daughter should by will appoint. At the period of

division there were three infant children, issue of the marriage of one of the daughters of the testator's son. A summons was taken out by the trustee of the testator's will to determine (*inter alia*) the manner in which the provisions as to hotchpot were to be carried out: *Held* the operation of the hotchpot clause was confined to the life interests of the two daughters of the testator's son.

Re Gordon, Public Trustee v Bland [1942] Ch 131; [1942] 1 All ER 59; 111 LJ Ch 114; 166 LT 102; 86 Sol Jo 21; sub nom

Re Gordon, Public Trustee v Gordon (1942) 58 TLR 112

ANNOTATION **Apld** Re Morton, Morton v Wareham [1956] 3 All ER 259

2780 To what funds applicable — Two funds settled for same purpose by separate instrument

On a marriage, two separate sums were provided by two separate deeds, for the portions of younger children, and each deed contained a hotchpot clause: *Held* these clauses were separate and distinct, and operated only on the fund contained in each settlement respectively.

Montague v Montague (1852) 15 Beav 565; 51 ER 657

ANNOTATION **Distd** Re Perkins, Perkins v Bagot (1892) 67 LT 743

2781 To what funds applicable — Two funds settled for same purpose by separate instrument

On the marriage of M and his wife two deeds were executed, one conveying English estates the other Irish; in the former a term was created to raise £40,000 portions; in the latter a term to raise £25,000 in each, after powers of appointment was a hotchpot clause, declaring that "in default of any appointment to the contrary," no child should take any unappointed part without bringing his appointed share into hotchpot, and the Irish deed referred to the English. Two appointments were made of parts of the £40,000 and there was a direction in the deeds of appointment, that the appointment should not prejudice the appointees' rights in the unappointed part: *Held* he was not obliged to bring anything into hotchpot, but was entitled to his share in the £25,000 and in the residue of the £40,000 as if he had taken nothing by appointment.

Wellesley v Mornington (Earl) (1855) 2 K&J 143; 1 Jur NS 1202; 69 ER 728

2782 To what funds applicable — Two funds settled for same purpose by separate instrument

By a marriage settlement, certain funds were settled upon certain usual trusts for the benefit of the husband and wife and their children, and it contained a hotchpot clause. By the will of the wife's mother, made subsequently, a portion of her personal estate was bequeathed to the trustees to pay and transfer the same to the trustees of the settlement, to be held by them upon and for the same trusts and purposes as were therein expressed concerning the property thereby settled. On a summons taken out by the trustees of the settlement to ascertain the effect of this bequest, it was contended by parties to whom but small appointments under the settlement had been made that the bequest was to be treated as an accretion of the settlement, so as to make the hotchpot clause applicable by bringing into account the funds already appointed under the settlement: *Held* inasmuch as there was no context in the will importing that the use of the words "same trusts" implied an accretion of the settlement trust fund, the bequest must be deemed to be of an independent fund, to which the hotchpot clause in the settlement was not applicable.

Re North, Meates v Bishop (1897) 76 LT 186

ANNOTATION **Expld** Re Fraser, Ind v Fraser [1913] 2 Ch 224

2783 To what funds applicable — Two funds settled by same instrument — Whether considered distinct for purposes of clause

Testator devised real estate on trust for sale and conversion, and directed a third of the proceeds of the sale to be held on trust for each of his daughters for her life, and after her death in trust for such of her children or their issue born in her lifetime as she should by will or deed appoint, and, failing any such appointment, in trust for all her children in equal shares. A general hotchpot clause followed. Testator then directed two other funds to be held by his trustees on the same trusts. One of testator's daughters by will appointed part of the trust moneys to her two sons on condition that they should resign a benefit accruing to them under their father's will, whereby the residuary estate of testatrix, which was given to a stranger, would be enlarged, and failing their compliance with this condition, testatrix appointed the fund to one of her daughters: *Held* testator's intention was not to create three funds, but one fund, and therefore there was one general hotchpot clause applying to the whole share of the issue of testator's daughter in the moneys accruing to them under his will.

Re Perkins, Perkins v Bagot [1893] 1 Ch 283; 62 LJ Ch 531; 67 LT 743; 41 WR 170; 37 Sol Jo 26; 3 R 40

ANNOTATIONS **Consd** Re North, Meates v Bishop (1897) 76 LT 186 **Distd** Re Bristol, Grey v Grey [1897] Ch 946; Re Cavendish, Grosvenor v Butler [1912] 1 Ch 794 **Consd** Re Fraser, Ind v Fraser [1913] 2 Ch 224; Re Wood, Wodehouse v Wood [1913] 1 Ch 303 **Distd** Re Holland, Holland v Clapton [1914] 2 Ch 595

2784 To what funds applicable — Whether considered distinct for purposes of clause — Two funds settled by same instrument

A marriage settlement dealt with two funds: £13,000 Consols belonging to the wife, and a policy for £5,000 on the life of the husband. The capital of the wife's fund was to go to such children of the marriage as the husband and wife by deed, or the survivor by deed or will, should appoint, and in default of appointment to the children equally, subject to a hotchpot clause in the form usually adopted in the case of one fund: the £5,000 policy moneys were to go to such children of the marriage as the wife should by deed or will appoint, and in default of appointment "upon the same or the like trusts," and subject to "the same or the like" powers and provisos as were expressed in the said settlement concerning the wife's fund after the death of the husband and wife and in default of appointment. The whole of the £13,000 had been appointed unequally among the three children of the marriage, the £5,000 was unappointed and the question now raised was whether the two sums were to be aggregated for the purposes of hotchpot, or whether the £5,000 was divisible into three equal shares: *Held* the two funds were distinct, and the three children were entitled to the £5,000 in equal shares, without having to account for or bring into hotchpot any sums appointed to them out of the £13,000.

Re Bristol (Marquis), Grey (Earl) v Grey [1897] 1 Ch 946; 66 LJ Ch 446; 76 LT 757; 45 WR 552; 4 Sol Jo 451

ANNOTATIONS **Follld** Re Cavendish, Grosvenor v Butler [1912] 1 Ch 794 **Consd** Re Fraser, Ind v Fraser [1913] 2 Ch 224 **Apld** Re Wood, Wodehouse v Wood [1913] 1 Ch 303

2785 To what funds applicable — Whether considered distinct for purposes of clause — Two funds settled by same instrument

By a marriage settlement made in 1877, after reciting that by virtue of a prior settlement and deed poll the wife was entitled to a reversionary sum of £15,000, but subject to a provision in the deed poll for the reduction thereof, in case the wife should make default in bringing the same into account in the division of certain trust funds in the deed poll mentioned, the sum of £15,000 was settled, subject to the life interests of the husband and wife, in trust for children of the marriage as the husband and wife should jointly appoint, and in default, as the survivor should appoint, and in default, in trust for children of the marriage in equal shares, the sons to take vested interests at twenty-one and the daughters at twenty-one or marriage. Then followed a usual hotchpot clause relating to "the trust premises," and usual powers of maintenance and advancement with the usual ultimate trusts in default of children in favour of the wife. The settlement contained an agreement to settle the wife's other or after-acquired property upon trusts for sale and conversion, the proceeds to be held "upon the trusts and with and subject to the powers, provisos, agreements and declarations herein declared concerning the sum of £15,000 hereinbefore expressed to be hereby assigned," and further provided that, notwithstanding the agreement, if the wife became entitled to any interest which ought to be settled pursuant to the said agreement but under the provisions of the deed poll would go in satisfaction of the £15,000, it should be lawful for the trustees to release any such interest with the intent of keeping the £15,000 intact and unreduced. The husband and wife appointed the £15,000 in favour of one daughter and died without having made any further appointment: *Held* for the purposes of the hotchpot clause the £15,000 and the other or after-acquired property were distinct funds, and the daughter was entitled to share in the other or after-acquired property without bringing the £15,000 appointed to her into hotchpot.

Re Cavendish's Settlement, Grosvenor v Butler [1912] 1 Ch 794; 81 LJ Ch 400; 106 LT 510; 56 Sol Jo 344

ANNOTATIONS **Consd** Re Fraser, Ind v Fraser [1913] 2 Ch 224; Re Wood, Wodehouse v Wood [1913] 2 Ch 574; Re Campbell's Trusts, Public Trustee v Campbell [1922] 1 Ch 551 **Distd** Re Rydon Marriage Settlement, Barclays Bank Ltd v Everitt [1954] 3 All ER 1

2786 To what funds applicable — Whether considered distinct for purposes of clause — Two funds settled by same instrument — Whether considered distinct for purposes of clause

Testator gave three separate funds to trustees upon trusts, fully set out in each case, for his three children respectively for life, with remainder to their issue as they should respectively appoint, and in default of appointment to their respective children in equal shares with a hotchpot clause. In each case testator gave the fund over, on failure of the express trusts, upon trusts in favour of his other children, and their issue successively, by reference to the trusts expressly declared in favour of such children and their issue concerning the fund given in trust for them in the

first instance. In the events which happened, a granddaughter of testator became entitled to one fund by appointment, and to a share in another fund in default of appointment: *Held* the granddaughter was entitled to take her share in the unappointed fund without bringing into hotchpot the fund which she took by appointment.

Re Wood, Wodehouse v Wood [1913] 2 Ch 574; 83 LJ Ch 59; 109 LT 347; 57 Sol Jo 835, CA

ANNOTATIONS **Consd** Re Fraser, Ind v Fraser [1913] 2 Ch 224; Re Campbell's Trusts, Public Trustee v Campbell [1922] 1 Ch 551; Re Rydon Marriage Settlement, Barclays Bank Ltd v Everitt [1954] 3 All ER 1

2787 To what funds applicable — Whether considered distinct for purposes of clause — Two funds settled by same instrument

By a marriage settlement made in 1847, funds belonging to the husband, called "the firstly mentioned trust fund," and a fund belonging to the wife's father, called "the secondly mentioned trust fund," were settled, subject to life interests in the husband and wife, in trust for such children of the marriage as the husband and wife should jointly appoint, and in default as the wife should appoint, and as to the unappointed part, in trust for the children in equal shares, the sons taking vested interests at twenty-one and the daughters at twenty-one or marriage. Then followed a clause providing that no child, who should "take any part of the said trust funds" under any appointment made by the husband and wife or the survivor of them under the powers thereinbefore given, should take any part of "the said trust funds by virtue of the trust's hereinbefore declared in default of appointment" without bringing his or her share into hotchpot. The settlement also contained a covenant to settle the wife's after-acquired property, which was to be held "upon and for such of the said trusts, intents, and purposes, and under and subject to such of the powers, provisos and agreements as are herein declared, expressed or contained of and concerning the secondly mentioned trust fund, and the income thereof, as shall for the time being be subsisting or capable of being acted upon and exercised." There were seven children of the marriage, and the husband and wife appointed the whole of "the firstly mentioned trust fund" and "the secondly mentioned trust fund" in favour of five of the children. Subsequently two legacies to the wife came in and were caught by the after-acquired property clause. The husband and wife died without making any further appointment: *Held* the two after-acquired legacies formed an accretion to the two original funds and the five appointees of these funds could not share in the legacies without bringing the shares appointed to them into hotchpot.

Re Fraser, Ind v Fraser [1913] 2 Ch 224; 82 LJ Ch 406; 108 LT 960; 57 Sol Jo 462

ANNOTATIONS **Consd** Re Campbell's Trusts, Public Trustee v Campbell [1922] 1 Ch 551; Re Rydon Marriage Settlement, Barclays Bank Ltd v Everitt [1954] 3 All ER 1

2788 To what funds applicable — Whether considered distinct for purposes of clause — Two funds settled by same instrument

Testator devised and bequeathed all his real and personal estate to trustees upon trust to sell and convert the same and stand possessed of the residue upon trust for his sons equally. He directed his trustees to retain the share of each upon trust for the son for life, and after his death upon trust for his issue, as he should by deed or will appoint, and in default of appointment, equally, but with the proviso contained in a hotchpot clause. Testator empowered his sons by deed or will to appoint to their respective wives all or any part, not exceeding one-third part, of the income of their respective shares in his residuary estate. The gifts to the sons were expressly declared to be conditional on each of them on attaining the age of twenty-one assigning to the trustees of testator's will their interests under his marriage settlements "to be held upon the like trusts and with and subject to the like powers and provisions declared concerning the share for the same son" in testator's residuary estate. All the sons complied with this condition and assigned their interests. By a memorandum of direction and a deed poll the sons directed the trustees to hold the share of each of them in a sum which represented surplus income "as an addition to the capital" of their respective shares, and "so as to follow the destination thereof," and be subject to the same trusts, but with one exception. There were thus three trust funds, the residuary, the assigned, and the surplus income fund. In the exercise of the power of appointment one son appointed to his wife for life the income from his share of testator's residuary estate, and a second son made a similar appointment of one-third of the income of his share, "including in such share" the share under testator's marriage settlement which he had assigned to the trustees of the will: *Held* the assigned and surplus income funds were not an accretion to testator's residuary estate, and therefore the appointment of a share in the income from the residuary fund did not carry with it the shares in the income of the two other funds; the assignments, the memorandum of direction, and the deed poll were separate settlements of separate funds, with different settlors, and each must be treated as a separate settlement in which were written out the referential trusts therein referred to; and therefore the appointment by the

second son of his share of the assigned funds was good, and there was no general hotchpot clause.
Re Campbell's Trusts, Public Trustee v Campbell [1922] 1 Ch 551; 91 LJ Ch 433; 127 LT 236

ANNOTATION **Apld** Re Gooch, Gooch v Gooch [1929] 1 Ch 740

2789 To what funds applicable — Advancement clause

Testator by his will left his residuary estate upon trust for his wife for life, and gave her power to appoint the funds amongst their four children. In default of appointment the children were to take equally. Any child who had received any part of the funds under any appointment was, in default of appointment to the contrary, to bring the appointed funds into hotchpot. The will also contained an advancement clause. After testator's death £705 was advanced to R, one of the children. The widow subsequently by her will appointed one equal fourth part of the property of which she was tenant for life to each of two of her children absolutely, and one equal fourth part upon trust for each of her other children, of whom R was one, respectively for life, with remainder to their respective children. Testatrix did not in her will make any reference to the advance to R: *Held* R was not liable to bring into hotchpot or account for the £705 advanced to him out of his expectant share.
Re Fox, Wodehouse v Fox [1904] 1 Ch 480; 73 LJ Ch 314; 90 LT 477; 52 WR 229; 48 Sol Jo 223

2790 To what funds applicable — Property caught by covenant to settle after-acquired property

By a marriage settlement made in 1890 a sum of £3,000 was settled on behalf of the wife and was directed to be held on trusts for investment, with power to vary investments, and it was declared that the trustees should "stand possessed of the said sum of £3,000 and the investments for the time being representing the same (which sum and investments are hereinafter referred to as 'the wife's trust fund') and also of the income of the wife's trust fund on trust in the first place out of the income of the wife's trust fund from time to time" until a certain date called "the 'testator's time of division' [*ie*, a time when the reversionary interests forming part of a fund called 'the husband's trust fund' would fall into possession] shall arrive to pay the premiums on [a policy of insurance] and subject to such payment upon trust to pay the income of the wife's trust fund" to the wife during her life and after her death on protective trusts for the husband for his life. From and after the death of the survivor of the husband and the wife, the "capital and income of the wife's trust fund" was to be held in trust for the children or remoter issue of the wife as she, or, in default, as the husband, should by deed or will or codicil appoint, with a trust in default for all the children of the marriage who attained the age of twenty-one years or being daughters married. There followed a hotchpot clause, in the usual form, relating to both the husband's trust fund and the wife's trust fund. The settlement further provided for the raising every six months, out of the securities for the time being representing the said sum of £3,000, of £150 to be paid to the husband if living, and, if not, to the wife, so long as the husband and the wife or one of them should be living and the "testator's time of division" should not have arrived. At the "testator's time of division" the amount expended by way of these "half-yearly sales" was to be recouped out of the husband's fund. The settlement contained an after-acquired property clause whereby the wife covenanted that if she should become entitled in any manner to any real or personal property of the value of £300 or upwards she would convey it to the trustees on trust for sale and to dispose of the income thereof "in like manner as the income of the wife's trust fund" and it was thereby agreed that the trustees should stand possessed of such property (and the proceeds of sale and the investments representing them) "upon the trusts and subject to the powers and provisions hereinbefore declared concerning money forming part of the wife's trust fund (except the special provisions . . . as to half-yearly sales and application of the proceeds thereof). . . ." By her will the wife, after reciting the settlement of 1890 and that thereby divers trust funds and property therein and hereinbefore shortly referred to as "the wife's trust fund" were settled in trust after the death of herself and the husband for their issue as she should appoint, appointed that the trustees of the settlement should "after my death stand possessed of the wife's trust fund in trust for" a granddaughter. On the question whether the testamentary appointment extended to property caught by the after-acquired property clause in the settlement: *Held* (1) on the true construction of the settlement the expression "the wife's trust fund" included the after-acquired property, the hotchpot clause in particular leading to this conclusion because otherwise the clause would become unworkable, and the distinction (in relation to half-yearly sales) between the trusts applicable to the £3,000 and those relating to the after-acquired property not preventing the coalescence of the after-acquired property with the wife's trust fund; (2) even if the term "the wife's trust fund" in the settlement did not include the after-acquired property, nevertheless on the true construction of the will, the testamentary appointment passed both the original wife's trust fund and the property accruing under the after-acquired property clause.

Re Rydon Marriage Settlement, Barclays Bank Ltd v Everitt [1955] Ch 1; [1954] 3 All ER 1; 98 Sol Jo 586, CA

Scottish, Irish and Commonwealth Cases

2791 To what funds applicable — To all funds settled where so indicated
Hutchinson v Tottenham [1898] 1 IR 403 (IR)

2792 To what funds applicable — Definite sum appointed in specified amounts
Bagge v Bagge [1921] 1 IR 213 (IR)

3 Trusts in default of or subject to appointment

LAW See Halsbury's Laws (4th edn) vol 42 para 931

CROSS REFERENCES See no 534 et seq ante (particular words and phrases); PERPETUITIES vol 37(1) (reissue) no 721 et seq (remoteness of vesting)

2793 Usual form for children at twenty-one or marriage
Chamberlain v Napier (1880) 15 Ch D 614; 49 LJ Ch 628; 29 WR 194

2794 Usual form for children at twenty-one or marriage — Omitted words supplied
A settlement recited that it was the desire of the settlor to benefit certain grandchildren described as "all the children present and future of the marriage of" A and B. The ultimate trust for the grandchildren was worded thus: "in trust for such of the grandchildren as being male shall have attained the age of 21 years or being female shall have married under that age": *Held* the court should give effect to the settlement considered as a whole and the provision for female grandchildren should be given effect to as if it read: "or being female shall have attained the age of 21 years or shall have married under that age."
Re Hargraves' Trusts, Leach v Leach [1937] 2 All ER 545

2795 Ill appointment as to part — Part goes as in default
Personal estate settled on marriage for the husband for life, then for the wife for life, then to and among all and every children and grandchildren, or issue, in such shares, under such restrictions, at such times, and in such manner, as they or the survivor should appoint by deed or deeds or by will; for want to appointment to all and every the children and grandchildren, or issue, living at the decease of the survivor, equally payable at twenty-one or marriage; if but one, to that one; provided that in case of no appointment the issue of any children dead should not have a greater share than their parents would have had: issue only are within the power; but in any degree; but an appointment to any issue not living must be restrained to twenty-one years after lives in being at the creation of the power- otherwise it is void, even as to such as come *in esse* within those limits: but on marriage of a daughter interests may be given to her children, generally, and to the husband. What is ill appointed goes as in default of appointment: but children of a living parent cannot take under the proviso.
Routledge v Dorril (1794) 2 Ves 357; 30 ER 671

ANNOTATIONS **Consd** Leake v Robinson (1817) 2 Mer 363; Harvey v Stracey (1852) 1 Drew 73; Fitzroy v Richmond (1859) 27 Beav 190

2796 Meaning of gift to daughter on "marriage" — Marriage under twenty-one
By a voluntary settlement personal property was assigned to trustees upon trust to pay the interest to T during his life, and on his decease to pay the principal to his lawful issue, if then of age or married, share and share alike, if more than one, and if only one, the whole to be paid to such only child; or in case such child or children should be an infant or infants on the death of the said T, then the principal was to be paid to him, her or them as aforesaid, on their attaining twenty-one if sons or, if daughters, on their marriage, respectively. By his will the settlor bequeathed certain other funds to the same trustees upon similar trusts. T died, leaving an infant daughter his sole surviving child: *Held* the daughter would become absolutely entitled to the funds in question, either on attaining twenty-one, or on her marriage under that age.
Lang v Pugh (1842) 1 Y&C Ch Cas 718; 6 Jur 939; 62 ER 1086

2797 Ascertainment of class to take — First member becoming absolutely entitled
A fund was settled by a voluntary deed upon such trusts as the settlor should appoint, and in default of appointment for such of the younger children of a third person as should attain twenty-one, or being daughters marry: *Held* when one younger child attained a vested interest in possession the class was closed, and such child was entitled to be then paid a share.
Re Knapp's Settlement, Knapp v Vassall [1895] 1 Ch 91; 64 LJ Ch 112; 71 LT 625; 43 WR 279; 13 R 147

2798 Ascertainment of class to take — Application of accumulations during minority
Certain property was vested in the Public Trustee under a settlement, whereby the settlor directed him after her decease to pay the income to the tenants for life therein mentioned, and directed that after the death of any tenant for life the share of that tenant for life should be held in trust for the grandchildren

of the settlor in manner therein mentioned. One of the tenants for life died in the lifetime of the settlor. A summons was taken out by the Public Trustee for the direction of the court as to the application of the accumulations of income of the share of the tenant for life who died in the lifetime of the settlor, having regard to the facts that (*a*) no grandchild of the settlor had attained the age of twenty-one years, or being female had married, at the death of the settlor; (*b*) one of the grandchildren of the settlor was born after the dates, when two of such grandchildren had attained the age of twenty-one years, and (*c*) a grandchild of the settlor, who survived the settlor, died under the age of twenty-one years: *Held* (1) the property from which the accumulated income arose must be regarded as the share to which the infant would become ultimately entitled, even though that share might be reduced by reason of other members of the class coming into existence; (2) the share of the grandchild, who had died under the age of twenty-one years, which had been provisionally assigned to that grandchild, ought to be treated as not having been properly assigned, and that portion of the money which had accrued while the infant was a member of the class, and which had not been applied in the maintenance and education of the infant, ought to be reassigned amongst the other persons who were at that time members of the class; (3) observations on the method of dealing with accumulations of income provisionally assigned to infant members of a class, having regard to Conveyancing Act 1881 (c 41) s 43 (repealed), and Trustee Act 1925 (c 19) s 31.

Re King, Public Trustee v Aldridge [1928] Ch 330; 97 LJ Ch 172; 139 LT 641

2799 Annuities to widow and children — Appropriation on death of widow — Child predeceasing widow — Appropriation of share

By a settlement of personalty the settlor directed the trustees to apply the income of the trust fund after his death in the payment of certain annuities to his widow and four children. After the death of his widow they were to divide the trust fund into as many equal shares as there were children surviving him or who had died in his lifetime leaving issue surviving him, and to appropriate one share to each child, paying the income to that child. After the death of each child they were to hold the share in trust for that child's children who being male should attain the age of twenty-one years or being female should attain that age or marry under that age, in equal shares. The settlor further directed that, if there should be no grandchild who should attain that age or marry, the trustees should hold the fund in trust for himself (the settlor) absolutely. The settlor died in 1929, and one of his daughters died a spinster in 1941 in the lifetime of the settlor's widow: *Held* (1) the share of income payable to her was payable to her legal personal representative during the remainder of the life of the widow of the settlor; (2) in the case of a settlement of personalty it was possible in law to imply a gift over as regarded the share of one beneficiary in favour of the shares of the others; (3) on the true construction of the settlement, the share appropriated to the deceased daughter should be held after her death upon the trusts concerning the shares directed to be appropriated to the other children.

Re Bickerton's Settlement, Shaw v Bickerton [1942] Ch 84; [1942] 1 All ER 217; 111 LJ Ch 132; 166 LT 38; 85 Sol Jo 481

2800 Trusts for children irrespective of age or marriage

By a declaration of trust, dated 3 November 1897, it was agreed that the trustees should stand possessed of certain residuary trust funds of the estate of a testator in trust to pay the income thereof to the daughter of the testator during her life with power for her to appoint that after her decease the whole or any part of such income should be paid to any husband of hers who might survive her and, subject to any such appointment, "in trust for the children of [the daughter] or any of her issue in such shares (if more than one) and in such manner as she shall by any deed or deeds or by her will appoint." The deed also contained a gift over in an event which did not happen. She died in 1944, there being, as a result of her marriage, nine children; and five grandchildren (born in her lifetime). She did not exercise her power of appointment either by deed or by will. A summons was taken out by the trustees to determine how the trust funds became divisible on the death of the daughter, as no provision appeared to have been made for her children or remoter issue in the event of her not having exercised the power of appointment in their favour contained in the deed: *Held* (1) the case fell within the second class mentioned by *Kindersley V-C*, in his statement of the general principle set out in *Lambert v Thwaites* ((1866) LR 2 Eq 151, at p 155; 37(2) (reissue) Digest no 838) and, on the true construction of the deed, the trust funds became, on the death of the daughter, divisible between all the children and remoter issue of the daughter, born in her lifetime, whether living at her death or not and whether they had attained, or should attain, the age of twenty-one years, or, being female, had married or should marry, or not, in equal shares; (2) they took *per capita* and not as joint tenants.

Re Arnold, Wainwright v Howlett [1947] Ch 131; [1946] 2 All ER 579; [1947] LJR 227; 175 LT 510; 62 TLR 686; 90 Sol Jo 601

2801 Class gifts — Gift to issue attaining twenty-one

A settlement effected in 1924 created a life interest for the settlor and, after his death, a trust of income in favour of such of his 3 daughters living at his death who had attained 21 years of age or married under that age and also the issue of any daughter who might have predeceased the settlor; such issue were to take their parent's share equally amongst themselves on attaining the age of 21 or marrying under that age. A clause of the settlement provided that, in case there was no child living to take a vested interest in a daughter's share, such share was to be divided equally amongst such of the daughters then living and the issue of any of them then dead, such issue taking their parent's share only on attaining the age of 21 or marrying under that age. All the daughters attained 21 years, married and survived the testator. On the death of one of them without issue, the trustees sought determination of the question whether the deceased daughter's share was to be held on trust for the two surviving daughters or whether the trust in respect of that share was void for perpetuity because potential beneficiaries would have included the issue of either of the surviving daughters if they had predeceased the deceased daughter: *Held* the true meaning of the word "issue" meant issue through all degrees, not children. The issue intended to take on a daughter dying without leaving a child were any issue living at the death of the daughter. The issue intended to take on the failure of a child to attain 21 years were those alive at the death of the child. Consequently, since there might be issue born after the death of the daughter, but who were included in the issue class, which closed on the death of the child, they would not necessarily take a vested interest within 21 years of the daughter's death. Since there was a possibility of the issue limitation taking effect outside the perpetuity period, it was void for remoteness and there was a resulting trust in favour of the settlor's estate.

Re Drummond [1988] 1 All ER 449; [1988] 1 WLR 234, CA

2802 Class gifts — Time for distribution

In a settlement dated 20 March 1931, a settlor declared: "The trustees shall hold the fund in trust for all such of the children of the settlor (whether now living or hereafter to be born) as being male attain the age of twenty-one years or being female attain that age or marry and in such proportions that each son shall receive twice as large a share as each daughter." At the date of the settlement the settlor was aged thirty-eight and had three children, a son aged twelve and a half years and two daughters aged eleven and a half and six years respectively. At the date of the summons the settlor was living and had had no further children, his son had attained the age of twenty-one and had died, and his two daughters had attained that age and married. The question arose whether on the true construction of the settlement the rule in *Andrews v Partington* (see WILLS vol 51 (reissue) no 8391), was applicable and the trust fund was distributable or whether any future children of the settlor would be entitled to benefit under the trust: *Held* the rule in *Andrews v Partington, supra,* applied, with the consequence that the trust fund was held on trust absolutely as to one half for the son's estate and as to the other two quarters for the daughters, for the following reasons: (1) in determining whether the rule in *Andrews v Partington, supra,* applied to a disposition by settlement, the settlor must be taken to have framed his trust with the rule in mind unless there was something in the settlement that was so inconsistent with the rule as to negative conclusively the assumption that it would apply; (2) a trust for a class of persons who should attain a certain age and for such persons in shares as a trust which involved a distribution between those persons for the purposes of the rule, even though the trust instrument did not expressly direct distribution at any particular time; (3) where in a settlement such words of futurity as "hereafter to be born" were used in describing a class of children who were to benefit, and the words were capable of being given an intelligible and effective meaning by relating them to the period between the date of the settlement and the date of distribution, when the first member of the class should attain a vested interest, it was proper to relate the words of futurity to that period, and so to confine the class of children born before the date of distribution.

Re Wernher's Settlmt Trusts, Lloyds Bank Ltd v Mountbatten (Earl) [1961] 1 All ER 184; [1961] 1 WLR 136; 105 Sol Jo 88

ANNOTATIONS **Apld** Re Chapman's Settlmt Trusts, Jones v Chapman [1978] 1 All ER 1122; (dictum Buckley J) Re Clifford's Settlement Trusts, Heaton v Westwater [1980] 1 All ER 1013

2803 Class gifts — Time for distribution

In 1956 a widow settled property for the benefit of her grandchildren, being the children of two named sons. The property was to be held on trust for such of her grandchildren "now born or who shall be born hereafter . . . as shall attain the vesting age and if more than one in equal shares". Clause 2(*b*) of the settlement defined the vesting age as "(1) In the case of any such grandchild born four or more years before

the death of the survivor of Settlor's said sons the age of 25 years; (2) in the case of any such grandchild born less than four years before the death of the survivor of Settlor's said sons the age which such grandchild would be if he or she were to live until the expiration of 21 years from the death of such survivor". At the date of the settlement the two named sons were aged 28 and 31 and there were four grandchildren whose ages ranged from one to 6½. In 1975, after five more grandchildren had been born and while both sons were still living, the eldest grandchild attained the age of 25. In proceedings to determine whether the class of grandchildren entitled to a share under the settlement closed when the eldest grandchild attained the age of 25: *Held* in order to exclude the application of the rule that the class of persons to benefit closed on the eldest member of the class attaining the prescribed vesting age, the words used had to be sufficiently specific and emphatic to show an intention to exclude its application. The words "now born or who shall be born hereafter" neither showed such an intention nor were inconsistent with the application of the rule. Nor did the provision as to vesting in clause 2(*b*) of the settlement give any indication whether settlor intended to include or exclude as a member of the class a grandchild born after one had already attained a vested interest; it did no more than specify the age at which a member of the class of grandchildren intended to be benefited was to take a vested interest. Accordingly the rule applied and the class of grandchildren entitled to a share under the settlement had closed when the eldest had attained the age of 25.

Re Chapman's Settlmt Trusts, Jones v Chapman [1978] 1 All ER 1122; [1977] 1 WLR 1163; 121 Sol Jo 619, CA

ANNOTATION **Apld** (dicta Bridge LJ and Sir John Pennycuick) Re Tom's Settlement, Rose v Evans [1987] 1 All ER 1081

2804 Class gifts — Time for distribution — Application of class closing rule

The plaintiffs were trustees of a settlement dated 19 August 1955. By a deed of appointment dated 25 March 1977 they provided for the creation of a 'specified beneficiaries fund' of some £12m, the specified beneficiaries being defined as the future grandchildren and existing and future great-grandchildren of the settlor. The deed of appointment provided that the trustees were to hold the fund on trust absolutely for such of the specified beneficiaries who reached 18 before the vesting day or who were living at the vesting day and further provided that at the closing date each specified beneficiary then living was to receive a share in the distribution of income, so that on the closing day each beneficiary would acquire an interest in possession in the whole or part of the fund. The closing date was defined by the deed of appointment as the vesting day or 25 years from the date of execution of the deed, whichever was earlier. At the date of appointment there were 9 great-grandchildren. The trustees brought an action to determine whether the class of specified beneficiaries closed when the oldest great-grandchild reached 18. At the time of the proceedings there were 20 great-grandchildren and it was likely that more would be born. The defendant, the great-grandchild who had reached 18, had become entitled to call for payment of his share under the terms of the appointment. Unless the class was closed, it was impossible to determine the maximum number of beneficiaries and thus quantify the amount of his share: *Held* where a trust instrument showed two conflicting intentions, ie an intention to give a share under a settlement to all the members of a certain class whenever born and an intention to permit each member of the class to enjoy his share when he became entitled to do so, the class closing rule in *Andrews v Partington* provided a presumption resolving the conflict in favour of early enjoyment by the member who became entitled. However, if the trust instrument showed that the draftsman had specifically considered the date at which the class was to close there could not be said to be conflict of intention and the rule could not apply. Since the deed of appointment expressly defined the category of future born beneficiaries by reference to a named propositor and their ages and to a period of clearly defined duration, ie beneficiaries born after the date of the deed of appointment and before the closing date, the deed had excluded the class closing rule because its unequivocal intention was for the class to remain open until the defined date. Furthermore, the express reference in the deed to future great-grandchildren living at the closing date clearly showed an intention that the class would remain open until the defined date. Accordingly, the class did not close when the defendant reached 18.

Re Tom's Settlement, Rose v Evans [1987] 1 All ER 1081; [1987] 1 WLR 1021

2805 Class gifts — Time for distribution — Compound gift

By a settlement dated August 25 1954 the settlor directed trustees to hold the trust fund "in Trust for the children of the Settlor's son . . . born in the Settlor's lifetime or after his death who before the expiration of the period of Twenty one years from the death of the survivor of the Settlor and [the son] shall attain the age of Twenty five years and the other children or child of [the son] living at the expiration of such period". If more than one child qualified for a share in the trust fund, they were to

take equal shares. At the date of the settlement, the son had two children, and subsequently he had two more, one born in 1956 and the other in 1960. On 26 March 1977 the eldest child attained the age of 25 years. In 1979, when the settlor's son was still living, the trustees instituted proceedings to determine whether the class of persons entitled to a share under the settlement had closed when the son's eldest child attained 25 years of age. The trustees contended that the settlement provided for a compound class of the son's children with two different qualifications, namely (*a*) children born in the settlor's lifetime who attained the age of 25 within 21 years of the son's death, and (*b*) other children, of any age, who were alive 21 years after the son's death and who did not qualify under limb (*a*), and since the rule that the class of persons entitled to a share of a fund closed when one member of the class became absolutely entitled in advance of the others could not apply to limb (*b*), there being but a single point of time at which it was to be determined which children were entitled to take and consequently no question of premature closing, it could not apply to the gift as a whole. The trustees further contended that the rule was excluded if its application would prevent one limb of the gift from having any operation save in improbable circumstances, and since the only circumstances in which limb (*b*) could have any effect were the improbable circumstances of the settlor and the son dying promptly after the making of the settlement that sufficed to show an intention to exclude the rule: *Held* the rule that the class of persons to benefit under a gift closed on one of the members becoming absolutely entitled in advance of the others was a rule which yielded to a contrary intention, but in determining whether an expression sufficed to exclude the application of the rule the standard was high. It was not enough that there were provisions which merely pointed to the exclusion of the rule if they were nevertheless capable of operating in conformity with it: there had to be an inescapable incompatibility with the operation of the rule. The mere fact that the rule could not apply to part of a compound class was not sufficient to demonstrate any incompatibility of the rule with the other part or with the gift as a whole. Nor was the fact that the application of the rule would reduce the scope of limb (*b*) to circumstances which, though by no means impossible, were less probable than other circumstances, sufficient to exclude the rule, since the question was one of impossibility and not improbability; and, although it might be that "impossible" could be treated as extending to something which was so improbable as to be unreal, that was not the case with the settlement. In any event the exclusion of the rule could not depend on a mere estimate of a degree of improbability. Accordingly the rule applied and the class of persons entitled to a share under the settlement closed when the son's eldest child attained 25 years of age.

Re Clifford's Settlement Trusts, Heaton v Westwater [1980] 1 All ER 1013; [1980] 2 WLR 749; 124 Sol Jo 362

ANNOTATION **Apld** (dictum Megarry VC) Re Tom's Settlement, Rose v Evans [1987] 1 All ER 1081

4 Marriage with consent

LAW See Halsbury's Laws (4th edn) vol 42 para 932

CROSS REFERENCE See WILLS vol 50 (reissue) no 4134 et seq (conditions relating to consent in wills)

2806 Direction that shares of daughters be settled — Daughters dying without issue — Effect of

Where either in a settlement or a will there is an absolute gift to children followed by a direction that the daughters' shares shall be settled on themselves for life, with remainder to their children, the daughters' interests are only cut down for the sake of the children, and any daughter who dies without issue takes her share absolutely.

Re Sidway Hall Estate (1877) 37 LT 457

2807 Where consent dispensed with — Consent capriciously refused

Settlement to two daughters. Proviso, if either marry without the consent of their mother, it should be to her separate use, etc. The mother proposed and encouraged the marriage of one of her daughters with S and afterwards refused her consent out of pique and resentment; the marriage was had without her consent, and held no forfeiture.

Strange (Lord) v Smith (1755) Amb 263; 27 ER 175, LC

ANNOTATIONS **Consd** Dashwood v Bulkeley (1804) 10 Ves 230; Clarke v Parker (1812) 19 Ves 1

2808 What may constitute consent — Subsequent approbation of marriage contracted without consent

G conveyed real estates upon trust for the benefit of his daughter; but he declared that if she married under age, and without his consent, the trustees should hold the estates in trust for him and his heirs. The daughter married under twenty-one, and without consent; but G was afterwards reconciled to her, and treated both her and her husband with great kindness: *Held* this conduct of the father did not divest the equitable fee which had vested in him on the marriage.

Duffield v Elwes (1823) as reported in 1 Sim&St 239; 57 ER 96; on appeal (1827) 1 Bli NS 497, HL

ANNOTATION **Consd** Sen v Headley [1991] 2 All ER 636

2809 Failure to exercise power on marriage with consent — Discretionary power of trustees

A settlement was made of a trust fund, in moieties, for the granddaughters of the settlor for life, subject to a prior interest in their mother, with remainder to their children as they should appoint, or, in default, equally. A power was interposed that in the event of either of the granddaughters marrying with consent, the trustees might transfer to her part of the trust funds. One of the granddaughers married with consent, but the power was not executed. The trust fund was paid into court: *Held* the execution of the power was discretionary with the trustees, and they not having exercised it, the granddaughter was not entitled to payment to her of any part of the capital of the trust funds.

Re Strickland's Trust (1862) 1 New Rep 164

2810 Whether condition enforceable — Necessity for gift over on marriage without consent

A condition subsequent in partial restraint of marriage, eg, a condition providing for the forfeiture of interests, given by a settlement to a daughter of the settlor and her children, upon the marriage of the daughter at any time without the consent of named persons, is valid and enforceable if it be accompanied by a gift over of the fund on marriage without the required consent.

Re Whiting's Settlement, Whiting v De Rutzen [1905] 1 Ch 96; 74 LJ Ch 207; 91 LT 821; 53 WR 293; 21 TLR 83; 49 Sol Jo 83, CA

2811 Consent of trustees required — Whether consent of majority sufficient

The trust of a term under a settlement was, that if there should be two or more daughters of the marriage, then the trustees were to raise and pay to each the sum of £2,000, if she marry with the consent of her mother, if living, and a widow; if not, then with the consent of the trustees or the survivor of them, his executors, administrators, or assigns; and in case any of the daughters die before the portion was paid, that it should not go to the executor, but the estate should be exonerated thereof, or, if raised, should go to him on whom the reversion of the premises is limited to descend.

The father afterwards by his will gives the further sum of £2,000 to each of his daughters, as an augmentation of their portions, subject to the same conditions, etc, as the original portions; and if any of the daughters die before the original portions become payable, then he wills that this £2,000 should not be paid to her executor, but that this lady and executrix should have the residuum of this money, and makes her residuary legatee.

Plaintiff, H, married one of the daughters without consent, and C another, also without consent. They are not entitled to the portions under the settlements or will.

Where a condition has been performed to a reasonable intent, the court will dispense with the want of circumstances, as where the major part of the trustees consent, or where they give an implied, not an express, consent.

Harvey v Aston (Lady) (1737) 1 Atk 361; 2 Com 726; 5 Vin Abr 89 pl 10; 26 ER 230; sub nom *Hervey v Aston* (1737) West temp Hard 350; Willes 83, LC

ANNOTATION **Dbtd** Clarke v Parker (1812) 19 Ves 1 It was contended . . . upon the dictum of Lord Chief Baron Comyns assisting Lord Hardwicke in the case of *Harvey v Aston* that the consent of the major part of the trustees is sufficient and two had consented. As to that passage, cited from Atkyn's Report, I have seen a manuscript note, in which the Chief Baron says no such thing. He has published his judgment in his own report, where no such passage appears (*Lord Eldon C*)

2812 Consent of trustees required — Whether consent of majority sufficient

No instance that consent of three trustees to marriage being required that of two not consulting the third would be sufficient.

Clarke v Parker (1812) 19 Ves 1; 34 ER 419, LC

ANNOTATION **Apld** Worthington v Evans (1823) 1 Sim&St 165

2813 Validity of gift over — Gift over on marriage without consent

A condition subsequent causing the forfeiture of a previous gift in the event of the marriage of the donee at any time without the consent of a specified person is a valid condition provided that there is a good and effectual gift over.

Re Whiting's Settlement, Whiting v De Rutzen [1905] 1 Ch 96; 74 LJ Ch 207; 91 LT 821; 53 WR 293; TLR 83; 49 Sol Jo 83, CA

5 Time of vesting

LAW See Halsbury's Laws (4th edn) vol 42 para 933

CROSS REFERENCES See PERPETUITIES vol 37(1) (reissue) no 588 et seq (application of rule against remoteness of vesting); WILLS vol 51 (reissue) no 12105 (vesting)

2814 Covenant to pay annuity to wife — To survivor for life — Afterwards to children

A possessed of an exchequer annuity for ninety-six years by marriage articles covenants to pay it to the

wife for her separate use, and then to the survivor of husband and wife for life, and after to the children of the marriage, and if no child, then to be for the benefit of A. Husband and wife die leaving a child, who soon after dies. A shall keep the annuity and it shall not go to the administrator of the child.
Basse v Gray (1715) 2 Vern 692; Gib Ch 97; 1 Eq Cas Abr 363 pl 16; 23 ER 1049

2815 Limitation to children attaining twenty-one — Payable at twenty-three
Combe v Combe (1741) 2 Atk 185; 26 ER 516, LC

2816 Child not surviving parents — Where intention as to vesting clear in settlement — Intention followed
Where a settlement makes the right of a child to a provision clearly depend upon its surviving both parents, the intention must prevail; but where the expressions are ambiguous, the presumption is in favour of the child.
Perfect v Curzon (Lord) (1820) 5 Madd 442; 56 ER 964

ANNOTATIONS **Apld** Bailie v Jackson (1853) 1 Sm&G 175; Swallow v Binns (1855) 1 K&J 417 **Consd** Currie v Larkins (1863) 9 LT 638; Jeyes v Savage (1875) 10 Ch App 558n **Apld** Re Knowles, Nottage v Buxton (1882) 21 Ch D 806

2817 Child not surviving parents — Where intention as to vesting clear in settlement — Intention followed
Peck v Parrot (1749) 1 Ves Sen 236; 27 ER 1004, LC

2818 Child not surviving parents — Where intention as to vesting clear in settlement — Intention followed
A, by his marriage settlement, covenanted that he would, by his will or otherwise, settle all the real and personal estates which he should die seised or possessed of, so that the same might be enjoyed by his wife, for life, in case she should survive him; and, after the death of the survivor, by all the children of the marriage equally: some of the children of the marriage died in the lifetime of A and his wife: *Held* under this covenant, all the children became entitled to vested interests, on their coming into existence.
Nayler v Wetherell (1831) 4 Sim 114; 9 LJOS Ch 125; 58 ER 44

2819 Child not surviving parents — Where intention as to vesting clear in settlement — Intention followed
A married woman, by a testamentary instrument made in execution of a power contained in her marriage settlement, gave £2,000 subject to the life interest of her husband, to trustees upon trust for the benefit of her child or children, to be equally divided between them share and share alike; but in case the £2,000 should become payable before her children, being sons, should have attained twenty-one, or, being daughters, should have attained that age or day of marriage, then in trust to invest and apply the interest to their maintenance and education, and when they should attain twenty-one or day of marriage, to pay to them their respective shares of the principal; and in case any of the children should happen to die before their portions should become payable, then the same should go and belong to the survivors or survivor of them.

Testatrix left a son and two daughters, all of whom had attained twenty-one at her decease. The son, and afterwards a daughter, died in the lifetime of their father: *Held* on the death of the father, the surviving daughter was entitled to the £2,000 by survivorship, except as to that share of it which accrued to the deceased daughter upon the death of the son, which belonged to the representative of deceased daughter.
Bright v Rowe (1834) 3 My&K 316; 40 ER 121

2820 Child not surviving parents — Where intention as to vesting clear in settlement — Intention followed
By the marriage settlement of A and B, a sum of £3,300 was assigned to trustees upon trusts for the husband and wife for their respective lives; after the decease of the survivor of them, in case there should be any child or children of their bodies then living, to pay the sum unto such child or children which should be then living, in such shares, etc, as the husband and wife should jointly appoint; and for want of such appointment, the same was to go and be equally divided among such children, if more than one, as should not be inheritable to the real estate of the husband, share and share alike, and to be paid to him, her, or them, at his, her, or their respective age or ages of twenty-one years or days of marriage, which should first happen; and in case there should be no such child or children living at the time of the death of the survivor of A and B, or, if such, and they should all happen to die before their respective ages of twenty-one years or days of marriage as aforesaid, then the sum was to go to such person or persons as B by deed or will should appoint. A and B died, without executing the joint power of appointment, having had several children, some of whom survived them: *Held* a son of the marriage who attained twenty-one, but died, without having been married, in the lifetime of one of his parents, acquired a vested interest in the fund, but two children who died infants and without having been married, in their parent's lifetime, were excluded from the fund.

The court must read settlements of this description with an inclination to believe that there was an inten-

tion to provide for children at a time when a provision would be required, namely at twenty-one or marriage. If the expressions are doubtful that inclination will prevail, but if there be a clearly expressed intention that intention so clearly expressed must be abided by (*Knight Bruce V-C*).
Mostyn v Mostyn (1844) 1 Coll 161; 8 Jur 456, 820; 63 ER 366

ANNOTATION **Consd** Jackson v Dover (1864) 2 Hem&M 209

2821 Child not surviving parents — Where intention as to vesting clear in settlement — Intention followed

A sum was vested in trustees, upon trust, declared by deed. The deed recited an intention to make some provision for A and her children, and declared that the trustees should hold the fund for A for life, and upon her death or doing any act to incumber her interest, the trustees were to stand possessed, "if there should be one child of A then living, the stock to be an interest vested in such child at twenty-one, and to be paid accordingly, if such age should happen after the death of A, and if not, immediately on her death, or making any charge"; and if there should be two or more such children, then the stock to be transferred amongst such children, in equal shares, at the age of twenty-one, if A should be dead; but if not, then immediately after her decease or having made such incumbrance. The deed contained clauses of survivorship in case of any child dying under twenty-one, as to "the share intended to be thereby provided for such child dying," and also clauses for maintenance, advancement, and accruer. There were several children; one attained twenty-one, and died in the life of A: *Held* her representatives did not participate in the fund.
Skipper v King (1848) 12 Beav 29; 12 Jur 570; 50 ER 970, LC

ANNOTATION **Distd** Swallow v Binns (1855) 1 K&J 417

2822 Child not surviving parents — Where intention as to vesting clear in settlement — Intention followed

By a marriage settlement, dated in 1787, £1,000, the wife's property, was vested in trustees, in trust for the wife and her husband for their lives, successively, and after their several deceases and the death of the survivor of them, in case there should be any child or children of the body of the husband or the body of the wife lawfully begotten which should be then living, in trust to pay the £1,000 unto such children equally, and, if there should be but one such child living, then in trust for such only child, and to be paid to such child or children at their respective ages of twenty-one, and, in the meantime, the interest of each child's share to be applied for its maintenance; and, in case there should be no such child living at the death of the survivor of the husband and wife, or in the case of there being such and all of them should die before they should attain twenty-one, then the £1,000 to be in trust for the wife's father. By a deed, dated in 1793, the wife's father made a voluntary settlement of leaseholds and £500 stock, in trust for the wife for life, remainder in trust for all her children then born or thereafter to be born who should be living at her decease, equally and to be assigned and paid to them at their respective ages of twenty-one, and, in the meantime, the income to be applied for their maintenance, and if any of them should die before their shares should become payable or assignable, their shares to go to the survivors, and in case all the children should die under twenty-one, the property to be in trust for the settlor. The husband and wife had three children. The wife survived the husband. Two of the children died in her lifetime; one of them having attained twenty-one. The third attained twenty-one and survived the wife: *Held* that child was entitled to the whole of the property comprised in the deeds.
Jeffery v Jeffery (1849) 17 Sim 26; 13 Jur 482; 60 ER 1036

2823 Child not surviving parents — Where intention as to vesting clear in settlement — Intention followed

An appointment, under a power in a settlement, was made, directing the trustees after the death of the tenant for life to stand possessed of £6,000, to pay the dividends to S for life, and after his decease to permit T to receive the dividends for his life, and after the decease of the survivor for all and every child and children of T and S equally to be divided between them, share and share alike, the shares of sons to be paid, assigned or transferred at the age of twenty-one, and the shares of daughters at twenty-one or marriage, which should respectively first happen, with benefit of survivorship among the children surviving, in case any of them should die before he, she, or they should, by virtue of the trusts, become entitled to payment, assignment or transfer of his, her or their respective parts. At the time of executing the deed T and S had seven children, the eldest of whom was forty-three, and the youngest twenty-six years of age. One of the children died in the lifetime of the tenants for life: *Held* the personal representative of deceased child was entitled to her share, and not the surviving brothers and sisters.
Re Williams (1849) 12 Beav 317; 19 LJ Ch 46; 14 LTOS 393; 13 Jur 1110; 50 ER 1083

2824 Child not surviving parents — Where intention as to vesting clear in settlement — Intention followed

In determining the rights of children under a marriage settlement, the court, unless prevented by clear and distinct words, will hold that children who attained twenty-one, and died, living their parents, took vested interests under the settlement.

The court will lay hold of minute circumstances in favour of such construction.

Bailie v Jackson (1853) 1 Sm&G 175; 1 WR 196; 65 ER 76

2825 Child not surviving parents — Where intention as to vesting clear in settlement — Intention followed

By a marriage settlement, after the death of the husband and wife, the trustees were to pay, assign and transfer, the capital to the children of the wife equally, the shares to be paid at twenty-one. There was a subsequent proviso that if there should be no such child living at the decease of the survivor of the parents, then the fund was to go over to C. There was only one child of the marriage: *Held* though she had attained twenty-one, her interest was defeasible by her death before the survivor of her parents.

Lloyd v Cocker (1854) 19 Beav 140; 24 LJ Ch 84; 24 LTOS 105; 1 Jur NS 174; 52 ER 302

2826 Child not surviving parents — Where intention as to vesting clear in settlement — Intention followed

S, under a power in a settlement, directed that after the death of the survivor of W, A and M the trust premises "shall go and be paid, assigned, transferred, and conveyed in equal parts and proportions unto all and every child or or children of J born, or to be born, who shall be living at the decease of W, A and M, in case they would survive B or at the decease of B in case they, the said W, A and M, should all die in his lifetime, and to the children of those who may then be dead, such children to stand in the place of their parents respectively, and to take such share as their parents, if living, would have been entitled to." W, A and M died in the lifetime of B. B died in 1851, J died in 1837; J had five children, one of whom married G and died in 1842. There was issue of that marriage six children, four of whom died before B. G obtained letters of administration to the estate of one of his children, who survived her mother; the other three deceased children of J were not represented: *Held* the fund was divisible in equal shares among the surviving children of J and the representatives of her deceased children.

Harcourt v Harcourt (1857) 26 LJ Ch 536; 29 LTOS 174; 5 WR 478

2827 Child not surviving parents — Where intention as to vesting clear in settlement — Intention followed

Moor v Abbott no 2751 ante

2828 Child not surviving parents — Where intention as to vesting clear in settlement — Intention followed

Money was settled upon trusts, after the death of the survivor of the parents, to pay, etc, unto all the sons and daughters, and the children of such as should be dead leaving issue (the children to take the share of their parents), with a gift over if there should be no child of the marriage, or being such, all sons, should die under twenty-one, and the daughters under twenty-one or marriage: *Held* the shares vested on the children on their births, and the representatives of those who died unmarried, in their infancy, and in the life of the parents, took a share.

Re Minor's Trusts (1860) 28 Beav 50; 54 ER 284

2829 Child not surviving parents — Where intention as to vesting clear in settlement — Intention followed

A fund was settled upon marriage upon trust in case the husband should die in the lifetime of the wife and there should be issue of the marriage living at the death of the husband, for all and every the child and children of the marriage, and the issue of such child or children in case any of them should happen to be dead, leaving issue, in equal shares; the issue to be entitled only to the shares which their parents would have been entitled to if living: *Held* having regard to the context, the words "all and every the child and children" must be restricted to children who survived their father.

Re Thorne's Trust (1862) 10 WR 338

2830 Child not surviving parents — Where intention as to vesting clear in settlement — Intention followed

Property was settled upon trust after death of settlor to apply the whole or part of income towards the maintenance and education of the six children of S by name, and to accumulate the residue of the income until the death of the survivor of O and S, or until such time as the youngest of the six children, or the youngest of such of them as should be living attained twenty-one; and then if O and S should then have died, or if not immediately after the death of the survivor, to convey and assign the same to the children, or such of them as should be then living. There was no other gift to the children. The settlement contained a

clause that the share of any of the six children who "alienated" his share should be forfeited, and go over to the other children: *Held* none of the children took a vested interest till after the happening of the last of the three events, namely, the attainment of twenty-one by the youngest, and the death of O and S; and therefore none of the children who died before the last of such events happened took a vested interest.

Barnett v Blake (1862) 2 Drew&Sm 117; 63 ER 566; sub nom

Blake v Barnett (1862) 31 LJ Ch 898; 6 LT 886; 26 JP 692; 8 Jur NS 812; 10 WR 767

2831 Child not surviving parents — Ambiguous expressions in settlement as to vesting — Presumption in favour of child

Perfect v Curzon (Lord) no 2816 ante

2832 Child not surviving parents — Ambiguous expressions in settlement as to vesting — Presumption in favour of child

By a marriage settlement stock was vested in trustees, upon trust, to pay the dividends to the husband during coverture and to the wife during her life, in case she survived him; and from and after her decease, in case there should be any children of the marriage then living, then upon trust for such of the children as should attain twenty-one or be married, with a direction in case all or any of such children should then be under twenty-one and unmarried, to apply the dividends for the maintenance, and in case the wife should die without leaving any child or children at the time of her decease, or in case there should be one or more such child or children then living, yet all of them should die under twenty-one and unmarried, upon trust, if the husband should survive the wife and all such children, to pay the dividends to him during his life, and from and after the death of the survivor of the husband and wife, and from and after the death of the children, in case there should be any, and all of them should die under age and unmarried, in trust for certain other persons: the wife survived the husband, and at her death there was no child of the marriage living; but a son, who died in her lifetime, had attained twenty-one and married: *Held* the stock vested in that son absolutely.

Where clauses are conflicting the rational presumption is that a child attaining twenty-one takes a vested interest (*Leach MR*).

Torres v Franco (1830) 1 Russ&M 649; 39 ER 249

ANNOTATIONS **Follď** Swallow v Binns (1855) 1 K&J 417 **Apld** Dixon v Barkshire (1865) 34 Beav 537; Re Knowles, Nottage v Buxton (1882) 21 Ch D 806 **Consd** Re Hamlet, Stephen v Cunningham (1888) 38 Ch D 183

2833 Child not surviving parents — Ambiguous expressions in settlement as to vesting — Presumption in favour of child

Mostyn v Mostyn no 2820 ante

2834 Child not surviving parents — Ambiguous expressions in settlement as to vesting — Presumption in favour of child

Bailie v Jackson no 2824 ante

2835 Child not surviving parents — Ambiguous expressions in settlement as to vesting — Presumption in favour of child

By a settlement trustees were directed to hold trust funds upon trust to pay the income to E for life, and after her death, "leaving a child or children," to transfer, pay, and make over the fund unto "all and every the child or children of E and the issue of such of the children as might be then dead," such issue to take the parent's share, equally between them if more than one, the shares of sons to be transferred and paid at the age of twenty-one, and the shares of daughters at that age or marriage. Five of the children of E survived her, and attained twenty-one or married, and one of her sons attained twenty-one and died without issue in her lifetime: *Held* although the trust only took effect in case some one child survived E, the contingency upon which the trust took effect was not to be imported into the constitution of the class who were to take under the trust, and the son who attained twenty-one and died in the lifetime of the tenant for life without issue took, nevertheless, a vested interest in the fund.

Re Orlebar's Settlement Trusts (1875) LR 20 Eq 711; 44 LJ Ch 661

ANNOTATIONS **Consd** Selby v Whittaker (1877) 6 Ch D 239; Re Sutcliffe, Alison v Alison [1934] Ch 219

2836 Child not surviving parents — Right of children of deceased child

By a settlement reciting a royal warrant directing a sum of £1,000 to be paid to trustees for the benefit of A and J and children of A, it was declared that the trustees should stand possessed of the £1,000 upon trusts for investment and payment, and application of the income to or for the benefit of A and J, during their respective lives, and from and after the deceases of A and J upon trust to pay, divide, or transfer the £1,000, and all dividends or interest which might be due thereon, unto and amongst all and every the child and children of A, and the issue of such child and children, if more than one, in equal shares and proportions, and if but one, then the whole to such one, and to be paid and transferred to such children or child as should be sons or a son at the age of twenty-one years, and to such children or child as should be daughters or a daughter at the age of

twenty-one years, or day of marriage, whichever should first happen, the issue of any child or children whose parent or parents should die before his, her, or their share or shares should become payable to be entitled to the share or shares which his, her, or their parent or parents would have been entitled to if living. A son of A attained twenty-one, and died in the lifetime of A leaving a child: *Held* the child of the son so dying was entitled to the parent's share of the trust fund.

Day v Radcliffe (1876) 3 Ch D 654; 4 WR 961

2837 Covenant to pay on death of parent — Child under age at death — Control of covenant by subsequent clause — Prevention of vesting

Fitzgerald v Field no 1540 ante

2838 Limitation to children "then living" — Meaning of — Time of determination of prior life interest

Limitation over after a life interest to husband for life or until bankruptcy remainder to the wife for life, remainder in the case of the wife dying in the husband's lifetime, then after the husband's death or sooner, in case of his becoming bankrupt, to the children "then living": *Held* these words referred to the period of the wife's death, and not of the bankruptcy.

Re Edgington's Trusts (1855) 3 Drew 202; 61 ER 880

2839 Direction to divide among class — Following life interest

Under a trust for A for life, "and after her decease, to be divided equally between her younger children": *Held* (1) the children took vested interests at their births; (2) the character of "younger child" was to be determined at the period of vesting, and not that of distribution.

Adams v Robarts (1858) 25 Beav 658; 53 ER 788

2840 Substitutional gift to children — Whether affected by death of parent before settlement

By a voluntary deed a settlor gave property to A, B, C, and D in equal shares. He provided that if any of the four should die in his lifetime, leaving specified issue, the share of him or her so dying should be in trust for the children of him and her so dying; and if any of the four should die in his lifetime, without leaving such issue, the share of him or her so dying should go over and accrue and be added to the other shares. A and B were dead at the date of the settlement, the former leaving issue, the latter without issue: *Held* the gifts over of the shares of A and B did not fail by reason of their being dead at the date of the settlement.

Barnes v Jennings (1866) LR 2 Eq 448; 35 LJ Ch 675; 14 WR 831

2841 Limitation to issue on death of husband and wife — Effect of divorce

By ante-nuptial contract of marriage the intended wife conveyed a sum of about £19,000 to trustees, directing them to pay the annual income to her during her life and after her death, in the event of her being survived by her husband to pay the same to him during all the days of his life and survivance and on the death of the spouses to pay or deliver the fee or capital of the means and estate to the child or children of the marriage.

The marriage was dissolved by decree of divorce obtained by the wife against the husband on the ground of desertion. Thereafter the wife died survived by her husband and a daughter. The daughter and her marriage contract trustees claimed that in consequence of the wife's death and the husband being divorced she, the daughter and her trustees became entitled to the funds in the hands of her mother's trustees: *Held* (1) the divorce of the father was not equivalent to his death in a question as to the vesting of the daughter's provision; (2) during her father's life nothing fell to the daughter; (3) the income which but for the divorce would have been paid to the father fell into the executory estate of the wife.

Dawson v Smart [1903] AC 457; 89 LT 343; 19 TLR 633, HL

ANNOTATION **Apld** Montgomery v Zarifi (1918) 88 LJPC 20

2842 Absolute gift — Restrictions on enjoyment — Failure of trust

By a settlement it was provided that the trustees should stand possessed of the trust fund "in trust to divide it into seven equal shares and to appropriate one of such shares to each of the settlor's children," and it was further provided that: "The shares so directed to be appropriated to the settlor's said respective children shall not vest absolutely in them but shall be retained by the trustees and held upon the trusts" thereinafter declared. The income of each share was to be paid to the children during their respective lives, subject to determination on bankruptcy, or assignment, and on the death of a life tenant the share was to be held in trust for the children of the life tenant as therein provided. In the event of a life tenant having no children a power of appointment by will was given to such life tenant of the share "given to such life tenant." The trustees were given power on the marriage of a life tenant to settle upon certain trusts all or any part of the trust fund given to such life tenant.

One of the children died a bachelor and without having exercised his power of appointment by will. A summons was taken out to determine whether his share formed part of his estate, or whether being undisposed of, there was a resulting trust in favour of the settlor: *Held* upon a consideration of the settlor's intention as indicated in the settlement, there was an absolute gift in the first instance, and applying the rule in *Lassence v Tierney* (no 445 ante), the share passed to the child's estate.

Re Gatti's Voluntary Settlement Trusts, De Ville v Gatti [1936] 2 All ER 1489; 52 TLR 674; 80 Sol Jo 704

2843 Absolute gift — Restrictions on enjoyment — Failure of trust

By a settlement in English form made upon the marriage of a husband whose domicil was in Scotland with a wife whose domicil was in England the income of certain settled property was to be paid to the wife during her life for her separate use without power of anticipation, and after her death to the husband during his life, and subject to these life interests the property was to be held in trust for the issue of the marriage, with the remainders over in default of issue, and the settlement expressly provided "that these presents shall be construed and that the rights of all persons claiming hereunder shall be regulated according to the law of England."

After the marriage the spouses resided in Scotland, and the husband obtained in the Court of Session a decree of divorce against the wife on the ground of her adultery: *Held* the effect of the provision in the settlement was to exclude the Scottish law of forfeiture under the statute of 1573 (c 55), in case of divorce for adultery, and the husband was not entitled to the income of the settled funds for his life as if the wife were dead.

Montgomery v Zarifi (1918) 88 LJPC 20; 119 LT 380, HL

2844 Trust for grandchildren — Distribution period

On 2 July 1928, a settlor, then aged fifty-seven, made a voluntary settlement of shares for the benefit of his four named children, two daughters then aged twelve and eleven and two sons then aged nine and five years, and their issue. The settlement directed the trustees to accumulate the income of the trust fund during the remainder of the settlor's life by investing it at compound interest, and subject thereto to hold the trust fund and all accumulations of income thereof in trust for such of the settlor's grandchildren by his four named children as should attain the age of twenty-one or being female marry under that age in equal shares *per capita*. Clause 2(iii) of the settlement provided that the provisions of Trustee Act 1925 (c 19) ss 31, 32 ". . . shall apply in regard to the vested or contingent absolute or presumptive share of any grandchild . . ." The settlor died in November 1931. All his four children married and at the date of the summons there were twelve grandchildren, the eldest having been born in March 1938, and nine more between 1944 and February 1958 *ie*, before the eldest attained the age of twenty-one, and two more born in 1962 *ie*, after the eldest had attained the age of twenty-one. On the question whether the rule in *Andrews v Partington* (see vol 51 Digest (reissue) WILLS no 8391) applied to the settlement and so excluded grandchildren born after March 1959 when the interest of the eldest grandchildren vested, from sharing in the fund: *Held* the rule was excluded and all grandchildren were entitled to share, because: (1) the power of advancement imported into the settlement by clause 2(iii) was in perfectly general terms, was therefore exercisable after a grandchild had attained a vested interest, and so was inconsistent with such a grandchild having the right to receive the total capital of his share immediately on attaining a vested interest; (2) (Per *Russell & Karminski LJJ*), the powers of advancement and maintenance in clause 2(iii) were not exercisable during the accumulation period, and so the power of advancement in respect of vested presumptive shares was necessarily inconsistent with the rule in *Andrews v Partington* (see vol 51 Digest (reissue) WILLS no 8391).

Re Henderson's Trusts, Schreiber v Baring [1969] 3 All ER 769; [1969] 1 WLR 651; 113 Sol Jo 328, CA

ANNOTATIONS **Distd** Re Edmonson's Will Trusts, Baron Sandford of Banbury v Edmondson [1972] 1 All ER 444 **Apld** Re Chapman's Settlmt Trusts, Jones v Chapman [1978] 1 All ER 1122

Scottish, Irish and Commonwealth Cases

2845 Covenant to pay annuity to wife

By an antenuptial contract of marriage the husband's father conveyed a fund to the marriage-contract trustees in security of an annuity provided by the husband for the wife in the event of her being the survivor of the spouses, and for the further purposes, *inter alia*, of paying the income to the husband and, on the husband's death in the event of his being the survivor of the spouses, of making over the capital to the husband's testamentary trustees or executors to form part of his estate and be administered by them in accordance with any will of other deed which might be executed by him. The wife having predeceased the husband, and there being no purposes to fulfil except payment of the income to the husband and ultimate payment of the capital to his trustees or executors, the husband called on the marriage contract trustees to denude in his favour: *Held* the fee of the trust fund had vested in the husband, and consequently he was entitled to immediate payment.

Baird v Baird's Trustees [1956] SC (HL) 93 (SCOT)

2846 Child not surviving parents — Where intention as to vesting clear in settlement — Intention followed

Beale v Connolly (1874) 8 IR Eq 412 (IR)

2847 Child not surviving parents — Ambiguous expressions in settlement as to vesting — Presumption in favour of child

Darley v Perceval [1900] 1 IR 129 (IR)

2848 Right of children of deceased child

Reilly v Fitzgerald (1843) 6 I Eq R 335; Drury temp Sug 122 (IR)

2849 Right of children of deceased child

Cunningham v Cunningham (1889) 17 R (Ct of Sess) 218; 27 Sc LR 106 (SCOT)

2850 Right of children of deceased child

Bogle's Trustees v Cochrane (1892) 20 R (Ct of Sess) 108; 30 Sc LR 128 (SCOT)

2851 Right of children of deceased child

Blackburn's Trustees v Blackburn (1896) 23 R (Ct of Sess) 698; 33 Sc LR 505; 3 SLT 331 (SCOT)

2852 Right of children of deceased child

Stirling's Trustees v Stirling (1898) 1 F (Ct of Sess) 215; 36 Sc LR 194; 6 SLT 223 (SCOT)

2853 Limitation to issue on death of husband and wife — Effect of divorce

Boyd's Trustees v Boyd (1905) 7 F (Ct of Sess) 576; 42 Sc LR 435; 12 SLT 798 (SCOT)

2854 Whether time of vesting postponed — Where trustees have power to postpone payment

M'Elmail v Lundie's Trustees (1888) 16 R (Ct of Sess) 47; 26 Sc LR 28 (SCOT)

2855 New settlement with proviso safeguarding rights of children under original settlement — Vesting of children's shares on acceptance of new settlement

Whyte v Robertson (1890) 17 R (Ct of Sess) 708; 27 Sc LR 555 (SCOT)

6 Meaning of issue

LAW See Halsbury's Laws (4th edn) vol 42 paras 934, 936

CROSS REFERENCE See no 536 et seq ante (construction)

iii TRUSTS IN DEFAULT OF ISSUE

1 In general

LAW See Halsbury's Laws (4th edn) vol 42 para 937

2856 No reference to death without issue — Whether implied by court — Intention of parties

Articles construed against the words for the sake of the intent. As where the wife's portion was to be laid out in land, to be settled on husband and wife, and the heirs of their bodies; and if not laid out in land during their joint lives, and the wife should die first, that the money should go to the wife's brother and sister: wife dies first, leaving issue, and the money is not laid out in a purchase, yet the issue, and not the wife's brother and sister, shall have it; equity supplying the words, "if the wife dies without issue."

Kentish v Newman (1713) 1 P Wms 234; 24 ER 368, LC

ANNOTATIONS **Apld** Targus v Puget (1751) 2 Ves Sen 194 **Consd** Abbott v Middleton, Ricketts v Carpenter (1858) 7 HL Cas 69

2857 When trusts arise — No issue of marriage — Gift over on death of issue under age

By a marriage settlement real and personal estate was conveyed in trust, after the death of the parents, for the children at twenty-one or marriage, but if no child attained that age, or, being a daughter, did not marry under that age, then the trustees were directed to convey and assign the property to certain persons. There were never any children of the marriage: *Held* the instrument was executory and the gift over took effect.

Osborn v Bellman (1860) 2 Giff 593; 3 LT 265; 6 Jur NS 1325; 9 WR 11; 66 ER 249

2858 When trusts arise — No issue of marriage — Dissolution of marriage

(1) A marriage settlement vested funds in trustees, upon trusts for the children of the marriage, and in default as the wife should appoint. The wife was divorced *à vinculo*, and there being no children, appointed to herself: *Held* a good appointment.

(2) Children of a second marriage of the wife and divorced husband would not be children of "the marriage" contemplated by the settlement.

Bond v Taylor (1861) 2 John&H 473; 31 LJ Ch 784; 5 LT 445; 8 Jur NS 1090; 10 WR 169; 70 ER 1144

2859 Exclusion of eldest son entitled to real estates

By a settlement made in 1901 it was provided that in the event of the life tenant thereunder dying without issue the trust funds should then be held "upon trust for all the children of the said RG [the settlor] (other than an eldest son or only surviving son or an eldest or only surviving daughter entitled for the time being under his will to his real estates for his or her life) who being a son or sons shall

attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry in equal shares." The settlor died in 1905. Under his will his eldest son NG became entitled to the settlor's real estate for life. NG died in 1917. The life tenant under the settlement died in 1942 without ever having been married: *Held* NG, by having become entitled in possession for his life under the settlor's will to the real estates, was effectively excluded by the excepting words in the settlement from the class of children entitled to participate in the distribution of the settled funds.

Re Gunter's Settlements, Owen v Pritchard-Barrett [1949] Ch 502; [1949] 1 All ER 680; [1949] LJR 916; 93 Sol Jo 198

2860 Power of appointment — Omission discovered by wife after husband's death

By a marriage settlement made in 1850, the property of the intended wife was settled in trust, as to £600, as the wife should by deed appoint and subject thereto, as to the whole property, in trust for the wife for life, and after her decease as she should by will appoint, and in default of appointment in trust for her children by any marriage, and if there should be no children of the then intended marriage and the husband should predecease the wife, then in trust as to two-thirds for such persons as, under the Statutes of Distribution, would have become entitled thereto at the death of the wife if she had died possessed thereof intestate, and without having been married. There were no children of the marriage, and in 1879, after the death of the husband, the wife, not having married again, brought an action claiming the rectification of the settlement. The only evidence was an affidavit of the wife that it had not been her intention to limit and she had not for some time discovered that she had by the settlement limited her disposing power in the event of her surviving her husband: *Held* the settlement ought to be rectified by inserting a power of appointment by deed as well as by will.

Edwards v Bingham (1879) 28 WR 89

2861 Absolute interest to wife — On death of husband — No issue of marriage

A marriage settlement, dated in 1823, reformed in 1857, and after the death of the husband, upon proof of the written instructions, so as to give the property to the wife absolutely in the event of her surviving her husband and there being no issue, which events had happened.

Wolterbeek v Barrow (1857) 23 Beav 423; 29 LTOS 119; 3 Jur NS 804; 53 ER 167

ANNOTATIONS **Apld** Smith v Iliffe (1875) LR 20 Eq 666 **Distd** Tucker v Bennett (1887) 38 Ch D 1

2862 Absolute interest to wife — On death of husband — No issue of marriage

By a marriage settlement executed in pursuance of articles made under the order of the court on the marriage of a lady, an infant and a ward of court, personalty of the wife was limited on death of the husband and in default of children, both of which events happened, to the wife, as she should by will appoint, and in default to her next of kin. Upon her uncontradicted evidence that this was not in accordance with her intention: *Held* she was entitled to have the settlements rectified by limiting the property, in the events which had happened, to herself, her executors, and administrators absolutely; and declaration to that effect ordered to be indorsed on the settlement.

Smith v Iliffe (1875) LR 20 Eq 666; 44 LJ Ch 755; 33 LT 200; 23 WR 851

ANNOTATIONS **Consd** Cogan v Duffield (1876) 34 LT 593; Hanley v Pearson (1879) 41 LT 673 **Dbtd** Tucker v Bennett (1887) 38 Ch D 1

2863 Absolute interest to wife — On death of husband — No issue of marriage

By a marriage settlement personalty of the wife was settled on trust for herself for life, for her separate use, without power of anticipation, and after her death, as she should by will or codicil notwithstanding coverture appoint, and in default of appointment on trust for the statutory next of kin then living. The husband died in the wife's lifetime. On her uncontradicted evidence that the settlement was not in accordance with the intentions of the parties: *Held* she was entitled to have it rectified, so that in the events which had happened the trust funds might be held in trust for herself absolutely.

Cook v Fearn (1878) 48 LJ Ch 63; 39 LT 348; 27 WR 212

2864 Absolute interest to wife — On death of husband — No issue of marriage

By a post-nuptial settlement, real estate belonging to the wife was conveyed unto A and his heirs "to the use of" A, his executors and administrators, during the life of the wife, "upon trust" to pay the rents and profits to her for her separate use: and from and after her decease, in case of the death of her husband in her lifetime, "to the use of the heirs and assigns" of the wife for ever; but in case of the wife predeceasing the husband, then to the use of the husband, his heirs, and assigns for ever. The wife having survived her husband, she brought an action against A's legal personal representative to have the settlement rectified, on the ground that by a technical mistake in the form of the settlement her equitable life estate and the legal estate in remainder did not coalesce within the rule in *Shelley's Case* (1581) 1 Co Rep 93, so as to give

her, as was intended in the events that had happened, an absolute estate in fee. Plaintiff's case was supported by an affidavit by herself alone: *Held* the settlement be rectified so as to vest the legal estate in fee simple to plaintiff.

Hanley v Pearson (1879) 13 Ch D 545; 41 LT 673

2865 Absolute interest to wife — On death of husband — Whether possibility of future marriage and issue thereby considered

By a marriage settlement, certain stocks, the property of the lady, are assigned to trustees, upon certain trusts, for the benefit of the intended wife and husband, during their joint lives; and if the wife should survive the husband, having children by him, upon trust for her during her life, and after the death both of her and her husband, upon trust for all her children by her then intended or any future husband, as she should appoint; and, in default of appointment, upon trust for the children of the then intended marriage; and it was provided, that, if the lady should survive her intended husband, and there should be no children of that marriage who should acquire a vested interest in the property, the stocks should be upon trust for her, and assigned to her: the lady having outlived her husband, and there being no child of that marriage who had acquired a vested interest: *Held* the lady was entitled to the stocks absolutely, without regard to the possibility of there being children of a future marriage.

Hanson v Cooke & Hanson (1825) 4 LJOS Ch 45

2866 Ultimate trust for settlor

By a settlement made in 1811, the C family plate was settled upon trust for R for life and after his decease for J, the son and heir apparent of R, for his life, and after his decease in trust for the first son of the body of J his executors and assigns; but if such first son should die under twenty-one without leaving issue male living at his death, then for the second son, his executors administrators, and assigns, with like executory trusts in favour of the other sons of J; and if he should not have any son or sons, or having such all of them should leave issue male living at his death, then in trust for the second son of R, his executors, administrators, and assigns; but if such second son should die under twenty-one without leaving issue male living at his death, then in trust for the third and other sons of R; and if there should be any son of the said R or the said J, who should live to attain the age of twenty-one years or should die under that age leaving issue male living at his death, then in trust for the settlor. R had only one son J, who attained twenty-one, and died without issue: *Held* upon his death, the ultimate trust in favour of the settlor took effect, the words "any son" in the gift over being read "any such son as is hereinbefore mentioned."

Cardigan v Curzon-Howe (1870) LR 9 Eq 358; 22 LT 640; 18 WR 878

2867 Provision for survivorship and accrual

On the marriage of J and S a sum of stock was settled by deed, upon trust after the death of J and S, and failure of issue of the marriage, to transfer the same unto, amongst and between F, R, W and E equally; provided that if either of them, the said F, R, W and E, should depart this life without having acquired a vested interest, leaving issue, the share of such person so dying should go to such issue, but in case either of them should die without having lawful issue, then the share of him, her or them so dying should belong to the survivors or survivor of them. There was no issue of the marriage. F and R died in the lifetime of J and S, leaving issue. W survived F, and died in the lifetime of R without issue. E survived both J and S: *Held* she was entitled by survivorship to W's share in the fund.

Re Acott's Settlement (1859) 28 LJ Ch 383

Scottish, Irish and Commonwealth Cases

2868 Meaning of "issue" — Children or descendants

Re Dixon's Trusts (1869) 4 IR Eq 1 (IR)

2869 Meaning of "issue" — Children or descendants

The word "issue" occurring in a marriage settlement *primâ facie* includes all descendants, and in the absence of some controlling or explanatory context is not to be restricted to children only.

Hobbs v Tuthill [1895] 1 IR 155 (IR)

2870 Meaning of "issue" — Includes child en ventre sa mère

Donoghue v Brooke (1875) 9 IR Eq 489 (IR)

2871 Power to wife to devise remainder to her nearest-of-kin — No power of appointment to self conferred

Tait's Trustees v Neil (1903) 6 F (Ct of Sess) 138; 41 Sc LR 92; 11 SLT 438 (SCOT)

2 Trusts for personal representatives

LAW See Halsbury's Laws (4th edn) vol 42 para 938

2872 "Personal representatives" — Husband taking partial interest — Whether husband is entitled

Bailey v Wright no 565 ante

2873 "Personal representatives" — Construed as "next of kin"

A, by a settlement, declared that trustees should be possessed of £4,000, as to a moiety for M and her

children; and as to the other moiety, for N and her children; and that if both M and N should die without leaving issue living at the time or respective times of their decease, then that the trustees should divide the trust moneys among the personal representatives of A in a legal course of administration. M and N both died without having been married. A did not leave a widow: *Held* the persons intended to be benefited were the next of kin of A living at his death.

Wilson v Pilkington (1847) 16 LJ Ch 169; 9 LTOS 145; 11 Jur 537

ANNOTATION **Consd** King v Cleaveland (1859) 4 De G&J 477

2874 "Personal representatives" — Construed as "next of kin"

J settled certain policies of insurance on his own life, on his wife and children and provided that in default of children, and after the death of the wife, the fund should be in trust for such persons as should be his next of kin at his wife's death, and who would be then his personal representatives in case he died intestate and unmarried, and be distributable accordingly under the Statutes for the Distribution of Intestates' Effects; but in case his wife should die in his lifetime, whether leaving children or not, then the whole fund to be in trust for J, his executors, administrators, and assigns absolutely. J became bankrupt and died, leaving his wife, but no children surviving. On the question whether the words "personal representatives," referred to the executors and administrators of J in their representative character: *Held* the next of kin of J at the death of the wife were entitled.

Rhodes v Kipps (1859) 7 WR 511

2875 "Personal representatives" — Construed as "next of kin"

In a settlement the words "to pay the legal representatives in a due course of administration": *Held* to amount to a direction to pay to next of kin, and not to executors or administrators.

Briggs v Upton (1872) 7 Ch App 376; 41 LJ Ch 519; 26 LT 485; 21 WR 30, LC

ANNOTATION **Distd** Re Best's Settlmt Trusts (1874) LR 18 Eq 686

2876 "Personal representatives" — Construed as "next of kin"

A fund was settled on A for life then on any husband she might leave for life, then on her children, and in default of children on the person or persons who should happen to be her legal personal representative or representatives at the time of her death: *Held* legal personal representatives meant next of kin according to Statutes of Distribution.

Robinson v Evans (1873) 43 LJ Ch 82; 29 LT 715; 22 WR 199

ANNOTATION **Consd** Re Best's Settlmt Trusts (1874) LR 18 Eq 686

2877 "Personal representatives" — Construed as "next of kin" — Statutory next of kin

Personal estate brought into settlement by B, stood on trust for the person or persons, exclusive of A and his representatives, who under Statute of Distributions would have became entitled, if B had died possessed thereof, a *feme sole* and intestate. A was B's brother. At B's death her statutory next of kin included three daughters of A: *Held* the term representatives meant those who represented A as statutory next of kin of B; and A's daughters were therefore excluded from taking under the settlement.

Lindsay v Ellicott (1876) 46 LJ Ch 878

2878 "Personal representatives" — Construed as "executors and administrators"

By a marriage settlement, the wife's real and personal estate was assigned to trustees on trust to pay the annual income to husband for life, remainder to wife for life, remainder as she should by deed or will appoint; and in default for her personal representatives. The wife predeceased her husband, intestate and without issue. After the husband's death, his executors took out administration of the wife's estates: *Held* they were entitled to the fund.

Re Best's Settlement Trusts (1874) LR 18 Eq 686; 43 LJ Ch 545; 22 WR 599

2879 "Executors and administrators" — Whether they take beneficially

By a marriage settlement the ultimate trust declared of a copyhold estate, the property of the husband, was for his executors or administrators, and a similar trust was declared with respect to the executors or administrators of the wife as to a copyhold estate which was her property. The wife survived and took out administration to her husband: *Held* she was not entitled to hold the former estate for her own exclusive benefit but for the benefit of herself and her husband's next of kin.

Wellman v Bowring (1830) 3 Sim 328; 57 ER 1021

2880 "Executors and administrators" — Whether they take beneficially

By a marriage settlement, stock, the property of the husband, was settled on trust for the separate use of the wife during her life, and, after her death, for the husband, if he survived her; but if he died in her lifetime, then for such persons as he should by deed or will appoint; and in default of appointment, for his executors and administrators; the husband died in the wife's lifetime, having appointed an executrix, but without exercising his power: *Held* the executrix was not entitled to the stock beneficially, but it was

to be administered by her as part of his general personal estate.

Collier v Squire (1827) 3 Russ 467; 5 LJOS Ch 186; 38 ER 650

2881 "Executors and administrators" — Whether they take beneficially — Addition of "for their own use and benefit"

By a marriage settlement, stock was assigned to trustees, upon trust to pay the interest and dividends to the husband for life, and in case he should survive the wife, upon trust to transfer the stock to the husband, "his executors, administrators, or assigns, to and for his or their own use and benefit", but in case the wife should survive the husband, upon trust during her life to pay the interest and dividends as she should appoint, and, after her decease, upon trust to transfer the stock "unto the executors or administrators of M, the husband, to and for their own use and benefit." The wife survived the husband and took out administration of his effects, and claimed an absolute interest in the whole *corpus* of the stock: *Held* she was not entitled.

Semble: a limitation in a settlement "to the executors and administrators of A, for their own use and benefit," unconnected with any other limitation showing more specifically who are to take, is void for uncertainty.

Marshall v Collett (1835) 1 Y&C Ex 232; 160 ER 94

2882 "Executors and administrators" — Whether they take beneficially — Addition of "for their own use and benefit"

Upon the construction of a marriage settlement: *Held* under a limitation "to the executors, administrators, or assigns of the settlor, to and for his and their own use and benefit," his executors were not entitled beneficially.

Hames v Hames (1838) 2 Keen 646; 7 LJ Ch 123; 48 ER 777

ANNOTATION **Consd** Johnson v Routh (1857) 27 LJ Ch 305

2883 "Executors and administrators" — Whether they take beneficially — Addition of "for their own use and benefit"

(1) Under a limitation by deed of a fund, to "the executors or administrators of the settlor, to and for his and their own use and benefit": *Held* under the circumstances, the fund belonged to the next of kin, and not the administrator.

(2) A being under an obligation to make a settlement on his wife, by deed expressed to be made in order to make such provision, conveyed property to trustees in trust to permit him and his assigns to receive the dividends, "to and for his and their own entire use and benefit during the joint lives of himself and his wife"; and in case A survived his wife, then in trust, after her death, to assign it to him, "his executors, administrators and assigns, to and for his and their own use and benefit"; but if his wife should survive him, then to her for life, and afterwards to assign it "unto the executors or administrators of A to and for his and their own use and benefit." The wife survived: *Held* subject to her life interest, the fund belonged to the next of kin of A and not to his administrator.

Meryon v Collett (1845) 8 Beav 386; 14 LJ Ch 369; 5 LTOS 366; 9 Jur 459; 50 ER 151

2884 "Executors and administrators" — Whether they take beneficially — Addition of "for their own use and benefit"

By a marriage settlement, an annuity and policy of assurance were assigned by the husband to trustees, upon trust for himself and his wife during their lives, and then for the benefit of the children of the marriage, and in default of children, to such person as the husband should by deed or will appoint, and in default of appointment, "unto the executors or administrators of the husband to and for their own use and benefit": *Held* the executors took the property as part of the husband's general assets.

Johnson v Routh (1857) 27 LJ Ch 305; 30 LTOS 111; 3 Jur NS 1048; 6 WR 6

ANNOTATION **Distd** Harrington v Atherton (1864) 4 New Rep 206 (See 5 New Rep 1)

2885 "Executors and administrators" — Whether next of kin entitled

The ultimate limitation of a fund in a marriage settlement, after the death of a husband and wife, was to the husband if he survived his wife, but if the wife survived, then, after her death, to such person as the husband should appoint, and in default, "to his executors, administrators, or assigns." The wife survived, and the husband made no appointment: *Held* his residuary legatees, and not his next of kin, were entitled.

Howell v Gayler (1842) 5 Beav 157; 11 LJ Ch 398; 49 ER 537

2886 Trust for person or his legal representative

By an incorrectly framed settlement a sum of money was settled on trusts for A for life, with trusts in remainder for her children, and, if she should die without issue, in trust to pay a portion of the fund to B or her legal representatives: *Held* the words "legal representatives" were either words of limitation, so as to give B an absolute interest, or were intended to provide for her being dead at the date of the settlement, or were void for uncertainty.

Topping v Howard (1851) 4 De G&Sm 268; 64 ER 827; sub nom
Tipping v Howard (1851) 17 LTOS 231; 15 Jur 911

2887 Whether limitation makes property subject to disposition — By settlor's will

The effect of a settlement by deed, limiting property to the executor or administrator of the settlor, is to make such property subject to the disposition of the settlor by will, or to be dealt with under Statute of Distributions.

Mackenzie v Mackenzie (1851) 3 Mac&G 559; 21 LJ Ch 465; 18 LTOS 229; 15 Jur 109; 42 ER 376, LC

2888 Ultimate trust for husband's executors — "Of his own family" — Whether trust for next of kin

In a marriage settlement, the ultimate trust of the wife's chattels was for the executors or administrators of the wife of her own family, and the ultimate trust of the husband's chattels was for his executors or administrators of his own family: *Held* though the same words were used, *mutatis mutandis*, in both limitations, yet the court was justified in holding that, with respect to the wife's chattels, they meant her next of kin at her death, and with respect to the husband's chattels, his executors or administrators simply.

Smith v Dudley (1738) 9 Sim 125; 2 Jur 322; 59 ER 306

2889 Ultimate trust for wife's next of kin — Whether revocable

Settlement by a *feme sole* in contemplation of marriage, of part of her fortune in trust to pay the dividends to herself for her separate use for life, and after her death for her intended husband; and after the death of the survivor to transfer the capital according to her appointment by will: and in case she should die without appointment, and he should be then dead, in trust for her next of kin, their executors, etc, according to Statute of Distributions. An interest for life only in the widow, with a power of disposition by will.

There was a case before *Lord Alvanley* upon a settlement in favour of next of kin, whether they could take a vested interest. It turns upon that, whether they were intended: so that plaintiff could disappoint them only by a will (*Grant MR*).

Anderson v Dawson (1808) 15 Ves 532; 33 ER 856

ANNOTATION **Distd** Godsal v Webb (1838) 2 Keen 99

2890 Ultimate trust for wife's next of kin — Whether revocable

By a marriage settlement of the wife's property, consisting of money in the funds, a general power of appointment by will was given to the wife in the event of her dying before her husband without children, and in default of appointment there was a trust for the next of kin of the wife excluding the husband. But if the wife survived, then in default of children, in trust for the wife absolutely. The father of the wife joined in the settlement, and covenanted to pay an annuity to his daughter. During the life of the husband and wife debts were contracted by the wife. There were no children, and the impossibility of there being any was questioned: *Held* upon the application of the wife and with the approbation of the husband the next of kin being mere volunteers, and not within the marriage consideration, the *corpus* of the trust funds might be applied in payment of debts.

Paul v Paul (1880) 15 Ch D 580; 50 LJ Ch 14; 43 LT 239; 29 WR 281

ANNOTATION **Overd** Paul v Paul (1882) 20 Ch D 742

2891 Ultimate trust for wife's next of kin — Whether revocable

By a marriage settlement the wife's property was settled, after life estates in the husband and wife in default of children, in the event of the wife surviving, on her, and in the event of the husband surviving, as the wife should by will appoint, and in default, on her next of kin, excluding the husband: *Held* the trust in favour of the next of kin could not be revoked, and although there was no possibility of issue, the husband and wife together were not entitled to the *corpus* of the settled fund.

Paul v Paul (1882) 20 Ch D 742; 51 LJ Ch 839; 47 LT 210; 30 WR 801, CA

2892 Ultimate trust for wife's next of kin — On bankruptcy of husband

A trader, on his marriage, received a fortune of £5,000 with his wife; and settled a sum of stock in trust for himself, with limitations over for the benefit of his wife and children, in the event of his becoming bankrupt or insolvent. It was provided that, if he should survive his wife, and the issue of the marriage should fail, and he should then be or should have been bankrupt, fifteen sixty-sixths of the stock should belong to the wife's next of kin in blood. No part of the £5,000 was settled; but the whole of the settled fund was the husband's property, and it did not appear, from any of the expressions in the settlement, what was the consideration for the provision as to fifteen sixty-sixths of the stock: *Held* the limitations over in the event of the bankruptcy of the husband were good as to fifteen sixty-sixths of the trust fund, that being the proportion of the trust fund which the wife's fortune would have purchased, but were void as to the remainder.

Lester v Garland (1832) 5 Sim 205; Mont 471; 1 LJ Ch 185; 58 ER 314

2893 Ultimate trust for wife's next of kin — Claim against husband's estate

Upon a marriage in 1818, a sum of £400 was handed over by the wife to the husband, and the husband executed a bond for repayment with interest at the expiration of six months, if required by the trustees of the marriage settlement. The trusts of the settlement were to pay the interest to the husband for life, then to the wife for life, and then for the benefit of the children, but if no children to transfer the trust funds to the next of kin of the wife. The husband died in 1853, leaving his wife his sole legatee and executrix, and his wife died in 1864. There were no children, and there had been no repayment and no demand: *Held* the trustees were entitled to claim the £400 on behalf of the wife's next of kin against the husband's estate.

Mills v Borthwick (1865) 35 LJ Ch 31; 12 LT 600; 11 Jur NS 558; 13 WR 707

ANNOTATION **Consd** Re Dixon, Heynes v Dixon [1899] 83 LT 129

2894 Ultimate trust for executors of wife's mother — After death of husband and wife — Death of husband and wife during mother's life — Whether gift fails

Horseman v Abbey (1819) 1 Jac&W 381; 37 ER 420

ANNOTATIONS **Consd** Morris v Howes (1846) 16 LJ Ch 121

2895 Ultimate trust for executors of wife's mother — In default of appointment by wife — No appointment during first coverture — Whether subsequent appointment avoids ultimate trust

By a marriage settlement, a sum of £1,000 was charged upon real estates of the husband, for such persons as the wife should, be deed or will, during his coverture, appoint; and in default of appointment, for the executors, administrators and assigns of the wife's mother, who was then living: *Held* the power of appointment could only be exercised during the continuance of the coverture, and an appointment of £1,000 after the death of the husband was void, and the £1,000 formed part of the personal estate of the wife's mother, by virtue of the limitation to her executors, administrators and assigns.

Morris v Howes (1846) 16 LJ Ch 121; 8 LTOS 229; 10 Jur 955, LC

2896 Ultimate trust for wife's executors — Wife predeceasing husband — Whether trust for wife's next of kin

Trust in a marriage settlement, to raise a sum of money charged on the settled estate, at the end of twelve months from the decease of the survivor of the husband and wife, and to pay same to the executors or administrators of the wife: *Held* upon the whole scope and context of the instrument a trust for the next of kin of the wife, although she died in the husband's lifetime.

Bulmer v Jay (1834) 3 My&K 197; 40 ER 75, LC

ANNOTATIONS **Distd** Wallis v Taylor (1836) Donnelly 162 **Apld** Smith v Dudley (1838) 2 Jur 322 **Distd** Daniel v Dudley (1841) 1 Ph 1; Mackenzie v Mackenzie (1851) 3 Mac&G 559 **Consd** Page v Soper (1853) 11 Hare 321

2897 Ultimate trust for wife's executors — Wife predeceasing husband — Whether trust for wife's next of kin

By a marriage settlement a sum of money, the property of the wife, was vested in trustees in trust for the separate use of wife during her life, and after her decease in trust for the husband during his life, and after the death of the survivor, upon certain trusts for the children, and in default of children, who, being sons should attain twenty-one, or being daughters, should attain that age or marry, in trust for such person or persons as the wife should, notwithstanding her coverture, by deed or will appoint, and in default of appointment, in trust to pay and transfer same to the executors or administrators of the wife: *Held* under the ultimate limitation to the executors or administrators of the wife the fund did not belong to the next of kin of the wife, in exclusion of the husband, but passed to the administratrix of the wife as part of her general estate.

Daniel v Dudley (1841) 1 Ph 1; 41 ER 531, LC

ANNOTATIONS **Consd** Holloway v Clarkson (1842) 6 Jur 932 **Apld** Allen v Thorp (1843) 7 Beav 72; Mackenzie v Mackenzie (1851) 3 Mac&G 559

2898 Ultimate trust for wife's executors — Wife predeceasing husband — Whether trust for wife's next of kin

The ultimate trust in a marriage settlement of a fund belonging to the wife, was to her executors or administrators: *Held* (1) the surviving husband, who was her administrator, and not her next of kin, was entitled; (2) if by those words her next of kin were intended, then that the next of kin at the death of the wife, and not of the husband, who was tenant for life, were entitled.

(3) By a marriage settlement, a fund belonging to the wife was settled on the husband and wife for their respective lives, with remainder to the children of the marriage, to be vested at twenty-one or marriage; and in case no children should attain vested interests, which happened, then as the wife should appoint; and in default unto the executors or administrators of the wife. The wife predeceased the husband, and made no appoint-

ment. There was one child only of the marriage, who survived her mother, but died without attaining a vested interest: *Held* the ultimate limitation was in favour of the wife's administrator, and not of her next of kin.

Allen v Thorp (1843) 7 Beav 72; 13 LJ Ch 5; 49 ER 990

2899 Ultimate trust for wife's executors — Wife predeceasing husband — Whether trust for wife's next of kin

A sum of money was bequeathed in trust for several tenants for life in succession, with remainder to such persons as one of them, who was a married woman, should by will appoint, and in default of such appointment, "to and for the benefit of her executors or administrators." The lady died without any appointment: *Held* her personal representative took the reversionary interest in the fund, not beneficially nor in trust for her next of kin, but as part of her estate.

A-G v Malkin (1846) 2 Ph 64; 1 Coop temp Cott 237; 16 LJ Ch 99; 9 LTOS 69; 10 Jur 955; 41 ER 866, LC

ANNOTATION **Apld** Mackenzie v Mackenzie (1851) 3 Mac&G 559

2900 Ultimate trust for wife's executors — Wife predeceasing husband — Property passes to administrator — Husband

By a marriage settlement, a reversion in real estate was conveyed to trustees, in trust, at the request of the husband and wife, or of the survivor, to sell, and the proceeds were settled on the husband and wife for life, with remainder to the children, and, in default thereof, to such person as the wife should appoint, and in case of no appointment, to the use of the heirs, executors, and administrators of the wife, according to the nature and property of the premises. The wife died without issue, and without having exercised the power; the husband took out administration to his wife, and required the trustees to sell the reversion: *Held* he was entitled to have it sold, and to have the proceeds as administrator of his wife.

Warburton v Hadfield (1837) 6 LJ Ch 203; 1 Jur 164

2901 Ultimate trust for wife's executors — In default of appointment by will — Whether wife entitled to absolute interest — Settlement in contemplation of future marriage

By a marriage settlement, the wife's property was vested in trustees, in trust for her separate use for life, independently of her then or any future husband, without anticipation, with remainder, in the events which happened, as she should, notwithstanding her coverture, appoint by will, and, in default of appointment, in trust for her executors and administrators: *Held* the lady and an after-taken husband were entitled to a transfer of the settled fund.

Malcolm v O'Callaghan (1835) 5 LJ Ch 137

ANNOTATION **Consd** Tullett v Armstrong (1840) 4 My&Cr 390

2902 Power of appointment in donee of life interest — Limitation in default of appointment — To executors and administrators

Bequests to females, some of whom were married and some single, for their separate use for their respective lives, and after their decease to such persons as they should respectively appoint; and in default of appointment, to their respective executors, administrators, and assigns: *Held* each of the legatees, whether married or unmarried women, were entitled upon petition, without executing any formal appointment, to an immediate transfer or payment to themselves of the *corpus* of their shares of the fund.

Holloway v Clarkson (1843) 2 Hare 521; 67 ER 215

ANNOTATIONS **Apld** Long v Watkinson (1852) 17 Beav 471 **Folld** Cambridge v Rous (No 2) (1858) 5 Beav 574 **Consd** Taylor v Millington (1858) 4 Jur NS 204 **Apld** Re David's Trusts (1859) John 495; Re Seymour's Trusts (1859) John 472

2903 Power of appointment in donee of life interest — Limitation in default of appointment — To executors and administrators

Bequest of personalty, in trust for the legatee for life, with remainder to her appointees by will, with remainder, in default of appointment, to her executors and administrators: *Held* the legatee took the capital absolutely.

Devall v Dickens (1845) 9 Jur 550

ANNOTATION **Folld** Page v Soper (1853) 11 Hare 321

2904 Power of appointment in donee of life interest — Limitation in default of appointment — To executors and administrators

The trusts of some stock were, by a settlement, declared to be for A, B, C, and D, equally; with a proviso, that the shares of females should not be paid to them, but should be invested, and the income paid to them for their lives and that, after the death of each such female, the trustees should stand possessed of her share for such persons as she should by will appoint, and, in default of appointment, for the executors or administrators, or other the personal representatives or representative of such female: *Held* each female had an absolute interest in her share, and had a right to a transfer.

St John v Gibson (1847) 17 LJ Ch 95; 10 LTOS 480; 12 Jur 373

2905 Power of appointment in donee of life interest — Limitation in default of appointment — To executors and administrators

Where trust funds were settled to the separate use of a married woman for her life, and after her decease upon trust for such persons as she should by will appoint, and, in default of appointment, for her executors and administrators, she, having become a widow, applied for a transfer of the funds to herself and her assignees, offering to release her power of appointment, and it was held that she was absolutely entitled to the trust funds, and the order was made accordingly.

Page v Soper (1853) 11 Hare 321; 1 Eq Rep 540; 22 LJ Ch 1044; 17 Jur 851; 1 WR 518; 68 ER 1298

3 Trusts for heirs or next of kin

LAW See Halsbury's Laws (4th edn) vol 42 para 939

CROSS REFERENCE See no 2939 et seq post (trusts for statutory next of kin)

2906 Limitation of "right heirs" — Whether husband entitled as administrator

By a marriage settlement certain personal property of the intended wife was assigned to trustees, in trust for the wife for life, and after the death of the survivor, and in default of issue of the marriage, to the right heir or heirs of the wife. The wife died without issue, in the lifetime of her husband, who took out letters of administration to her effects: *Held* the husband did not acquire as the administrator of his wife, an absolute interest in the settled property.

Newenham v Pittar (1838) 7 LJ Ch 300

2907 Limitation of "right heirs" — Whether next of kin entitled

Personal estate was settled on a husband and wife successively for life, with remainder to their children, and, on failure of children, "then to the right heirs" of the survivor of the husband and wife: *Held* under the last limitation, the heir-at-law of the survivor, and not the next of kin, was entitled.

Hamilton v Mills (1861) 29 Beav 193; 3 LT 766; 54 ER 601

ANNOTATION **Distd** Re Philps's Will (1869) LR 7 Eq 151

2908 Who are next of kin — Nearest blood relations

(1) A assigned a fund to trustees, upon trust to pay the interest to B for his life, and after his decease to pay, transfer, and assign the same among B's children, and if no child of B, from and immediately after the decease of B upon trust to pay, transfer, and assign the same as A should appoint, and in default of appointment, to pay, transfer, and assign the same to such person or persons as should at the time of the decease of A be A's next of kin. A died in the lifetime of B without having made any appointment; and B died without issue. B is not excluded from the benefit of the limitation to A's next of kin.

(2) B was the only surviving brother of A, and there were children of a deceased brother of A: *Held* the words "next of kin," used *simpliciter*, are to be taken to mean "nearest of kin," and consequently B's personal representatives were entitled to the whole fund.

Elmsley v Young (1835) 2 My&K 780; 4 LJ Ch 200; 39 ER 1142; affg (1833) 2 My&K 82

ANNOTATIONS As to (1) **Consd** Urquhart v Urquhart (1844) 13 Sim 613. As to (2) **Apld** Cooper v Denison (1843) 13 Sim 290 **Folld** Withy v Mangles (1843) 10 Cl&Fin 215 **Distd** Booth v Vicars (1844) 1 Coll 6; Doody v Higgins (1856) 2 K&J 729 **Apld** Rook v A-G (1862) 31 Beav 313; Harris v Newton (1877) 46 LJ Ch 268

2909 Who are next of kin — Nearest blood relations — Sisters

Limitation by settlement of personal property "to next of kin in equal degree," passes the property to a surviving sister, in exclusion of children by a deceased brother.

Worthington v Stother (1815) 1 Madd 36; 56 ER 14; sub nom

Worthington v Stother (1815) cited in 10 Cl&Fin at p 251; sub nom

Worthington v Statham (1815) cited in 3 Swan at p 314

2910 Who are next of kin — Nearest blood relations — Parents

(1) By the settlement made on the marriage of E, the ultimate limitation of a sum of £10,000, which her father thereby covenanted to pay, was "to such person or persons as at the time of her death should be her next of kin." E died, leaving her husband and a child of the marriage, and her own father and mother, surviving: *Held* the father, mother, and child of E were equally her next of kin, and were entitled, under the limitation, to the £10,000 in joint tenancy.

(2) By a marriage settlement, the wife's portion was limited to her for life, remainder to her husband for life, remainder to the children of the marriage to be vested at twenty-one or marriage, and in case none should attain that age or marry, then in trust for the brothers and sisters of the wife or their issue, as she should appoint; and in default of appointment, in trust for her next of kin: *Held* the child of the marriage was not excluded from taking under the ultimate limitation.

(3) Under the ultimate limitation of a trust fund in a marriage settlement "for such person or persons as, at the time of the death of E should be her next of kin": *Held* those who at the death of E were nearest to her in proximity of blood, and not those who

would be entitled to E's personal estate in case of intestacy, under Statute of Distributions were intended.
Withy v Mangles (1843) 610 Cl&Fin 215; 8 Jur 69; 8 ER 724, HL

ANNOTATIONS As to (3) **Consd** Kidd v Frazer (1851) 18 LTOS 13; Horn v Coleman (1853) 1 Sm&G 169 **Extd** Avison v Simpson (1859) John 43 **Apld** Halton v Foster (1868) 3 Ch App 505 **Distd** Re Gray's Settlmt, Akers v Sears [1896] 2 Ch 802

2911 Who are next of kin — Nearest blood relations — Brothers
Trust under a deed for such person or persons as, at the time of the death of A, shall be the next of kin of B, his wife, and would be entitled to her personal estate, as if she had died sole and unmarried. B died in the lifetime of A, having five brothers; four died in the lifetime of A: *Held* the surviving brother alone was entitled.
Re Webber's Settlement (1850) 17 Sim 221; 19 LJ Ch 445; 60 ER 1114

ANNOTATION **Expld** Nichols v Haviland (1855) 1 K&J 504

2912 Who are next of kin — Wife
A widow, as such, cannot take under a limitation to the next of kin of her husband according to Statute of Distribution 1670 (c 10).

In a marriage settlement, the ultimate limitation of a fund was to such persons "as would, at the decease of the husband, be entitled to his personal estate, as his next of kin, according to the statute for the distribution of personal estate of persons dying intestate, if the husband had died intestate without having been married to A," his wife. The wife died, and the husband married again and died: *Held* his widow took nothing under this limitation.
Cholmondeley v Ashburton (Lord) (1843) 6 Beav 86; 12 LJ Ch 337; 49 ER 757

2913 Who are next of kin — Wife
In a marriage settlement, the ultimate limitation of a fund provided by the husband was, "for his next of kin or personal representative in a due course of administration according to Statute of Distribution 1670 (c 10)." There was a similar limitation *mutatis mutandis* of the fund provided by the wife. The court, rejecting the claims of the husband's executors and of his residuary legatee, and excluding his widow: *Held* the next of kin were entitled to the fund provided by the husband.
Kilner v Leech (1847) 10 Beav 362; 16 LJ Ch 503; 10 LTOS 202; 11 Jur 859; 50 ER 621

2914 Who are next of kin — Wife
In a post-nuptial settlement the ultimate limitation of a fund settled by the husband was for his "next of kin in blood according to Statutes for the Distribution of Intestates' Effects, and in the manner in which the same would have been distributed if he had died possessed thereof intestate." The husband died in the lifetime of his wife: *Held* his widow was not entitled to share in the fund with his next of kin.
Re Fitzgerald (1889) 58 LJ Ch 662; 61 LT 221; 37 WR 552

2915 Who are next of kin — Husband
Trust under marriage settlement for the next of kin of the wife, subject to her appointment by will with two witnesses: appointment in favour of the husband by an unattested will being void, the children are entitled, not the husband; who is not of kin to his wife; and whose claim to her personal property is not in that character under the estate, but *jure mariti*; and in this case according to the plan of the settlement he was not intended.
Watt v Watt (1796) 3 Ves 244; 30 ER 992, LC

2916 Who are next of kin — Husband
Under a limitation in a marriage settlement of the wife's property, in default of her appointment, for her next of kin or personal representative, the husband not entitled.
Bailey v Wright (1811) 18 Ves 49; 34 ER 236; affd (1818) 1 Swan 39; 1 Wils Ch 15, LC

ANNOTATIONS **Consd** Bulmer v Jay (1834) 3 My&K 197; Re Best's Settlmt Trusts (1874) LR 18 Eq 686

2917 Effect of illegitimacy of wife — Right of husband to take — As administrator
By a marriage settlement a fund, the property of the wife, was settled on her and her husband and their issue and, in default of issue, on the wife's next of kin. The wife, who was illegitimate, died without issue, and her husband administered to her: *Held* the Crown was not entitled to the fund; but it belonged to the husband as administrator to his wife.
Hawkins v Hawkins (1834) 7 Sim 173; 4 LJ Ch 9; 58 ER 803

2918 Effect of illegitimacy of wife — Right of husband to take
Anon (1858) 1 Giff 392; 65 ER 970

ANNOTATION **Consd** Wollaston v Berkeley (1876) 2 Ch D 213

2919 Trusts of settlement exhausted — Rights of personal representative of settlor
By a settlement made on the marriage of L and G, L agreed that he would, after the marriage, transfer to the trustees a sum of Consols, and G assigned unto the same trustees some Portuguese bonds. The trustees were to pay the income of the Consols to L for life, and after his death to pay it to G for life, and after the death of the survivor, in trust for the children

of the marriage, and if none, in trust for the survivor of L and G, his or her executors and administrators. The trustees were to pay the income of the bonds to L during his and G's joint lives, and in case he should survive, then, after G's decease, to transfer the bonds to whom she might appoint by will, and in default of appointment, to her next of kin; but if she should survive L, then in trust to transfer the bonds to her, her executors or administrators. After the marriage, the Consols were transferred to the trustees. L, by will, gave to his wife the whole of his property absolutely, and G bequeathed the whole of her property to her husband for life, and after his death, to her sisters. Both husband and wife, who left Liverpool, in April 1874, in the *Liberia*, were, with all hands on board, drowned at sea: *Held* the funds settled belonged to the legal personal representatives of each settlor.

Wollaston v Berkeley (1876) 2 Ch D 213; 45 LJ Ch 772; 34 LT 171; 24 WR 360

Scottish, Irish and Commonwealth Cases

2920 Time for ascertaining heirs — Where hypothesis is death without issue — At death of person to whom hypothesis refers

Anderson's Trustees v Forrest [1917] SC 321; [1917] 1 SLT 142 (SCOT)

2921 Who are next of kin — Daughter of deceased brother

A sum of money was settled upon A on her marriage, and upon her death without leaving issue, "in trust for the persons legally entitled thereto, as next-of-kin of A." A died without issue, leaving a brother and sister and a niece surviving her, the daughter of a deceased brother: *Held* under the settlement, the niece of A was entitled, with the brother and sister of A, to a distributive share of the sum settled.

Kidd v Frazer (1851) 18 LTOS 13 (IR)

2922 Who are next of kin — Nephew

In 1924 appellant's uncle settled property on trust for a class of persons, including his next of kin, with a power to appoint by will amongst the class. The indenture of settlement also contained a clause providing for the property to be held on charitable trusts in default of appointment. In 1970 settlor made a will purporting to appoint his nephew, appellant, the beneficiary of the settlement. When settlor died later in the same year appellant's mother was still alive. The trustee of the settlement, first respondent on appeal sought directions from the court whether the beneficial interest in the trust property was vested in appellant, or held on charitable trusts. The judge at first instance held that as his mother was alive, appellant was not the next of kin of settlor. The appointment was therefore invalid and the settled property was held on charitable trusts. On appeal appellant argued before the High Court that he was included within the next of kin of settlor and was a proper object of appointment under the settlement: *Held* (1) the appeal should be dismissed because appellant was not next of kin of settlor, and the appointment by settlor was therefore invalid; (2) the court should not have determined whether the property was held on charitable trusts in the absence of representation of appellant's mother, who was next of kin of settlor. The case should be remitted for further consideration by the Supreme Court.

Antill-Pockley v Perpetual Trustee Co Ltd (1974) 4 ALR 663 (AUS)

4 Trusts for statutory next of kin

LAW See Halsbury's Laws (4th edn) vol 42 para 940

2923 Implied reference to statute — Reference to death unmarried

On a limitation by settlement "to the next of kin of A of her own blood and family, as if she had died sole and unmarried," the next of kin take as under Statute of Distributions.

Cotton v Scarancke (1815) 1 Madd 45; 56 ER 18

2924 Implied reference to statute — Reference to death unmarried

(1) The ultimate limitation in a marriage settlement was "for the next of kin of the wife as if she had not been married, not including the husbands of both or either of her sisters": *Held* the sisters, who were her next of kin took as joint tenants.

It is no doubt settled, that if, in a case of this description there is a direct or implied reference to Statute of Distributions, the next of kin take as tenants in common; if therefore this settlement had stated that the next of kin were to take according to the statute in the same manner as if B had died intestate I should have held that the daughters took as tenants in common . . . It would be too strong an alteration of the deed to draw from the words "as if she had not been married" a reference to Statute of Distributions.

Finding then in this deed, no words of reference to Statute of Distributions or to an intestacy and finding no words of severance, I think the sisters as next of kin take as joint tenants (*Romilly MR*).

(2) By a marriage settlement, real estates were conveyed to trustees and "their heirs" upon trusts for the parents for life and afterwards for the children, and in default as the wife should appoint and in default for her next of kin. The gift to the next of kin contained no words of inheritance: *Held* they took for life only.

Lucas v Brandreth (No 2) (1860) 28 Beav 274; 2 LT 785; 6 Jur NS 945; 54 ER 371

2925 Implied reference to statute — Reference to death unmarried

Testator gave a legacy to his daughter for life, and in default of issue, in trust, "for her next of kin in blood as if she had died unmarried." The daughter

died without issue: *Held* the only surviving sister of the daughter was entitled to the legacy in exclusion of children of deceased brothers and sisters, for that the words "as if she had died unmarried" did not point to the mode of distribution in cases of intestacy, and "next of kin," therefore, must be taken as meaning nearest relations, and not persons entitled as next of kin according to the statute.

Halton v Foster (1868) 3 Ch App 505; 37 LJ Ch 547; 18 LT 623; 16 WR 683, LJJ

ANNOTATION **Consd** Re Gray's Settlmt, Akers v Sears [1896] 2 Ch 802

2926 Implied reference to statute — Reference to death unmarried

In a gift to next of kin a reference to the death of the propositus intestate imports division among blood relations according to Statute of Distributions.

Consols were settled on trust after the death of M for "the next of kin in blood to M . . . in case she had so died intestate and unmarried": *Held* children of deceased brothers and sisters of M were entitled as well as living brothers and sisters to share in the fund.

Re Gray's Settlement, Akers v Sears [1896] 2 Ch 802; 65 LJ Ch 858; 75 LT 407; 40 Sol Jo 702

2927 Direct reference to statute

The ultimate trust under a voluntary settlement made in 1912 was "for such person or persons as would have become entitled to the settled fund under the statutes for the distribution of the personal estate of intestates at the death of the settlor had he died possessed thereof intestate and without having been married such persons if more than one to take as tenants in common in the same shares in which they would have taken under the same statutes." The settlor died in 1941, intestate and unmarried: *Held* the clause amounted to a mere declaration of trust by reference to Statutes of Distribution, without showing any "contrary intention" within Administration of Estates Act 1925 (c 23) s 50(2), with the result that the trust must be construed as referring to the enactments relating to the distribution of effects of intestates which were in force immediately before the Act, namely, Statute of Distribution 1670 (c 10).

Re Hooper's Settlement, Phillips v Lake [1943] Ch 116; [1943] 1 All ER 173; 112 LJ Ch 135; 168 LT 165; 59 TLR 182; 87 Sol Jo 83, CA

2928 Effect of reference to statute

Under a limitation in a settlement in the event of the wife dying without leaving children in the lifetime of the husband, in trust for such persons as at the decease of the wife would have become entitled thereto under Statute of Distribution 1670 (c 10): *Held* the husband did not take.

Noon v Lyon (1875) 33 LT 199

2929 Period for ascertaining class — Where hypothesis is death intestate — At death of person to whom hypothesis refers

By a marriage settlement, a fund was settled on the wife, if she should survive her husband, for her life, remainder to their children who, being sons, should attain twenty-one, or being daughters, should attain that age or marry; and the trustees were directed to apply a portion of the income of the children's expectant shares for their maintenance, and to accumulate the surplus for the benefit of such person or persons as should be entitled thereto, by virtue of the settlement; provided that, if any son should attain twenty-one, nor any daughter should attain that age or marry, then the fund should be in trust for such person or persons as the husband should by deed or will appoint; and, in default of appointment, in trust for his next of kin according to Statute of Distributions and as if he had died intestate. There was issue of the marriage one son only. The husband died first, without having exercised the power reserved to him: then the son died under twenty-one, and, lastly, the wife died: *Held* the fund vested in the son as his father's next of kin at the father's death, and not in the persons who were the father's next of kin at the son's death.

Smith v Smith (1841) 12 Sim 317; 59 ER 1153

ANNOTATION **Consd** Re Saunders' Trust (1857) 3 K&J 152

2930 Period for ascertaining class — Where hypothesis is death intestate

Trust funds were settled upon a husband for life, and if the wife should die in the lifetime of the husband, then, after his decease and failure of issue, "for such persons, other than the husband, as should then be the next of kin of the wife, and would have been entitled thereto under Statutes of Distribution, in case she had died sole, unmarried and intestate": *Held* that her next of kin, at her own death, and not those at the death of her husband, were entitled.

Wheeler v Adams (1853) 17 Beav 417; 1 WR 473; 51 ER 1095

ANNOTATIONS **Consd** Bullock v Downes (1860) 3 LT 194; Day v Day (1870) 18 WR 417; Mortimer v Slater (1877) 7 Ch D 322

2931 Where hypothesis is that wife has survived husband and died intestate — At death of husband

By a marriage settlement personal estate of the wife was settled in trust for the husband and wife for their respective lives, and afterwards for the children of the marriage, and in default for the wife if she survived her husband, but if she predeceased him then,

subject to his life interest, for such person as, at the decease of the wife, would, under Statute of Distributions, have been entitled to her personal estate, as her next of kin, in case she had survived her husband and had afterwards died intestate. The husband survived the wife: *Held* her next of kin ascertained at the husband's death were entitled.

Chalmers v North (1860) 28 Beav 175; 3 LT 140; 6 Jur NS 490; 8 WR 426; 54 ER 333

ANNOTATIONS **Distd & Dbtd** Druitt v Seaward, Re Ainsworth, Ainsworth v Seaward (1885) 31 Ch D 234 **Distd** Re Bradley, Brown v Cottrell (1888) 58 LT 631 **Apld** Clarke v Hayne (1889) 42 Ch D 529 **Consd** Re King's Settlmt, Gibson v Wright (1889) 60 LT 745

2932 Where hypothesis is that wife has survived husband and died intestate — At death of husband

In the event of there being no issue of a marriage, the settled fund was given to the wife, if she should survive her husband, for her absolute use; but if she should die in his lifetime, then to such persons as she should appoint, and in default of appointment to the persons who would then be entitled to the personal estate of the wife, in case she had survived her husband and had died possessed of same intestate: *Held* the next of kin of the wife at the death of the husband were entitled to the fund.

If by the instrument testator chooses to say, that the next of kin of a person are to be ascertained not at his death, but at a later or subsequent time, how can the court avoid so to construe the gift (*Romilly MR*).

Pinder v Pinder (1860) 28 Beav 44; 29 LJ Ch 527; 2 LT 202; 6 Jur NS 489; 54 ER 282

ANNOTATIONS **Distd & Expld** Re Bradley, Brown v Cottrell (1888) 58 LT 631 **Apld** Clarke v Hayne (1889) 42 Ch D 529 **Folld** Re King's Settlmt, Gibson v Wright (1889) 60 LT 745; Re Peirson's Settlmt, Cayley v De Wend (1903) 88 LT 794

2933 Where hypothesis is that wife has survived husband and died intestate — At death of husband

By a marriage settlement, dated in 1844, trust funds to which the wife was entitled were settled upon trusts for the benefit of the wife and husband during their respective lives and for the benefit of the child or children of the marriage. The settlement then provided that, if there should be no child, the trust funds should remain upon the trusts following: if the husband should die in the lifetime of the wife, then, after his decease and such failure of issue as aforesaid, in trust for the wife absolutely, but if the husband should survive the wife, then, after the decease of the husband so surviving the wife, and such failure of issue as aforesaid, "in trust for the person or persons, who, under the Statutes made for the Distribution of Intestates' Estates would then be entitled to the personal estate of" the wife in case the wife, "having survived" the husband, "had died possessed of same intestate, and to be divided between or amongst the same persons respectively, if more than one, in the shares and proportions in which same respectively would, under or by virtue of the statutes, be divisible among the persons respectively." There was never any issue of the marriage. The wife died in 1886, and the husband died in 1888. The question was, when the class of next of kin of the wife entitled to the trust funds was ascertainable—whether at the death of the wife or of the husband: *Held* the wife's next of kin entitled to take were to be ascertained, not at the time of her own death, but at the time of the death of her husband.

Re King's Settlement, Gibson v Wright (1889) 60 LT 745

ANNOTATION **Consd** Re Peirson's Settlmt, Cayley v De Wend (1903) 88 LT 794

2934 Where hypothesis is that wife has survived husband and died intestate — At death of husband

Under the ultimate trusts in a marriage settlement trustees were directed to hold certain funds "in trust for the person or persons who, under the statutes made for the distribution of intestates' personal estates, would then be entitled to the personal estate of A in case she having survived" her husband "had died possessed of the trust moneys, stocks, funds, and securities, and to be paid and divided accordingly." The husband survived the wife: *Held* the period at which the wife's next of kin were to be ascertained was the death of the husband.

Re Peirson's Settlement, Cayley v De Wend (1903) 88 LT 794; 51 WR 519; 47 Sol Jo 547

2935 Where hypothesis is that wife has survived husband and died intestate — At death of wife

Testator by his will directed that the shares of his daughters in his residuary estate should be settled, the ultimate limitation, in case a daughter should not leave any child or children who should be living at the decease of the survivor of herself and her husband, being in trust for the person or persons who under Statutes of Distribution "would on her decease have been entitled thereto in case she having survived her husband and had then died possessed thereof and intestate." A daughter having died without issue, leaving her husband surviving: *Held* her next of kin to take under the ultimate limitation were to be ascertained at the time of her own death, and not at the time of the death of her husband.

Druitt v Seaward, Re Ainsworth, Ainsworth v Seaward (1885) 31 Ch D 234; 55 LJ Ch 239; 53 LT 954; 34 WR 180

ANNOTATIONS **Folld** Re Bradley, Brown v Cottrell (1888) 58 LT 631 **NF** Clarke v Hayne (1889) 42 Ch D 529 **Consd** Re King's Settlmt, Gibson v Wright (1889) 60 LT 745

2936 Where hypothesis is that wife has survived husband and died intestate — At death of wife

In a marriage settlement, which gave successive life interests to the wife and husband, the ultimate limitation of personal property, in the event of the husband surviving the wife, was in trust for the person or persons who, under the Statutes for the Distribution of Intestates' Estates would, on the decease of the wife, have been entitled thereto in case she had survived the husband, and had then died possessed thereof and intestate. The wife predeceased the husband: *Held* the class of persons to take under the limitation ought to be ascertained as at the date of the death of the wife, and not as at the date of the death of the husband.

Re Bradley, Brown v Cottrell (1888) 58 LT 631

ANNOTATION **NF** Clarke v Hayne (1889) 42 Ch D 529

2937 Where hypothesis is that wife has survived husband and died intestate — At death of wife — Immediately after death of husband

By a marriage settlement, dated in 1839, certain property of the wife was vested in trustees upon trust for the appointees of the wife, and, in default, for her for life for her separate use, and after her death for the husband for life, and, after the decease of the husband and wife, in trust for the person or persons who, under the Statutes made for the Distribution of Intestates' Estates would then be entitled thereto in case the wife having survived the husband were to die possessed thereof respectively and intestate, and to be divided between or among such persons, if more than one, in the shares and proportions in which the same would be divisible under the same statutes. The wife died in the lifetime of the husband. Her next of kin under the statute at her death and those persons who would have been her next of kin if she had survived her husband and died immediately after his death were not altogether the same, and the question was which of those two classes was to take: *Held* the persons to take were those who would have been entitled to the wife's personal estate if she had survived her husband and died intestate immediately after him.

Clarke v Hayne (1889) 42 Ch D 529; 61 LT 161; 37 WR 667; sub nom

Re Beach, Clarke v Hayne (1889) 59 LJ Ch 195

ANNOTATION **Consd** Re Peirson's Settlmt, Cayley v De Wend (1903) 88 LT 794

2938 Nature of estate taken

By a marriage settlement personal property of the intended wife was settled, the ultimate trust being for such person or persons as at the time of the decease of the wife should be her next of kin "under and according to Statute of Distributions": *Held* the next of kin of the wife took as tenants in common and not as joint tenants.

Re Ranking's Settlement Trusts (1868) LR 6 Eq 601

5 Effect of phrase "without having been married"

LAW See Halsbury's Laws (4th edn) vol 42 para 941

2939 Words to have ordinary meaning — Unless circumstances or context show contrary intention

By a settlement made on the marriage of a widow which contained a recital showing that she had children living by her first husband, but which made no provision for such children, her property was assigned to trustees upon trust, if there should be no issue of the intended marriage, which happened, after the deaths of her intended husband and herself, for those persons who, under Statutes for the Distribution of Intestates' Estates, would have been entitled thereto in case she had died absolutely possessed thereof "without ever having been married": *Held* there being no context, the words "without ever having been married" ought to have their ordinary meaning, and therefore the persons entitled under the ultimate trust were the persons who would be the next of kin of the lady if she had died a spinster.

Emmins v Bradford, Johnson v Emmins (1880) 13 Ch D 493; 49 LJ Ch 222; 42 LT 45; 28 WR 531

ANNOTATIONS **Consd** Re Watson's Trusts (1886) 55 LT 316 **NF** Stoddart v Saville [1894] 1 Ch 480 **Distd** Re Mare, Mare v Howey [1902] 2 Ch 112 **Folld** Re Brydone's Settlmt, Cobb v Blackburne [1903] 2 Ch 84; Re Smith's Settlmt, Wilkins v Smith [1903] 1 Ch 373; Boyce v Wasbrough [1922] 1 AC 425

2940 Words to have ordinary meaning — Unless circumstances or context show contrary intention

The words in question ought *primâ facie* to be construed according to their natural meaning, which would exclude issue of the wife, unless there be something in the context or in the circumstances of the case which shows that the words were not intended to bear that meaning.

By a settlement made on the marriage of a spinster a fund belonging to her was vested in trustees, upon trust to pay the income to her during the joint lives

of herself and her husband, and after the death of either of them to pay the income to the survivor during his or her life, and after the death of the survivor to hold the fund in trust for the child or children of the marriage as the husband and wife should by deed jointly appoint, and in default of appointment as the survivor should by deed or will appoint, and in default of appointment in trust for the children, of the marriage equally who being sons should attain twenty-one, or being daughters should attain twenty-one or marry. If there should be no child, who being a son should attain twenty-one "or being a daughter should attain that age or marry, then, without prejudice to the prior trusts, if the wife should die before the husband, the trustees were, after his death and such default or failure of children, to hold the fund upon such trusts as the wife should by will appoint, and in default of appointment upon trust for the persons who would have been entitled thereto as her statutory next of kin at her death "if she had died possessed thereof intestate and without having been married." The marriage took place in 1870. The wife died in 1871, intestate, leaving twin infant children, who both died a few months after their mother. In 1901 the husband died. No appointment had been made under the powers contained in the settlement: *Held* the sole statutory next of kin of the wife at the time of her death, excluding the infant children, was entitled to the fund.

Re Brydone's Settlement, Cobb v Blackburne [1903] 2 Ch 84; 72 LJ Ch 528; 88 LT 614; 51 WR 497; 47 Sol Jo 490, CA

ANNOTATION **Folld** Boyce v Wasbrough [1922] 1 AC 425

2941 Words to have ordinary meaning — Unless circumstances or context show contrary intention

Boyce v Wasbrough no 581 ante

2942 Whether issue excluded

Clarke v Colls no 2956 post

2943 Whether issue excluded

By a marriage settlement, personalty belonging to the intended wife was settled in trust for her separate use for her life, and subject thereto as she should by deed or will appoint; and in default of appointment, in case she should predecease her husband, in trust for such persons as under Statutes of Distribution would have become entitled thereto at her death if she had died intestate and without having been married. It was declared that A, her illegitimate daughter, should, for the purposes of that trust be deemed to be her lawful child. The wife made no appointment and died without lawful issue, leaving her husband and A surviving: *Held* A was entitled, under the settlement, to the trust fund.

Wilson v Atkinson (1864) 4 De GJ&Sm 455; 4 New Rep 451; 33 LJ Ch 576; 11 LT 220; 46 ER 995, LJJ

ANNOTATIONS **Folld** Re Ball's Trust (1879) 11 Ch D 270; Upton v Brown (1879) 12 Ch D 872 **Expld** Emmins v Bradford, Johnson v Emmins (1880) 13 Ch D 493 **Apld** Re Arden's Settlmts [1890] WN 204 **Consd** Stoddart v Savile [1894] 1 Ch 480 **Folld** Re Mare, Mare v Howey [1902] 2 Ch 112 **Consd** Re Brydone's Settlmt, Cobb v Blackburne [1903] 2 Ch 84; Re Smith's Settlmt, Wilkins v Smith [1903] 1 Ch 373; Boyce v Wasbrough [1922] 1 AC 425

2944 Whether issue excluded

Where a settlement made on the marriage of a spinster contains trusts for her children attaining twenty-one or marrying, an ultimate trust, in default of such children, and in the event of the wife predeceasing the husband, for her statutory next of kin as if she had died intestate and "without ever having been married" *primâ facie* excludes children.

Re Smith's Settlement, Wilkins v Smith [1903] 1 Ch 373; 2 LJ Ch 184; 87 LT 740; 41 WR 217

ANNOTATION **Consd** Boyce v Wasbrough [1922] 1 AC 425

2945 Whether issue excluded — Issue of intended marriage

By a marriage settlement the trust funds were, in the event of the husband surviving, to go as if the wife had died without having been married. She died leaving her husband and one child surviving: *Held* the trust funds went to the child.

Re Ball's Trust (1879) 11 Ch D 270; 48 LJ Ch 279; 40 LT 880; 27 WR 409

ANNOTATIONS **Consd** Emmins v Bradford, Johnson v Emmins (1880) 13 Ch D 493 **Folld** Re Forbes, Errington v Sempell [1899] WN 6 **Consd** Re Brydone's Settlmt, Cobb v Blackburne (1903) 88 LT 614; Re Smith's Settlmt, Wilkins v Smith [1903] 1 Ch 373; Boyce v Wasbrough [1922] 1 AC 425

2946 Whether issue excluded — Issue of intended marriage

By a marriage settlement, the trust fund was assigned to trustees upon trust to dispose of the same as the wife should in writing direct, and in default, to pay the income to her for life, for her separate use, and after her death for such persons as she should by deed or will appoint, and in default, in trust for the persons, who under the Statutes for the Distribution of Intestates' Estates, would, on her death, have been entitled thereto, if she had died possessed thereof intestate "and without having been married." The wife died, without having appointed, leaving one child of the marriage: *Held* the trust funds went to the child.

Stoddart v Saville [1894] 1 Ch 480; 63 LJ Ch 467; 70 LT 552; 42 WR 361; 10 TLR 120; 38 Sol Jo 79; 8 R 372

ANNOTATIONS **Folld** Re Ferbes, Errington v Sempell [1899] WN 6 **Consd** Re Smith's Settlmt, Wilkins v Smith [1903] 1 Ch 373

2947 Whether issue excluded — Issue of intended marriage

By a marriage settlement a fund was settled in the events of there being no child of the marriage who, being a son, should attain the age of twenty-one or, being a daughter, should attain that age or marry, and of the wife dying in the lifetime of the husband, upon such trusts as the wife should by will or codicil appoint, and in default of appointment upon trust for such person of persons as under the Statute for the Distribution of Intestates' Effects should or would have been entitled to her personal estate "in case she had died intestate without having been married." The wife died intestate in the lifetime of the husband, leaving an only son who died an infant: *Held* the case was governed by *Wilson v Atkinson* (no 2943 ante); in conformity with that decision the words referring to death "without having been married" must be construed as intended to exclude the husband, and not as intended to exclude a child, and therefore on the death of the wife intestate her infant son became entitled as her sole next of kin.

Re Mare, Mare v Howey [1902] 2 Ch 112; 71 LJ Ch 649; 87 LT 41; 46 Sol Jo 230

2948 Whether issue excluded — Issue of former marriage

Upton v Brown no 2704 ante

2949 Whether issue excluded — Issue of former marriage

By a settlement made on the second marriage of a lady who had one child by her first marriage, the trust fund was assigned to trustees upon trust to pay the income thereof to the wife for life, then to her husband for life, and upon the death of the survivor upon trust to hold the fund for the children of the said intended marriage, and in default of children, and in the event of the husband being the survivor, which happened, in trust for such persons and purposes as the wife should by will or codicil appoint, and in default of such appointment, in trust for such person or persons as under Statutes for the Distribution of the Intestates' Estates would at the time of the wife's decease have been entitled thereto if she had then died possessed thereof "a spinster and intestate." The settlement contained no reference to the child of the first marriage. The wife died without having had any child by her second marriage, and without having appointed the fund, but leaving her child by her first marriage surviving: *Held* the child of the first marriage was entitled, as sole next of kin of her mother, to the trust fund.

Re Forbes, Errington v Sempell [1899] WN 6

2950 Whether issue excluded — Issue of former marriage — Provision made for such issue

Boyce v Wasbrough no 581 ante

2951 Whether issue excluded — Issue of subsequent marriage

Re Arden's Settlement (1890) 25 LJNC 147

ANNOTATION **Folld** Re Forbes, Errington v Sempell [1899] WN 6

Scottish, Irish and Commonwealth Cases

2952 Whether issue excluded — Issue of intended marriage

Re Deane's Trusts, Dudley v Deane [1900] 1 IR 332 (IR)

2953 Whether issue excluded — Issue of subsequent marriage

Hardman v Maffett (1884) 13 LR Ir 499 (IR)

6 Effect of phrases "unmarried" and "without being married"

LAW See Halsbury's Laws (4th edn) vol 42 para 941

2954 Flexible term — Meaning decided according to context

Where there is an "ultimate limitation for such person or persons as would have been the next of kin of S, in case she had died intestate and unmarried": *Held* it could not be construed to exclude the children of the marriage.

"Unmarried," strictly speaking, would mean not being in a state of marriage. But it is not necessary to resort to the strict meaning of the word, because it has already received a judicial construction. *Doe d Balwin v Rawding* (WILLS vol 51 (reissue) no 13626) decides that it may mean "never having been married" or "unmarried at time of death," and that it has, therefore, a flexible meaning, and may be construed according to the obvious intention of the parties using the word. . . . The meaning is to be ascertained, not by any strict rule applied to the term itself, but according to the sense of it where the word is used (*Lord Cottenham C*).

Maugham v Vincent (1840) 9 LJ Ch 329; 4 Jur 452, LC

ANNOTATIONS **Apld** Coventry v Lauderdale (1846) 7 LTOS 467 **Distd** Re Norman's Trust (1853) 22 LJ Ch 582 **Apld** Pratt v Mathew (1856) 22 Beav 328 **Consd** Clarke v Colls (1861) 9 HL Cas 602

2955 Flexible term — Meaning decided according to context

The word "unmarried" when used in a will or settlement is flexible in its meaning and may be construed as meaning "never having been married"

or "discovert at the time of the death" according as it appears to best carry out the intention of the parties.
Coventry v Lauderdale (Earl) (1846) 7 LTOS 467; 10 Jur 793

2956 Flexible term — Meaning decided according to context
"Unmarried" is a word of flexible meaning, to be construed with reference to the plain intention of the instrument where it is used.

A marriage settlement gave a fund to trustees for M, the intended wife, for life, and after her decease, as to one moiety for the husband and as to the other moiety for the children, at such ages, etc, as the wife, notwithstanding her coverture should appoint, and in default of appointment, among the children, as tenants in common, to be vested at twenty-one or marriage; and if there should be no child, as to the whole, for the husband for life; and after his decease for any person the wife, notwithstanding her intended or any future coverture, might appoint: and in default of appointment, "for the person or persons, who at the decease of M, should be of her blood and in kin to her, and who, in their own right, or in right of their representatives, would have been entitled to the same under the Statutes for Distribution, in case the said MF had died possessed thereof intestate and unmarried." The wife died with her first child, which survived her only one day. She had not exercised the power of appointment: *Held* "unmarried" in this settlement meant being without a husband at the time of death, consequently the fund went to the child, as the wife's next of kin, and on its death passed to its father.

What is the meaning of the word unmarried? It may . . . mean either "without ever having been married" or "not having a husband living at her death." If the former construction be adopted, then if the wife should survive her husband and afterwards marry and have children her collateral relations would take the fund to the exclusion of her issue (*Lord Cranworth*).
Clarke v Colls (1861) 9 HL Cas 601; 11 ER 864, HL; affg SC sub nom
Mitchell v Colls (1860) John 674

ANNOTATIONS **Apld** Re Sanders' Trusts (1866) LR 1 Eq 675; Emmins v Bradford, Johnson v Emmins (1880) 13 Ch D 493 **Distd** Blundell v De Falbe (1888) 57 LJ Ch 576 **Folld** Re Smith's Settlmt, Wilkins v Smith [1903] 1 Ch 373 **Consd** Re Brydone's Settlmt, Cobb v Blackburne [1903] 2 Ch 84; Re Collyer, Collyer v Back [1907] 24 TLR 117 **Distd** Boyce v Wasbrough [1922] 1 AC 425

2957 Flexible term — Meaning decided according to context
Although the word "unmarried" is one of flexible meaning, and may mean either "never having been married," or "not having a husband" at the time when a gift is to take effect, the former is the primary or natural meaning, and, in the absence of any context showing a different intention, the word will be so construed.
Re Sergeant, Mertens v Walley (1884) 26 Ch D 575; 54 LJ Ch 159; 32 WR 987

ANNOTATIONS **Consd** Blundell v De Falbe (1888) 57 LJ Ch 576; Re Collyer, Collyer v Back (1907) 24 TLR 117

2958 "No husband living at her death"
Maugham v Vincent no 2954 ante

2959 "No husband living at her death"
(1) By a marriage settlement, a moiety of the settled fund was assured in trust after the death of the wife, if she died in the lifetime of the husband, to such uses as she should appoint, and, in default of appointment, to such person or persons as at her decease would have been entitled to the clear residue of her personal estate under the Statute of Distributions, in case she had died intestate and without being married. On the death of the wife, in the lifetime of the husband, without having exercised the power: *Held* the children of the marriage were entitled.

(2) Without being married means without having a husband at the time of her death, not without ever having had a husband. Still the rules of grammar must give way to the rules of good sense, and where a reasonable interpretation of the whole instrument requires that grammar should be departed from it must be and constantly is departed from (*Knight Bruce LJ*).
Re Norman's Trust (1853) 3 De GM&G 965; 1 Eq Rep 53; 22 LJ Ch 720; 21 LTOS 97; 17 Jur 444; 1 WR 220; 43 ER 378, LJJ

ANNOTATIONS As to (1) **Apld** Pratt v Mathew (1856) 22 Beav 328. As to (2) **Consd** Re Saunder's Trust (1857) 3 K&J 152; Clarke v Colls (1861) 9 HL Cas 601

2960 "No husband living at her death"
In a settlement the expression "in case she (the wife) had died intestate and unmarried" held equivalent to "in case she had died intestate and a widow."

Accordingly, under a limitation, at the wife's death, to the persons who, in the event above mentioned, would have been entitled to her personal estate: *Held* her first husband having died without issue, her children by a second husband, who survived her, were the persons designated.
Re Sanders' Trust (1857) 3 K&J 152; 69 ER 1060

2961 "Never having been married"
Maugham v Vincent no 2954 ante

2962 "Never having been married"
The word "unmarried" in one part of a settlement held to mean not having a husband, although in

another it was clearly used in the sense of "without having been married."

A fund was settled in contemplation of marriage, upon trust for the wife for life, then for the husband for life, then for the children of the marriage equally, subject to a power of appointment among them, to be paid at twenty-one, or in the case of daughters on their attaining that age or marrying; and in the event of any of them, being a son or sons, dying under twenty-one, or being a daughter or daughters dying under that age and "unmarried," the share of such child was to accrue among the others; with an ultimate trust, in the event of no child attaining a vested interest and of the wife dying in the husband's life, for such person or persons as would have been entitled to her personal estate under Statute of Distributions if she had died "unmarried" and intestate: *Held* the word "unmarried" in the ultimate trust was to be construed "not having a husband at the time."
Pratt v Mathew (1856) 8 De GM&G 522; 25 LJ Ch 686; 27 LTOS 267; 2 Jur NS 1055; 4 WR 772; 44 ER 491, LJJ

2963 "Never having been married"
Where there is a gift over in the event of a person, who is not married at the time, dying "unmarried," it means without ever having been married.

In a limitation in a marriage settlement giving the whole fund, after the death of the parents, to an only child, if all but one should have died "unmarried and without issue," the word "unmarried" was construed "without having been married," and one having married it was held that the clause became inoperative.
Heywood v Heywood (1860) 29 Beav 9; 30 LJ Ch 155; 3 LT 429; 7 Jur NS 228; 9 WR 62; 54 ER 527

ANNOTATION **Consd** Re Jones, Last v Dobson [1915] 1 Ch 246

2964 "Never having been married" — Natural meaning — In absence of context showing different intention
Re Sergeant, Mertens v Walley no 2957 ante

2965 "Never having been married" — Natural meaning — In absence of context showing different intention
The primary and usual meaning of the word "unmarried," in the absence of any context showing a different meaning, is "without ever having been married."

By a marriage settlement, property belonging to the wife was settled in the events which happened, subject to the life interests of the husband and wife, in trust "for such person or persons as, under or by virtue of the Statute for the Distribution of Intestates' Effects, would at the time of the decease of the wife have been entitled to her personal estate as her next of kin in case she had died intestate and unmarried": *Held* in the absence of anything in the settlement showing a contrary intention, the word "unmarried" must be construed to mean "without ever having been married."
Blundett v De Falbe (1888) 57 LJ Ch 576; 58 LT 621

ANNOTATION **Consd** Re Collyer, Collyer v Back (1907) 24 TLR 117

Scottish, Irish and Commonwealth Cases

2966 "Unmarried" means discovert
Re Woodhouse's Trusts [1903] 1 LR 126 (IR)

3 Settlements of personalty to devolve with realty

i IN GENERAL

LAW See Halsbury's Laws (4th edn) vol 42 para 942

CROSS REFERENCES See no 2490 et seq ante (power to sell heirlooms); REAL PROPERTY vol 38 (reissue) no 4114 et seq (chattels identified with real estate); WILLS vol 51 (reissue) no 10879 et seq (gift of heirlooms)

2967 Form of settlement — Whether power over chattels imported — Land subject to power of appointment
By a settlement made by a father and his eldest son certain freehold hereditaments were appointed and conveyed to such uses and trusts and subject to such powers as the father and son should by deed appoint, and in default, and until, and subject to any such appointment to the use of trustees for a term of a thousand years, upon trust to raise certain annual sums and subject thereto to the use of the father for life, and after his death for his eldest son for life, with remainder to his first and other sons successively in tail male, with remainder to the use of the second son of the settlor for life, and then to his first and other sons successively in tail male; with remainders over. By the same indenture certain jewels were assigned to the trustees upon trust that they should allow the same to devolve and be enjoyed, so far as the law would permit, as heirlooms along with the settled hereditaments. By a subsequent indenture made in purported exercise of the power conferred on them the father and eldest son appointed that the trustees of the settlement should stand possessed of the jewels in trust for the father absolutely. Upon a summons by the father and son asking for a declaration that under the trust in the settlement they had

a joint general power of appointment over the jewels corresponding to but exercisable independently of their joint general power of appointment by deed of the settled hereditaments: *Held* the court was bound to import into the trusts of the chattels a general power of appointment corresponding with the first limitation of the realty as the only means of securing unity of ownership in the event of the realty being withdrawn from the settlement, and the settlors desiring to maintain unity of ownership.
Re Penton's Settlement Trusts, Penton v Langley
[1924] 2 Ch 192; [1924] All ER 598; 93 LJ Ch 494; 131 LT 627; 68 Sol Jo 647

2968 What amounts to settlement — Delivery of chattels — With letter of directions
A casket containing diamonds was sent to plaintiff's father, accompanied by a letter to the effect that the diamonds were to be considered as heirlooms in the family, and were to be left to the eldest son and heir, after the death of his mother as long as the family should continue. On the death of plaintiff's mother, who survived her husband, one of the executors, the other having renounced, refused to deliver up the diamonds to plaintiff, the heir, and raised the question as to their forming part of the assets of the mother: *Held* the diamonds formed no part of the assets of the mother, but belonged to the family as heirlooms.
Seale v Hayne (1863) 3 New Rep 189; 9 LT 570; 9 Jur NS 1338; 12 WR 239

2969 Vesting of chattels — Pictures
In general, where chattels have been settled to devolve with realty held under a strict settlement the chattels vest absolutely in the holder of the first vested estate of inheritance at birth even though he is only entitled in remainder, and even if he predeceases the holder of any prior interest, unless there are "reasonably clear and certain words to" indicate that he is not to take unless he comes into actual possession of the land free from any prior interest. The mere use of the expression "entitled in possession" is insufficient for that purpose, although, in contrast, the words "entitled to the actual possession" are sufficient to exclude a tenant in tail in remainder. Although there is a clear distinction in meaning between "possession" and "actual possession" no such distinction can be drawn between "entitled" and "actually entitled".
Re Morrison's Settlmt, Gatty v Dent-Brocklehurst
[1974] Ch 326; [1973] 3 All ER 1094; [1973] 3 WLR 695; 117 Sol Jo 796

2970 Settlement of secret remedy — Order for account
The sole possessor of a recipe for making a medicine assigned it, on the marriage of his daughter, to trustees, in trust for her and her husband for their lives; and directed that after their decease it should be sold for the benefit of their children. The mother destroyed the recipe and verbally communicated the contents to her eldest son for the benefit of his brothers and sisters. Upon a bill filed against him by some of the younger children, he was declared to hold the secret upon the trusts of the settlement and was decreed to account for the profits made by him by the sale of the medicine after his mother's death, and as a sale was impracticable, an issue was directed to ascertain the value of the secret.
Green v Folgham (1823) 1 Sim&St 398; 57 ER 159; sub nom
Green v Church (1823) 1 LJOS Ch 203

ANNOTATION **Consd** Morison v Moat (1851) 9 Hare 241

ii DEVOLUTION OF PERSONALTY SETTLED BEFORE 1926

LAW See Halsbury's Laws (4th edn) vol 42 para 943

CROSS REFERENCE See WILLS vol 51 (reissue) no 10861 (gift by reference to real estate)

2971 Postponement of vesting — "As far as the rules of law or equity will permit"
A bequest or settlement of chattels upon the same limitations as real estate, whether immediate or by way of trust executed, vests them absolutely in the first tenant in tail at birth, and this whether the limitations of the chattels be expressed in extenso or created by reference to the limitations of the realty; and such reference may be effectually made either by declaring that the chattels are to go upon the limitations of the realty or by saying that they are to be treated as heirlooms.

The addition of the words "as far as the rules of law or equity will permit" and the circumstance that the legal interest is left in executors, will not prevail to alter the general rule or make the trusts executory.

Semble: where the trusts of the chattels are executory as in the case of covenants to settle, particular restrictions, as to the attainment of twenty-one or otherwise, may be implied for the purpose of keeping the realty and personalty together. Doubtful words tending to restrict the interest of the chattels to those who come into possession of the realty, will not overrule the operation of the general canons of construction, nor suspend the interest until possession of the realty is acquired. But clear words imposing such a restriction will overrule the ordinary construction of a bequest or settlement of heirlooms.

The rule is that which was established in *Foley v Burnell* (no 2978 post), and is favourable to the contention of those who insist that the chattels rest in

the first tenant in tail. But the full extent of that authority is no more than this, that doubtful words tending to restrict the interest in the chattels to those who come into possession of the real estate, will not overrule the operation of the general canons of construction, or have the effect of suspending the interest until the time when possession of the realty is obtained (*Page Wood V-C*).

Scarsdale (Lord) v Curzon (1860) 1 John&H 40; 29 LJ Ch 249; 3 LT 29; 6 Jur NS 209; 70 ER 653

ANNOTATIONS **Consd** Hogg v Jones (1863) 32 Beav 45; Re Johnson's Trusts (1866) LR 2 Eq 716 **Apld** Re Angerstein, Angerstein v Angerstein [1895] 2 Ch 883; Re Fothergill's Estate, Price-Fothergill v Price [1903] 1 Ch 149 **Consd** Re Chesham's Settlmt, Valentia v Chesham [1909] 2 Ch 329 **Apprvd** Portman v Portman [1922] 2 AC 473 **Consd** Re Coote, Cavers & Evans v Kaye [1940] Ch 549

2972 Postponement of vesting — Direction must be certain

Scarsdale (Lord) v Curzon no 2971 ante

2973 Postponement of vesting — Tenant in tail by purchase under twenty-one

By a settlement of real estates made in 1877, plate, pictures, and chattels were assigned to trustees "upon trust to permit the same to be used, held, and enjoyed with the mansion house aforesaid by the person who for the time being shall be entitled to the said mansion house under the limitations thereof herein contained," yet so that for the effect of transmission they should not vest absolutely in any person thereby made tenant in tail male by purchase who should not attain the age of twenty-one years. The eldest son attained twenty-one years but died in the lifetime of the tenant for life. On the death of the tenant for life in 1907, the second son, an infant, claimed to be entitled to these heirlooms as tenant in tail male in possession: *Held* as a question of construction, there was sufficient indication of intention on the part of the settlor these heirlooms should go with the mansion house and vest only in a tenant in tail male in possession, and consequently, they vested in the second son, though liable to be divested in the event of his dying under twenty-one.

Re Chesham's (Lord) Settlement, Valentia (Viscount) v Chesham (Lady) [1909] 2 Ch 329; 78 LJ Ch 692; 101 LT 9; 25 TLR 657; 53 Sol Jo 197, CA

ANNOTATIONS **Distd** Re Parker, Parker v Parkin [1910] 1 Ch 581; Re Beresford Hope, Aldenham v Beresford-Hope [1917] 1 Ch 287 **Consd** Re Fowler, Fowler v Fowler [1917] 2 Ch 307 **Distd** Re Lewis, Busk v Lewis [1918] 2 Ch 308; Portman v Portman [1922] 2 AC 473 **Consd** Re Coote, Cavers & Evans v Kaye [1940] Ch 549

2974 Heirlooms to be enjoyed by person "actually entitled" — Whether actual possession of mansion house necessary

A settlement by will of a mansion house and of heirlooms to be held and enjoyed by the person for the time being "actually entitled" under the settlement to the mansion house provided that the heirlooms should not vest absolutely in any person thereby made tenant in tail by purchase of the mansion house unless attaining the age of twenty-one years or, if dying under that age, leaving lawful issue living. The first tenant in tail by purchase, at the age of twenty-one years and without having been married, in 1918 predeceased an uncle and his own father, both of whom had prior life interests. The uncle died in 1925 and the father in 1938. On a summons to determine (*inter alia*) whether the heirlooms were held on trust for his personal representatives: *Held* he was entitled to the heirlooms, as he was the first tenant in tail by purchase and attained the age of twenty-one years, and as it was not clear from the use of the words "actually entitled" that the testator intended to make the ownership of the heirlooms dependent on the tenant in tail coming into actual possession of the mansion house. That followed from the rule, well settled by the date of *Foley v Burnell* (no 2978 post); re-stated by *Page Wood V-C*, in *Lord Scarsdale v Curzon* (no 2971 ante); and stated again in *re Parker* (WILLS vol 51 (reissue) no 10891) by *Parker J*, in terms later approved by the House of Lords in *Portman v Portman* (WILLS vol 51 (reissue) no 10895) as being that, where chattels are simply directed to pass as heirlooms with real estate, the first person who under the limitations of the settlement becomes entitled to the real estate for an estate of inheritance, whether in possession or in remainder, becomes absolutely entitled to the chattels, subject, if his estate is in remainder, to all prior to limited interests, and that words intended to defeat the interest of a tenant in tail who does not come into actual possession of the property must be reasonably clear and certain.

Re Coote, Cavers & Evans v Kaye [1940] Ch 549; [1940] 2 All ER 363; 109 LJ Ch 209; 163 LT 390; 56 TLR 555; 84 Sol Jo 288

2975 Whether executory trust of personalty created — Limitations of settled land — Direction to "release and convey"

(1) A settlement, on marriage, of real estate upon trust for the intended wife for life, remainder to the husband for life, and after the death of the survivor, "in trust for and to be released and conveyed unto" the children, as the parents or the survivor should appoint; in default, "in trust for and to be released and conveyed unto" the children as tenants in common in tail; and in default of issue, if the wife

should survive the husband, "in trust for and to be released and conveyed unto" the wife, "her heirs and assigns for ever." By the same deed, personal property was assigned to the same trustees, upon trust to pay the income and principal "to such person and persons, for such uses, ends, intents and purposes, and in such manner and form, and subject to the same powers, provisoes, contingencies, declarations and agreements as were thereinbefore expressed concerning the payment by the trustees of the rents and profits of the said real estate thereby conveyed, and concerning their release and conveyance of the same, or as near thereto as circumstances and the nature of the case would admit": *Held* the trust of the personalty was not rendered executory by reference to the direction to release and convey the real estate such direction being merely superadded to a distinct declaration of trust of such real estate.

(2) This construction was not altered by a proviso immediately following the limitation of the personal estate, that the ultimate limitation in favour of the heirs of the wife should, with respect to the personal estate, be construed to be for her next of kin; the meaning of such proviso being only that if, by failure of the preceding limitations, the real estate should at any time become vested in possession in the heirs of the wife, the personalty, which was settled upon corresponding trusts, should belong to her next of kin. There was only one child of the marriage, who died an infant in the lifetime of his father. On the subsequent death of the father: *Held* such child took an absolute interest in the personalty, subject to open and let in other children, if any.

Doncaster v Doncaster (1856) 3 K&J 26; 2 Jur NS 1066; 69 ER 1007

2976 Actual possession — Meaning

Under the P settlement the P estates stood limited to B for life, remainder to his first and other sons successively in tail male, remainder to P for life, remainder to his first and other sons successively in tail male, with remainders over. During the life of B, P executed a marriage settlement which provided that in case P should become entitled to the actual possession or the actual receipt of the rents and profits of the P estates under the limitations of the P settlement it should be lawful for him to revoke certain trusts declared by his marriage settlement. P subsequently assigned his life interest in the P estates to B. On the death of B without issue his executors and trustees went into possession of the P estates as assignees of the life estate of P. After the death of B, P by a deed poll purported to exercise his power of revoking the trusts of his marriage settlement: *Held* notwithstanding the assignment by P, of his life estate to B, P on the death of B became entitled to "the actual possession" of the P estates "under the limitations of" the P settlement, and his power of revocation had consequently arisen and was effectually exercised.

Re Petre's Settlement Trusts, Leigh v Petre [1910] 1 Ch 290; 79 LJ Ch 145; 101 LT 847; 54 Sol Jo 199

ANNOTATION **Consd** Re Duncombe's Will Trusts, Wrixon-Becher v Faversham (Earl) (1932) 146 LT 412

iii DEVOLUTION OF PERSONALTY SETTLED AFTER 1925

LAW See Halsbury's Laws (4th edn) vol 42 para 944

2977 Interest in tail — Intermediate income — Whether accumulated

By a deed of appointment and settlement dated 21 May 1949, personal property called the baronetcy fund was settled "(i) Upon trust for [FPIC] (the grandson of [Sir KIC] and being the next in line of succession to the baronetcy of [C]) during his life if and when he shall attain the age of twenty-one years and so that this trust shall be deemed for the purposes of Trustee Act 1925 (c 19) s 31, to carry the intermediate income of the baronetcy fund and accordingly the provisions of that section shall apply as regards the presumptive interest of the said [FPIC] in the baronetcy fund and with remainder (ii) Upon trust for the first and other sons of the said [FPIC] successively according to seniority in tail male with remainder (iii) Upon trust for the second third and other subsequently born younger sons of [Sir KIC] successively according to seniority in tail male with remainder (iv) Upon trust for [CJC] . . . during his life if and when he shall attain the age of twenty-one years and so that this trust shall be deemed for the purposes of Trustee Act 1925 (c 19) s 31, to carry the intermediate income of the baronetcy fund and accordingly the provisions of that section shall apply as regards the presumptive interest of the said [CJC] in the baronetcy fund . . ." In 1953 FPIC died leaving no issue. At that date, Sir KIC was living but his only son (the father of FPIC) was dead. CJC was living and of full age. On the question who pending the birth of sons of Sir KIC was entitled to the income of the baronetcy fund: *Held* (1) the income was not to be accumulated because by virtue of Law of Property Act 1925 (c 20) s 130(1), the creation of interests in tail in personalty was to have "like results" as the creation by deed before 1926 of a similar estate tail in freehold land, one result of which was that intermediate income, pending the birth of a person who, on being born, would be entitled in possession, would not be accumulated; (2) on the true construction of the deed CJC was entitled to the intermediate income during his life because the terms of the trust

stated in paragraph (iv) above were apt to refer back to the death of FPIC without issue and to carry the income to CJC subject to the divesting of his interest therein on the birth of a son to Sir KIC.
Re Crossley's Settlement Trusts, Chivers v Crossley [1955] Ch 627; [1955] 2 All ER 801; 99 Sol Jo 509

iv POWERS AND DUTIES IN RESPECT OF SETTLED CHATTELS

LAW See Halsbury's Laws (4th edn) vol 42 para 945 et seq

CROSS REFERENCE See no 2490 et seq ante (power to sell heirlooms)

2978 Whether tenant for life must give security — Sufficiency of inventory — Unless goods in danger
The cases as to tenant for life giving security for the goods have been overruled and the court now demands only an inventory, which is more equal justice; as there ought to be danger in order to give security (*Lord Thurlow C*).
Foley v Burnell (1783) 1 Bro CC 274; 28 ER 1125, LC; affd (1785) 4 Bro Parl Cas 319; 1 Bro CC 274; Rom 1; [1558–1774] All ER Rep 123, HL

ANNOTATIONS **Follld** Conduitt v Soane (1844) 1 Coll 285; Temple v Thring (1887) 56 LJ Ch 767

2979 Whether tenant for life must give security — Sufficiency of inventory — Unless goods in danger
Conduitt v Soane (1844) 1 Coll 285; 13 LJ Ch 390; 63 ER 421

ANNOTATION **Consd** Temple v Thring (1887) 56 LJ Ch 767

2980 Whether tenant for life must give security — Sufficiency of inventory — Unless goods in danger
A tenant for life of heirlooms will not be required to give security for the heirlooms but only to sign an inventory unless there is reason to suppose that the heirlooms will be in danger in his possession.
Temple v Thring (1887) 56 LJ Ch 767; 56 LT 283

2981 Whether heirlooms settled to devolve with land "insurable property"
Chattels settled as heirlooms are "insurable property" within Trustee Act 1893 (c 53) s 18, and small variations in detail between the trusts of these "heirlooms" and of other property comprised in the same settlement where such trusts are substantially the same will not prevent this other property being held upon the "same trusts" as the heirlooms within Trustee Act 1893 (c 53) s 18(2). Consequently, where certain chattels were by a settlement vested in trustees upon trust to be enjoyed by the person for the time being entitled to the freehold of real estate settled by the same settlements, and under the settlement other personal property was settled upon which it would have been held if it had been proceeds of sale of the settled realty made under Settled Land Act 1882 (c 38) (repealed), the trustees were held entitled to insure the "heirlooms" against fire, and to pay the premiums out of the income of the other settled personalty, although no power to insure was contained in the settlement.
Re Egmont's (Earl) Trusts, Lefroy v Egmont (Earl) [1908] 1 Ch 821; 77 LJ Ch 479; 98 LT 826; 24 TLR 783

5 CAPITAL AND INCOME; WASTE

1 Income and capital receipts

i IN GENERAL

1 Rights of tenant for life and remainderman

LAW See Halsbury's Laws (4th edn) vol 42 para 949

2982 Sale under special statute — Bonus paid to vendor — Irish Land Purchase Acts (repealed)
Where trustees of lands, held after a life tenancy for charitable purposes, sold the lands under above Acts 1903 and 1904 (repealed), the percentage bonus received by them under s 48 (repealed) of the Act of 1903 was to be applied upon the trusts of the settlement but was capital, not income, and was to be paid over as capital to the official trustee with the rest of the purchase-money.
Re Thorngate's Settlement, Churcher v A-G (1915) 84 LJ Ch 561; 113 LT 483

2983 Loan of securities to Treasury — Bonus paid by Treasury
Trustees deposited trust securities with the Treasury by way of loan for a term of years under a scheme of the Treasury, known as Scheme B, which provided that while the securities were on deposit with the Treasury the lenders would receive from the Treasury all interest and dividends paid in respect of them and also, by way of consideration for the loan, a payment at the rate of one-half of 1 per cent per

annum calculated on the face value of the securities; that at the end of the period of loan the Treasury would either return to the lender the securities or, at their option, pay to him the deposit value, as defined by the scheme, of the securities with an addition of 5 per cent on that value; and that the interest and dividends on all deposited securities, together with the additional payment at the rate of one-half of 1 per cent per annum, would be paid to the holder for the time being on the Treasury Register, and, for convenience of payment, in cases where interest or dividends were payable half-yearly, a full half-year's additional payment, namely, 1/4 per cent, would be added to the first dividend payment, and on the termination of the loan the amount due from the actual date of deposit to the date of return would be calculated, and any overpayment or underpayment would be adjusted. Questions having arisen whether the one-half of 1 per cent per annum paid in consideration for the loan and the additional 5 per cent, on the deposit value of the securities at the termination of the loan were capital or income of the trust estate, and how the full half-year's additional 1/4 per cent added to the first dividend payment was to be dealt with on the death of a tenant for life: *Held* (1) the one-half of 1 per cent per annum was to be treated as income and the 5 per cent was to be treated as capital of the trust estate; (2) the trustees ought to deduct from the first full half-year's payment, in advance, of the additional interest at the rate of 1/2 per cent per annum and to retain for the purpose of ultimate adjustment, if necessary, so much of such payment as exceeds the amount of such interest at the rate aforesaid for the period between the date of the deposit and the date at which such first payment may be made.

Re Oppenheim, Oppenheim v Oppenheim [1917] 1 Ch 274; 86 LJ Ch 193; 116 LT 7; 33 TLR 119

2984 Abortive sale of land — Forfeited deposit

A forfeited deposit upon an abortive sale of a mansion house and grounds by the tenant for life of a settled estate constituted capital money within Settled Land Act 1882 (c 38) s 21 (repealed), and was applicable as such and not to any other purposes.

Re Foster's Settled Estates [1922] 1 Ch 348; 91 LJ Ch 365; 126 LT 689; 66 Sol Jo 299

2985 Repayment of income tax

Testator directed that his residuary estate should be held in trust for such of his sons as should attain the age of twenty-one years and such of his daughters as should attain that age or marry. He further directed his trustees to hold the share of a daughter in trust to pay her the income thereof during her life, and after her death in trust for such persons as she should by will appoint, and in default of appointment in trust for all her children in equal shares, and in default of any issue of a daughter in trust for his other sons or daughters as part of their shares. Testator died in 1906, leaving one son and one daughter. The daughter attained the age of twenty-one years in 1926, and married in 1927. There was issue of that marriage one son. In 1927 the daughter claimed under Income Tax Act 1918 (c 40) s 25 (repealed) repayment of moneys paid or deducted on account of tax in respect of the income of her share accumulated under the will during her minority. In 1928 the Board of Inland Revenue admitted her claim in this respect to the amount of £7,770 19*s* 4*d*, and that amount had been paid to her. A question was then raised whether that sum should be treated as an accretion to the capital of the daughter's share, or whether she was entitled to it absolutely: *Held* the daughter was entitled absolutely to the sum of £7,770 19*s* 4*d*.

Re Fulford, Fulford v Hyslop [1930] 1 Ch 71; 99 LJ Ch 80; 142 LT 185

2986 "Proceeds of sale" — Compensation under Town and Country Planning Act 1954

Lands were devised on trust for sale and the proceeds of sale were settled on trust for G for life with remainders to his sons, who were infants, successively. Special payments under Pt I of Town and Country Planning Act 1954, for depreciation of land values, were received in respect of some of the lands, and compensation would be receivable under Pt II and Pt V of the Act for refusal or revocation or modification of planning permission in relation to other parts of the lands. The court having held that the sums so paid or receivable were to be treated as capital of the testator's estate, the question arose whether, under s 66 of the 1954 Act and reg 10 of the Town & Country Planning (Mortgages, Rentcharges, etc) Regulations 1955, the sums were "proceeds of sale arising under the trust for sale" within Law of Property Act 1925 s 28, with the consequence that the provisions of that section would apply to the sums: *Held* the sums were not "proceeds of sale arising under the trust for sale," within Law of Property Act 1925 s 28(1) because neither s 66(1) of the 1954 Act, nor reg 10 of the Regulations of 1955 stamped the sums with that character, and it was not necessary to imply in s 66(1) or reg 10 words having that consequence.

Re Meux's Trusts, Gilmour v Gilmour [1958] Ch 154; [1957] 2 All ER 630; 101 Sol Jo 611; 55 LGR 456

2987 Fines payable on enfranchisement

Copyhold lands taken under the Lands Clauses Consolidation Act 1845 (c 18), were enfranchised under Lands Clause Consolidation Act 1845 (c 18) s 96, and no fine was payable to the lord under Copyhold

Act 1858 (c 94) s 6 (repealed), as a condition of compulsory enfranchisement. Therefore, where the lord of the manor was tenant for life: *Held* he was not entitled to any part of the money paid into court by a railway company as compensation for the enfranchisement of copyhold land taken by them.
Re Wilson's Estate (1863) 3 De GJ&Sm 410; 1 New Rep 301; 32 LJ Ch 191; 7 LT 722; 9 Jur NS 1043; 11 WR 295; 46 ER 693, LJJ

2988 Compensation — Freehold licensed premises — Extinction of licence
Where licensed premises formed part of a settled estate, and the licence was extinguished under the provisions of Licensing Act 1904 (c 23) (repealed), the proportion of the compensation allocated to the freeholder of the premises represented capital money of the estate.
Re Bladon, Dando v Porter [1912] 1 Ch 45; 81 LJ Ch 117; 105 LT 729; 28 TLR 57, CA

ANNOTATION **Distd** Re Williams' Settlmt, Williams Wynn v Williams [1922] 2 Ch 750

2989 Compensation — Under Indemnity Act 1920 (c 48) (repealed) — Damage done by military authorities
Where a legal tenant for life of settled land without impeachment of waste recovered compensation under above Act (repealed), for damages done to a park forming part of the settled land by military authorities during the war in exercise of the royal prerogative, the compensation money was a casual profit and he might retain it for his own use.
Re Williams' Settlement, Williams Wynn v Williams [1922] 2 Ch 750; 92 LJ Ch 101; 128 LT 110; 38 TLR 789; 66 Sol Jo 648

ANNOTATIONS **Consd** Re Macnamara, Macnamara v Macnamara [1936] 1 All ER 602 **Apld** Re Lindsay's Settlement (no l) [1941] Ch 170; Re Pomfret's Settlement, Guest v Pomfret [1951] 2 All ER 951

2990 Compensation — For damage occurring during requisition
Compensation payable under Compensation (Defence) Act 1939 (c 75) s 2(1)(*b*), on the derequisitioning of leasehold property held on trust for sale, should be treated as capital and not income. It is in fact compensation for damage to the inheritance done by the occupation of the Crown, and can be properly described as dilapidations.
Re Thompson, Westminster Bank Ltd v Thompson [1949] Ch 1; [1948] 2 All ER 223; [1949] LJR 511; 92 Sol Jo 425

2991 Compensation — Patronage of benefice — Extinction
The sum paid under Welsh Church Act 1914 (c 91) s 16 by way of compensation for the extinction of the right of patronage of a benefice subject to a settlement does not belong to the tenant for life, as lay patron, under the settlement, but is payable to the trustees of the settlement as capital.
Re Penrhyn's (Lord) Settlement Trusts, Penrhyn v Robarts [1923] 1 Ch 143; 92 LJ Ch 145; 128 LT 442; 39 TLR 116; 67 Sol Jo 169

2992 Compensation — Damage to settled property in Ireland
A tenant for life unimpeachable for waste of an estate in Ireland and subject to Irish law was awarded £4,400 compensation for damage to the settled property. The compensation, which was awarded by a commission of inquiry set up by agreement between the Government of the Irish Free State and the British Government, was in the nature of a gratuity and was not by law recoverable by the owners of the property injured. The tenant for life in fact only received £2,600, the balance being retained by the Irish Free State Government in respect of an unascertained liability of the tenant for life for Irish income tax: *Held* by Irish law the sum awarded by way of compensation was capital money and was held by the tenant for life as a trustee for the trustees of the settled estate; in the circumstances the liability of the tenant for life was limited to £2,000, the only sum received in respect of the award.
Re Macnamara, Macnamara v Macnamara [1936] 1 All ER 602

2993 Compensation — Injury to land by improvements by river conservators
The Thames Conservators in 1933 were authorised by a private Act of Parliament to undertake works for the improvement of the navigation of the river, involving new cuts which might damage private property, and the Act contained special provisions for the protection of a settled estate and a ferry belonging to it. The Act incorporated the Lands Clauses Acts and provided that any claims for compensation should be referred to arbitration, unless otherwise agreed in writing between the estate owners and the conservators. A claim made by the tenant for life of the estate for compensation for damage was referred to arbitration, but the arbitration was not proceeded with, and the parties in November 1939 entered into an agreement in writing under which the conservators agreed to pay and the estate owners and the lessee of the ferry to accept a lump sum in settlement, the conservators being released from all further liability. On a summons taken out by the trustees of the settlement to determine the question whether the compensation was capital money or belonged to the tenant for life: *Held* the agreement under which the money was paid excluded the operation of the Lands Clauses Acts,

and brought the case under the general law. The money represented damages for acts done to the property, and was, therefore, not capital money, but belonged to the tenant for life as a casual profit.

Re Lindsay's Settlement (No 1) [1941] Ch 170; [1941] 1 All ER 104; 110 LJ Ch 39; 164 LT 329; 57 TLR 231; 85 Sol Jo 21

2994 Compensation — War damage

Testator by his will dated 25 May 1935, bequeathed leasehold properties on trust, until the death of the survivor of his children then living, to distribute the income as therein mentioned and the surplus annual income among his children for the time being living and issue *per stirpes* of any deceased child, and on the death of the said survivor to sell the properties and hold the proceeds on trust for the issue of certain of his children *per stirpes*. Testator died on 22 September 1941, leaving four children and certain remoter issue him surviving. Both before and after his death the leasehold properties suffered war damage. Value payments were made to the executors by War Damage Commission under the War Damage Act 1943 (c 21): *Held* so far as possible the value payments should be treated in the same way as the leasehold properties from which they were derived, and accordingly should be invested (subject to recoupment to capital of the war damage contributions) in the purchase of annuities for periods corresponding to the periods of the leases unexpired at the date of the damages. The annuities so purchased should be applied as though they represented the rents, profits and income arising from the respective leasehold properties.

Re Scholfield's Will's Trusts, Scholfield v Scholfield [1949] Ch 341; [1949] 1 All ER 490; [1949] LJR 757; 65 TLR 156; 93 Sol Jo 149

2995 Compensation — Damage done during requisition

Compensation paid under Compensation (Defence) Act 1939 (c 75) s 2(1)(*b*) in respect of damage done to settled property during occupation by military authorities is a casual profit retainable by the tenant for life. Settled Land Act 1925 (c 18) s 81, which provides that money "which ought . . . to be . . . treated as capital, shall . . . be deemed to be . . . capital money . . ." does not give the court a discretion to decide what in fact is capital money.

Re Pomfret's Settlement, Guest v Pomfret [1952] Ch 48; [1951] 2 All ER 951; [1951] 2 TLR 990

2996 Assignment or mortgages of life estate

Vincent v Ennys (1730) 2 Eq Cas Abr 665; 22 ER 559

2997 Assignment or mortgages of life estate

If a tenant for life with power to grant leases in possession for twenty-one years at the best rent convey his life estate to trustees to pay an annuity for his life, and the surplus to himself, the power is not thereby extinguished, but he may still grant a lease agreeable to the terms thereof.

Ren v Bulkeley (1779) 1 Dong KB 292; 99 ER 189

2998 Assignment or mortgages of life estate — Reservation of power by tenant for life — With consent of grantee

Long v Rankin (1822) Sugden on Powers 8th edn 895, HL

ANNOTATIONS **Apld** Walmesley v Butterworth (1835) 4 LJ Ch 253; Alexander v Mills (1870) 6 Ch App 124

2999 Assignment or mortgages of life estate — Bankruptcy of tenant for life

Plaintiff executed a post-nuptial settlement whereby he conveyed certain freehold hereditaments, the legal estate in which were outstanding to a trustee upon trust to pay the rents, issues, and profits to plaintiff's wife during her life, and after her death to plaintiff during his life, and after the death of the survivor for the benefit of their children. The settlement contained a power to plaintiff during his life, and after his death to the wife during her life, and after the death of the survivor to the trustee, to renew leases for lives, and take fines on renewals, but so that the usual rents were still reserved. Plaintiff subsequently assigned his interest under the settlement to B by way of mortgage. The trustee of the settlement disputed the right of plaintiff to take the fines for his own benefit, claiming them on behalf of the wife. Plaintiff accordingly filed a bill against the trustee, and B, praying that he might be declared entitled to take the fines on renewals of leases for his own benefit. After the filing of the bill plaintiff became bankrupt, and his assignee obtained a supplemental order to carry on the suit: *Held* (1) on the construction of the settlement plaintiff was entitled to take the fines on renewals for his own benefit, (2) inasmuch as the legal estate was outstanding and beyond plaintiff's control, and the trustee had interfered with his power of granting leases, he was entitled to bring a suit in equity for declaration of his right; (3) the power of granting renewed leases was not extinguished or suspended either by the assignment of plaintiff's interest by way of mortgage or by his bankruptcy.

Simpson v Bathurst, Shepherd v Bathurst (1869) 5 Ch App 193; 23 LT 29; 18 WR 772, LC

3000 Assignment of term to raise portion

An estate was settled on A for life, with power to charge it with an annuity for her husband, and portions for their younger children, and to grant leases. A granted the estate to trustees for 500 years, on trust, if she should so direct, to raise portions by mortgage or sale: *Held* the term, till called into operation, was

subservient to the leasing power, and was no answer to an ejectment by a lessee holding under a lease granted subsequently to the settlement.

Doe d Courtail v Thomas (1829) 9 B&C 288; 4 Man&Ry KB 218; 7 LJOSKB 214; 109 ER 107

Scottish, Irish and Commonwealth Cases

3001 How ascertained

A provision in a will giving the trustees thereunder absolute discretion to determine whether certain funds are capital or income or how they should be apportioned does not oust the jurisdiction of the court to make the proper determination where its aid is sought.

Re Bronson (1958) 14 DLR (2d) 51; [1958] OR 367; [1958] OWN 220 (CAN)

3002 Profits from business carried on by tenant for life

Wakefield v Wakefield (1900) 20 CLT 255; 32 OR 36; affd 2 OLR 33 (CAN)

3003 Royalties and profits from sale of literary works

In a question between liferenter and fiar: *Held* royalties and profits derived from sales, subsequent to testator's death of literary works, published by him during his lifetime, were part of the income of his estate, those from sales of works published by the trustees after his death were capital.

Davidson's Trustees v Ogilvie [1910] SC 294 (SCOT)

3004 Company dealing in lands of specific estate — Profits on sale

Re Vickers (1923) 54 OLR 352 (CAN)

3005 Profits from carrying on station

In carrying on a station property it is the duty of the trustees to hold the scale as evenly as possible between the life tenant and remaindermen consistently with prudent management, starting with the basic principle that the capital of the business is the capital which was embarked therein at the date of the testator's death, that any profit which that capital earns as the result of a strict method of accountancy belongs to the life tenant as soon as that profit is realised in cash, that that profit should be realised in cash so soon as it prudently can be realised, and that the life tenant is only entitled to such profits as is from time to time during the life tenancy realised in cash.

Re Porter, Porter v Porter (1931) 31 SRNSW 115; 48 NSWWN 17 (AUS)

3006 Profits from carrying on station

For the purpose of ascertaining the amount due to life tenants from income derived from the carrying on of a station for the purpose of the realisation of an estate, the whole period during which the station is carried on must be treated as one period. A book profit shown in an administrator's account for a part of such period is not income necessarily to be appropriated to a life tenant.

Union Trustee Co of Australia Ltd v Eckford (1931) 31 SRNSW 92; 48 NSWWN 40 (AUS)

3007 Reorganisation of Alberta debt

The amounts in columns 6 and 7 of the schedule of payments and exchanges on unmatured securities of the province of Alberta, which amounts are entitled "premium to *** 1 June 1945," and "premium *** after 1 June 1945," respectively, are income, not capital; and are therefore payable to persons who under the terms of a trust deed are entitled to the income from such securities.

Re Ramsey Trust Deeds [1946] 1 WWR 510 (CAN)

3008 Cash bonus — War Loan conversion

M was entitled to the income of a certain holding in British 5 per cent War Loan stock for her life. The stock was redeemable at any time between 1929 and 1947, and by the British Finance (no 2) Act 1931 (c 49), the British Treasury was empowered to convert the stock into stock bearing interest at $3^1/_2$ per cent *per annum*. Shareholders were entitled to have their holdings redeemed at par or to have them continued in the new stock, and if their applications for continuance were received before a specified date, cash bonuses were payable to them in respect of their holdings, s 15(2) of the Act provided that "as between persons having any beneficial interest in a holding, any case bonus payable in respect of the holding shall belong to the person entitled to the income of the holding on the day when the bonus is payable": *Held* the court would apply the provisions of the Act, and, therefore, M would be entitled to the cash bonus payable in respect of the holding.

Re Schopperle's Trusts [1932] IR 457 (IR)

2 Trust for sale

LAW See Halsbury's Laws (4th edn) vol 42 para 950

CROSS REFERENCE See EQUITY vol 20(3) (2nd reissue) no 1021 et seq (the doctrine of conversion)

3009 Investment of proceeds of sale — Purchase of lands — Income until investment

Testator devised real estates to trustees upon trust for A during his life, with remainder over; and he gave the residue of his personal estate to the same trustees, upon trust, with all convenient speed, to purchase lands to be conveyed to the same uses as the devised estates, and until the purchases be made, upon trust to lay out the money on securities, and pay the dividends to those, who, if lands had been bought, would have been entitled to the rents: *Held* the tenant for life is entitled to the dividends accruing upon the clear residue of the personal estate within the year after testator's death.

Angerstein v Martin (1823) Turn&R 232; 2 LJOS Ch 88; 37 ER 1087, LC

ANNOTATIONS **Consd** Hewitt v Morris (1824) Turn&R 241; Stair v MacGill (1827) 1 Bli NS 662; Douglas v Congreve (1836) 1 Keen 410; Taylor v Clark (1841) 1 Hare 161 **Apld** Macpherson v Macpherson (1852) 19 LTOS 221; Bulkeley v Stephens (1863) 3 New Rep 105 **Consd** Allhusen v Whittell (1867) LR 4 Eq 295

3010 Investment of proceeds of sale — Purchase of lands — Income until investment
Testator directed his residuary estate to be laid out in the purchase of land, as soon as a convenient purchase could be found, in the county of York, which, upon a fair letting, would produce a yearly rent equal to 3½ per cent upon the amount of the purchase-money, and, in the meantime, the interest of his residuary estate to be accumulated. The tenant for life will be entitled to the interest of the residuary estate, from the end of one year after testator's death, until it is laid out as directed.
Kilvington v Gray (1825) 2 Sim&St 396; 4 LJOS Ch 80; 57 ER 397

ANNOTATION **Consd** Clifton v Cockburn (1834) 3 My&K 76

3011 Investment of proceeds of sale — Purchase of lands — Income until investment
Testator after directing the payment of his debts, gave certain sums of his executors in trust for certain charities, and then after making a specific bequest, he gave all the residue of his real and personal estate to his executors in trust to invest all such moneys as should be uninvested at his death, and also all his mortgages, shares in the Liverpool Gas Light, and other companies, etc, that could be immediately sold without disadvantage, and otherwise as soon as may be in such manner, whether in the purchase of lands as they shall judge most advantageous, and convenient to the estate "I already possess", and he directed his executors to receive the interest, rents, and profits from all his real and personal, until converted into real, estate, and after deducting expenses to pay over the residue to P for life, and after her decease, etc. The pure personalty was not sufficient to pay all the legacies, and there was a delay of four or five years in converting the personalty: *Held* P the tenant for life, was entitled to the income of the residuary estate *in specie*, till conversion.
Sparling v Parker (1846) 9 Beav 524; 16 LJ Ch 57; 7 LTOS 465; 10 Jur 448; 50 ER 446

3012 Investment of proceeds of sale — Authorised securities — Income until investment — Whether income of unproductive property included
Devise and bequest of residuary real and personal estate to trustees, upon trust, with all convenient speed to sell the real estate, and such part of the personal estate as was in its nature saleable, but the mode and time of sale and of settling and adjusting accounts and of requiring payment of what should be due to testator to be left entirely to the discretion of the trustees, until such sale, and the final adjustment of his co-partnership accounts, the rents and income of the real and personal estate remaining unsold, and the interest on any debt or debts owing to testator, to be paid to the same persons and in the manner directed with respect to the income of the estate when invested. Testator gave the produce of his real and personal estate to his two daughters for their lives, with remainder over; and he recommended each of his two daughters to pay £25 a year out of her moiety of the income of his estate for the education and maintenance of his nephew, until the nephew attained twenty-one years: *Held* there being no improper delay in the conversion of the estate, the daughters of testator, as tenants for life, were entitled to the income actually produced by the residuary estate during the interval before the sale or realisation of the whole of such estate, and the investment thereof according to the directions in the will; but they were not entitled, during the interval, to any interest upon such parts of the residuary property, or on the value of such parts thereof as were unproductive.
Mackie v Mackie (1845) 5 Hare 70; 9 Jur 753; 67 ER 831

ANNOTATION **Apld** Rowlls v Bebb, Re Rowlls, Walters v Treasury Solicitor [1900] 2 Ch 107

3013 Sale postponed by court — Residue comprising life annuities — And policies securing capital value of annuities
Part of a residuary estate, settled on one for life, with remainder to her issue, consisted of life annuities and policies on the lives for securing the principal money. The court seeing it for the benefit of all parties, refrained from ordering a sale, but directed the policies to be kept up, so as to secure the principal, and that the surplus annuities should be paid to the tenant for life.
Glengall v Barnard (1842) 5 Beav 245; 49 ER 571; on appeal, sub nom
Thynne (Lady) v Glengall (Earl) (1848) 2 HL Cas 131

3014 Effect of Law of Property Act 1925 (c 20) — Leaseholds settled on trust for sale
Having regard to above Act s 28(2) and (5) and s 205(1), (9), the principle of *Howe v Dartmouth (Earl)*, *Howe v Aylesbury (Countess)* (no 3064 post) is no longer applicable to cases of leaseholds settled on trust for sale.
Re Brooker, Brooker v Brooker (1926) 70 Sol Jo 526

ANNOTATION **Folld** Re Berton, Vandyk v Berton [1939] Ch 200

3015 Effect of administration of Estates Act 1925 (c 23) — Power to postpone conversion
The expression "personal representatives" in above Act s 39 does not include trustees in the ordinary sense even when the personal representatives themselves become trustees upon an assent. The

introductory words of above Act s 39, conferring powers on personal representatives "during a minority of any beneficiary or the subsistence of any life interest, or until the period of distribution arrives" are explained by the fact that under the new law of intestate succession the existence of an infant beneficiary or of a beneficiary, such as a widow, entitled to a life interest only may postpone distribution, and that in these cases above Act s 33, places the personal representatives substantially in the position of trustees.

The provision in above Act s 39(1), (2), conferring on personal representatives "all the powers, discretions and duties conferred or imposed by law on trustees holding land upon an effectual trust for sale" does not operate referentially to make Law of Property Act 1925 (c 20) s 28(2), applicable to pure personalty.

Where under the will of testator unauthorised investments are retained under a power to postpone conversion, the rule laid down in *Howe v Dartmouth* (*Earl*), *Howe v Aylesbury* (*Countess*) (no 3064 post) still remains applicable in regard to the income payable to a tenant for life.

Re Trollope's Will Trusts, Public Trustee v Trollope [1927] 1 Ch 596; [1927] All ER 365; 96 LJ Ch 340; 137 LT 375; 71 Sol Jo 310

Scottish, Irish and Commonwealth Cases

3016 Absolute trust for sale — Part of the estate unproductive — Express direction as to income

A testator left his estate upon trust for sale with power to postpone conversion. Clause 11 of the will stated *inter alia*, that no property not producing income should be treated as producing income. The assets of the estate included some vacant land which had never produced income. The life tenant under the will contended that she was entitled to a notional income on the value of the land under the rule in *Re Earl of Chesterfield's Trusts*: *Held* the testator had excluded the application of the rule by the clear and unambiguous words in clause 11.

Re Canada Permanent Trust Co and McCregor (1980) 115 DLR (3d) 697 (CAN)

3 Income of unauthorised investments pending sale

LAW See Halsbury's Laws (4th edn) vol 42 para 951

CROSS REFERENCES See TRUSTS vol 48 (reissue) no 849 et seq (vesting property and unauthorised investments); WILLS vol 50 (reissue) no 76 et seq (rule in Howe v Earl of Dartmouth)

3017 Power to postpone conversion — Income to be applied in same manner as proceeds of conversion — Unauthorised and hazardous investments

Testator directed his trustees to get in and convert all his residue with all convenient speed, and invest in certain permanent securities, and pay the income to one for life, with remainder over; and then gave power to his trustees to suspend the conversion and sale as long as they should think proper, and directed that in case of any such suspension, the income of his estate in its actual investment should go as he had directed concerning the income of the estate got in and held in trust. The trustees had not up to the time of filing the bill, a period of more than two years, sold any part of testator's estate, which consisted in large part of leaseholds and other terminable securities: *Held* the tenant for life was entitled to the actual income produced, and not to the amount which the estate, if converted, would have produced, there being no suggestion of any fraudulent favour shown by the trustees to the tenant for life at the expense of the remainderman.

Morley v Mendham (1856) 2 Jur NS 998

3018 Power to postpone conversion — Income to be applied in same manner as proceeds of conversion — Unauthorised and hazardous investments

Waters v Waters (1875) 32 LT 306n

3019 Power to postpone conversion — Income to be applied in same manner as proceeds of conversion — Unauthorised and hazardous investments

Testator left his real and residuary personalty to his trustees and executors on trust to sell "if they should think proper," and invest the proceeds as directed, and hold the trust funds on trust for his wife for life, with remainder to his daughter; the income till conversion to be applied in the same manner as the income of the purchase-money. The trustees were authorised to postpone such sale for such period as they "in their free discretion should think fit."

Part of testator's estate consisted of shares in a bank of unlimited liability, and of foreign bonds.

Testator carried on the business of a chemist which business was, shortly after his death, purchased by one of his executors at a valuation, the judge held that the sale must be set aside, and the executor account for profits with just allowances, but no salary; and the tenant for life was only entitled to the income of the fund arising from the profits.

On appeal, by a compromise, the sale was confirmed, but the court intimated that in such a case if the sale were confirmed the executor would take the profits; but if it were set aside,

the tenant for life would be entitled to them as income.

Re Norrington, Brindley v Partridge (1879) 13 Ch D 654; 28 WR 711, CA

ANNOTATION **Consd** Re Crowther, Midgley v Crowther (1895) 64 LJ Ch 537

3020 Power to postpone conversion — No direction as to income — Unauthorised and hazardous investments

Testator gave the residue of his personal estate to trustees, directing them to convert it into money, and invest the proceeds in Government or real securities, of which they were to stand possessed, upon trust for A during her life, and, after her death, for B. The trustees permitted a share, which testator had in an Indian loan, bearing interest at 10 per cent, to remain for several years on that security, during which time they paid to A the interest at 10 per cent which it yielded annually; and the loan being afterwards paid off, they invested the money in the 3 per cents at a time when the funds were so low, that the amount of stock purchased was considerably greater, than if the conversion had taken place at the end of a year from testator's death: *Held* the tenant for life was not entitled to the actual interest, which the money yielded, while it remained on the Indian security, but only to the dividends of so much 3 per cent stock as would have been purchased with it at the end of a year from testator's death.

Dimes Scott (1828) 4 Russ 195; 38 ER 778, LC

ANNOTATIONS **Consd** Douglas v Congreve (1836) 1 Keen 410; Taylor v Clark (1841) 1 Hare 161; Sutherland v Cooke (1844) 1 Coll 498 **Folld** Morgan v Morgan (1851) 14 Beav 72 **Consd** Macpherson v Macpherson (1852) 19 LTOS 221 **Distd** Morley v Mendham (1856) 2 Jur NS 998 **Consd** Holgate v Jennings (1857) 24 Beav 623; Stroud v Gwyer (1860) 28 Beav 130; Yates v Yates (1860) 28 Beav 637; Scholefield v Redfern (1863) 32 LJ Ch 627 **Distd** Bulkeley v Stephens (1863) 3 New Rep 105 **Apld** Brown v Gellatly (1867) 2 Ch App 751 **Consd** Re Parry, Brown v Parry [1946] 2 All ER 412

3021 Power to postpone conversion — With consent of tenant for life

R by will gave all his residuary estate to the Public Trustee upon trust with the consent of his wife to sell and convert with power with the like consent to postpone sale and conversion for such time as he should think fit and to hold the proceeds upon trust with such consent as aforesaid to invest the same upon specified investments and to pay the income to his wife during her life. Testator's estate comprised investments not authorised by his will which produced a larger income than 4 per cent: *Held* as both conversion and postponement of conversion were subject to the wife's consent her position was the same as if conversion was postponed by the will until after her death and she was entitled to the income in specie.

Re Rogers, Public Trustee v Rogers [1915] 2 Ch 437; 84 LJ Ch 837; 113 LT 916; 60 Sol Jo 27

3022 Postponement without impropriety — Income until sale

Where by a will or settlement property is directed to be sold and converted and the proceeds held in trust for one for life and then for others, and, either in exercise of a power of postponement or without impropriety, the sale is postponed, the person entitled to the life interest in the proceeds is, as regards real estate, entitled to the rents and profits thereof until sale, and is consequently to be deemed to be the tenant for life thereof within Settled Land Act 1882 (c 38) s 63.

Re Searle, Searle v Baker [1900] 2 Ch 829; 69 LJ Ch 712; 83 LT 364; 49 WR 44; 44 Sol Jo 716

ANNOTATIONS **Folld** Re Darnley, Clifton v Darnley [1907] 1 Ch 159; Re Oliver, Wilson v Oliver [1908] 2 Ch 74 **Consd** Re Woodhouse, Public Trustee v Woodhouse [1941] Ch 332

3023 Power to retain investments — No direction as to income

Green v Britten (1863) 1 De GJ&Sm 649; 46 ER 257, LJJ; subsequent proceedings (1867) 16 LT 825

ANNOTATIONS **Distd** Brown v Gellatly (1867) 2 Ch App 751 **Consd** Cooper v Laroche (1869) 38 LJ Ch 591; Lambert v Lambert (1872) 27 LT 59 **Apld** Re Lambert, Lambert v Lambert (1892) 36 Sol Jo 327

3024 Power to retain investments — No direction as to income — Unauthorised investments — Not of wasting nature

Testator empowered his trustees at their discretion to continue all or any part of his personal estate in the state or investment in or upon which the same should be at his death, or otherwise to convert the same, and to invest the proceeds in the names of the trustees in certain specified securities. At the death of testator part of his personal estate consisted of securities not of a wasting nature and not specifically authorised. In an action for the administration of the estate the chief clerk found that some of these securities were proper to be continued, and that others were proper to be called in: *Held* the tenants for life under the will were entitled to receive in specie the income of those unauthorised securities which were retained, and which were not of a wasting nature.

Re Sheldon, Nixon v Sheldon (1888) 39 Ch D 50; 58 LJ Ch 25; 59 LT 133; 37 WR 26

ANNOTATIONS **Consd** Re Thomas, Wood v Thomas [1891] 3 Ch 482; Re Bates, Hodgson v Bates [1907] 1 Ch 22 **Folld** Re Wilson, Moore v Wilson [1907] 1 Ch 394

Consd Re Nicholson, Eade v Nicholson (1909) 78 LJ Ch 516

3025 Power to retain investments — No direction as to income — Unauthorised investments

Testator by will gave his residuary personal estate and effects to trustees, upon trust to convert the same and invest the proceeds of sale as therein mentioned, with power in their absolute discretion to retain any existing securities or property at the time of his death unconverted for such period as they should think fit; and declared that his trustees should stand possessed of the "stocks, funds, shares, and securities for the time being constituting or representing the residuary personal estate and effects hereinbefore bequeathed, and the income thereof," in trust to pay the income to certain tenants for life, with remainders over. At testator's death part of his personal estate consisted of American railroad bonds repayable at par at a fixed date, but bearing a high rate of interest, and now commanding a considerable premium in the market. These were not authorised investments by the investment clause, but had been retained unconverted by the trustees under the power to retain existing securities: *Held* the tenants for life were entitled to the net income of the unconverted property.

Re Thomas, Wood v Thomas [1891] 3 Ch 482; [1891–4] All ER 471; 60 LJ Ch 781; 65 LT 142; 40 WR 75

ANNOTATIONS **Consd** Hope v D'Hedouville [1893] 2 Ch 361; Re Chaytor, Chaytor v Horn [1905] 1 Ch 233 **Folld** Re Godfree, Godfree v Godfree [1914] 2 Ch 110 **Consd** Re Parry, Brown v Parry [1946] 2 All ER 412

3026 Power to retain investments — No direction as to income — Unauthorised investments

Re Lynch Blosse, Richards v Lynch Blosse (1899) 43 Sol Jo 297

ANNOTATION **Folld** Re Woods, Gabellini v Woods [1904] 2 Ch 4

3027 Power to retain investments — No direction as to income — Continuation of estate in business — With consent of tenant for life

Re Lambert, Lambert v Lambert (1892) 36 Sol Jo 327

3028 Unconverted reversionary interest — Not sold until falling into possession

Bequest of a residue, including a reversionary interest in stock expectant on lives, to trustees, upon trust to convert when they in their discretion should think fit; and to apply so much as they should think fit of the income in the maintenance of tenant for life during minority; and then to pay the whole income to him, with a gift over of the principal. The trustees, in the proper exercise of their discretion, did not sell the reversionary interest, which fell in nineteen years after testator's death, and fourteen years after the majority of the tenant for life: *Held* the rights of the tenant for life were not affected by the fact of no sale having been made; and he was entitled to the income on the value of the stock a year after testator's death, calculated on the actual duration and not on the then probability of the duration of the lives on which the reversion was expectant.

Wilkinson v Duncan (1857) 23 Beav 469; 26 LJ Ch 495; 29 LTOS 35; 3 Jur NS 530; 5 WR 398; 53 ER 184

ANNOTATIONS **Apld** Beavan v Beavan (1869) 24 Ch D 649n; Re Hollebone, Hollebone v Hollebone [1919] 2 Ch 93

3029 Unconverted reversionary interest — Not sold until falling into possession

Beavan v Beavan (1869) 24 Ch D 649n; 52 LJ Ch 961n; 49 LT 263n; 32 WR 363n

ANNOTATIONS **Folld** Re Chesterfield's Trusts (1883) 24 Ch D 643 **Apld** Re Hobson, Walker v Appach (1885) 55 LJ Ch 422; Re Hollebone, Hollebone v Hollebone [1919] 2 Ch 93

3030 Unconverted reversionary interest — Not sold until falling into possession

Where reversionary property is allowed to remain unsold until it falls into possession, the estate of a tenant for life of the property under a will who dies before it falls into possession is entitled to have paid to it, in respect of interest, out of the property, 4 per cent upon the value of the reversion, commencing at the end of a year from testator's death, and calculated upon the assumption that it was to fall in on the day when it actually did fall in.

Wright v Lamber (1877) 6 Ch D 649; 26 WR 206

3031 Trust for sale at life tenant's death

Testator having, a few days before the date of his will executed a deed of partnership, whereby certain "annual sums," "rents" and "royalties" were payable to him out of the partnership property, by his will gave all the residue of his real and personal estate to trustees upon trust to receive "the rents dividends interest and annual proceeds thereof," and pay the sums to his wife for life. After the wife's death the residuary estate was to be sold; and there was a subsequent proviso giving the trustees a discretionary power of conversion in her lifetime: *Held* the widow was entitled in specie to the annual income of testator's estate as it existed at the time of his death.

Greaves v Smith (1874) 29 LT 798; 22 WR 388

3032 Necessity for conversion into permanent securities — Settlement by deed

Husband and wife covenanted to vest in the trustees of their settlement, upon the trusts thereof, "all prop-

erty which should come to her absolutely, and not bound by any trust or provision, otherwise than for her absolute use": *Held* (1) property bequeathed to her "for her separate use absolutely" was bound by the covenant; (2) leaseholds and chattels bound by the covenant were to be enjoyed in specie and unconverted.

Milford v Peile (1854) 17 Beav 602; 2 WR 181; 51 ER 1169

3033 Necessity for conversion into permanent securities — Settlement by deed

A settlement contained the usual covenant by the husband and wife to assign after-acquired property of the wife to trustees with a proviso that it should be lawful for the trustees, at the request of the husband and wife during their joint lives, and of the survivor during his or her life, and afterwards at the discretion of the trustees, to sell and dispose of such property and invest the proceeds upon the trusts of the settlement. The wife afterwards became entitled to leaseholds and specific personal chattels: *Held* the trustees were not for the present to convert these things without the request in writing of the husband and wife.

I am not aware of any case in which the principle of *Howe v Dartmouth (Earl)*, *Howe v Ayleslury (Countess)* (no 3064 post) has been applied to a settlement which is a contract between the parties (*Kindersley V-C*).

Hope v Hope (1855) 1 Jur NS 770; 3 WR 617

ANNOTATION **Consd** Re Van Straubenzee, Boustead v Cooper [1901] 2 Ch 779

3034 Necessity for conversion into permanent securities — Settlement by deed

The rule in *Howe v Dartmouth (Earl)*, *Howe v Aylesbury (Countess)* (no 3064 post) and the corollary established in *Re Chesterfield's (Earl) Trust* (no 3063 post) respecting the apportionment between tenant for life and those absolutely entitled in remainder of a reversionary fund which falls into possession, has no application where the fund is subject to the trusts of a marriage settlement.

Re Van Straubenzee, Boustead v Cooper [1901] 2 Ch 779; 70 LJ Ch 825; 85 LT 541; 17 TLR 755; 45 Sol Jo 738

ANNOTATION **Consd** Re Woodhouse, Public Trustee v Woodhouse [1941] Ch 332

3035 Income exceeding income obtainable on authorised investments — Right of remainderman

Stroud v Gwyer no 3221 post

3036 Income exceeding income obtainable on authorised investments — Right of remainderman

A trustee who has paid the whole of the incomes arising from unauthorised investments of a trust fund to the tenant for life cannot, where no loss has resulted to the fund, be called upon to repay to the estate as part of the capital of the fund so much of the income as exceeded the amount which would have arisen if the fund had been property invested.

Re Appleby, Walker v Lever, Re Appleby, Walker v Nisbet (1902) 51 WR 153; on appeal [1903] 1 Ch 565, CA

ANNOTATION **Consd** Slade v Chaine [1908] 1 Ch 522

3037 Income exceeding income obtainable on authorised investments — Right of remainderman

The sole trustee of a marriage settlement realised a sum of Consols which had fallen into possession and formed part of the settled funds, and in breach of trust applied the proceeds in paying off a private debt which bore interest at 5 per cent. Subsequently he restored the capital in full to the trust estate, and it was assumed that he had paid interest thereon at the rate of 5 per cent to the tenant for life under the settlement, who made no claim against him: *Held* the persons entitled under the settlement to the fund in remainder were not entitled, as against the tenant for life, to attribute to capital the excess of interest over the amount which would have been produced if the fund had been invested in authorised securities.

Slade v Chaine [1908] 1 Ch 522; 77 LJ Ch 377; 98 LT 352; 52 Sol Jo 240, CA

3038 Income exceeding income obtainable on authorised investments — Right of remainderman

Where a trustee has invested a settled fund in unauthorised investments and the tenant for life has thereby received a larger income, but the capital is intact, the persons entitled in remainder cannot claim to recover from the tenant for life, the excess of income which has been paid to him. This rule applies to a case where the same person is trustee and tenant for life and has herself retained the excess of income.

Re Hoyles, Row v Jagg (No 2) [1912] 1 Ch 67; 81 LJ Ch 163; 105 LT 663; 56 Sol Jo 110

3039 Fund left in business without authority — Life tenant allowed 4 per cent on capital — Balance of profits capital

Plaintiff was tenant for life under the settlement executed on her marriage, part of the settled property consisting of a sum of £15,500. This sum was allowed to remain in the hands of plaintiff's father, who employed it in trade, he covenanting at his death

to pay it to the trustees. Upon the death of the father £10,000, part of the £15,500, was allowed to remain in the business, such investment being unauthorised by the settlement. Large profits accrued to the £10,000, some of which, with plaintiff's consent, had been paid to her husband: *Held* plaintiff was entitled in respect of income to 4 per cent on the original £10,000, and upon all accretions of profits retained and employed in the business, and the rest of the profits must be regarded as capital subject to the trusts of the settlement, and must be made good out of the husband's estate, so far as he had received any part thereof.

Re Hill, Hill v Hill (1881) 50 LJ Ch 551; 45 LT 126

ANNOTATION **Consd** Slade v Chaine [1908] 1 Ch 522

3040 Accumulation after expiration of period for conversion

Testator devised and bequeathed the residue of his property upon trust for conversion; but the trustees were empowered to postpone conversion for a period not exceeding twenty-one years. Until conversion and re-investment the income of unsold property was to be applied in paying debts and yearly charges, and the surplus accumulated in augmentation of capital. At the end of twenty-one years a portion of the estate which had, in accordance with a power in the will, been let on mining lease for forty years was still unconverted: *Held* the rents and royalties accrued since the expiration of the twenty-one years formed part of the capital of the residuary estate, and ought to be distributed accordingly, and until sale or conversion the tenants for life of settled shares were entitled as from such date to receive out of the accrued and accruing rents and royalties such an annual sum as, in the opinion of the court, would be a fair equivalent for the annual income which would have been received if the property had been sold at the end of the twenty-one years.

In this country in the case of income producing property directed by will to be converted, but retained for a time unconverted, for the benefit of the estate, it has been the practice of the court to put a value on the property and to allow the tenant for life out of the income actually produced a sum equal to 4 per cent on such value (*Lord Macnaghten*).

Wentworth v Wentworth [1900] AC 163; 69 LJPC 13; 81 LT 682; 16 TLR 81, PC

ANNOTATIONS **Expld** Re Woods, Gabellini v Woods [1904] 2 Ch 4 **Consd** Re Oliver, Wilson v Oliver [1908] 2 Ch 74; Re Beech, Saint v Beech [1920] 1 Ch 40

3041 Surplus of income of wasting property — Invested as capital — Right of tenant for life to interest

(1) Interest at 3 and not 4 per cent must at the present day be computed in applying the principle of *Brown v Gellalty* (TRUSTS vol 48 (reissue) no 876) whereby, when wasting securities, forming part of the residuary estate of testator given upon trust for conversion, are retained under a power to postpone conversion the tenant for life is entitled during the period of postponement to interest on the value of the securities.

(2) Where in such a case the interest at 3 per cent is paid out of the actual income of the wasting securities to the tenant for life, and the balance is invested as capital of the estate, the tenant for life is entitled to the income of the invested fund.

Re Woods, Gabellini v Woods [1904] 2 Ch 4; 73 LJ Ch 204; 90 LT 8; 48 Sol Jo 207

ANNOTATIONS As to (1) **Apld** Re Chaytor, Chaytor v Horn [1905] 1 Ch 233 **Distd** Re Beech, Saint v Beech [1920] 1 Ch 40 **Folld** Re Parry, Brown v Parry [1946] 2 All ER 412. As to (2) **Apld** Re Chaytor, Chaytor v Horn [1905] 1 Ch 233

3042 Interest until conversion — Whether interest equal to interest on authorised investments — On value of property — Value taken one year from testator's death

Dimes v Scott no 3021 ante

3043 Interest until conversion — Whether interest equal to interest on authorised investments — On value of property

Testator directed his real and personal estate to be converted, got in and invested in Government or real securities and the interest, dividends and annual produce to be paid to his wife for her life. The greater part of testator's property at his death consisted of capital in a partnership business abroad to be withdrawn by instalments in the course of three or five years at the discretion of his executors and bearing interest at 5 per cent in the meantime: *Held* the tenant for life would be entitled to the income actually produced by such of the property of testator, as was invested according to his will from the time of such investment; but she was not entitled during the first year after testator's death to a larger income, in respect of such part of testator's property as was not so invested, than his property would have produced if invested according to the will.

Taylor v Clark (1841) 1 Hare 161; 11 LJ Ch 189; 6 Jur 76; 66 ER 990

ANNOTATIONS **Apprvd** Macpherson v Macpherson (1852) 19 LTOS 221 **Consd** Re Parry, Brown v Parry [1946] 2 All ER 412

3044 Interest until conversion — Whether interest equal to interest on authorised investments — On value of property

Testator bequeathed all his money, securities for money, money in the funds, household furniture, cattle, and all other his personal estate and effects

unto two trustees, upon trust to pay his debts and legacies, and subject to the payment of a legacy, to stand possessed upon the trusts after mentioned. He then devised his freehold estates to trustees, upon trust to permit his wife to reside at his house, and to use the household furniture, plate, linen and china therein for her life, and to "pay the rents and profits of his real estate," and "the interest, dividends, and proceeds to arise from his money, and securities for money, money in the funds, and personal estate thereinbefore bequeathed" to her for life and after her decease, to sell his real estate, and divide and pay the purchase-moneys; "and pay, assign, or transfer his money and securities for money, money in the funds, and personal estate" unto his children. Testator possessed long annuities and leaseholds: *Held* (1) they ought to be converted unto 3 per cents, and the widow was merely entitled to the dividends thereon; (2) a tenant for life of a residue was entitled, during the first year, to the dividends on so much 3 per cents as would have been produced by the conversion of the property at the end of that year.

Morgan v Morgan (1851) 14 Beav 72; 51 ER 214

ANNOTATIONS **Distd** Wearing v Wearing (1856) 23 Beav 99 **Consd** Holgate v Jennings (1857) 24 Beav 623; Craig v Wheeler (1860) 29 LJ Ch 374 **Apld** Rowe v Rowe (1861) 29 Beav 276 **Consd** Thursby v Thursby (1875) LR 19 Eq 395; Re Pitcairn, Brandreth v Colvin [1896] 2 Ch 199; Re Parry, Brown v Parry [1946] 2 All ER 412

3045 Interest until conversion — Whether interest equal to interest on authorised investments — On value of property

Testator specifically bequeathed to trustees certain railway and other shares, upon trust to convert the same at their absolute discretion, and to pay the income arising from the proceeds to his daughter for life, with remainders over. Testator's property had become the subject of an administration suit, in which a decree had been made about two years previously. Some of the shares had not been converted, and the dividends thereon had, since testator's death, been paid to the tenant for life: *Held* the tenant for life was only entitled to the income that would have been derived from so much Consols as the moneys arising from the sale of the shares one year after testator's death would have purchased at that date, and she must account for what moneys she had received in excess of that sum.

Anderson v Read (1874) 22 WR 527

3046 Interest until conversion — Whether interest equal to interest on authorised investments — Value taken at testator's death

Hume v Richardson no 3382 post

3047 Four per cent on value — Value taken one year from testator's death

Where a will contains an implied but no specific direction for conversion of the property, and by an innocent mistake it has been left upon the original security and the income enjoyed by the tenant for life in specie, the court upon the mistake being rectified will, at its discretion, allow the tenant for life interest at the rate of a per cent *per annum* upon the value of the property as taken at the expiration of one year from testator's death.

Sutherland v Cooke (1845) 1 Coll 503; 5 LTOS 20; 9 Jur 224; 63 ER 519

3048 Four per cent on value — Value taken one year from testator's death

Trustees under a will had an option to invest testator's estate in 3 per cents or on real security, but neglected to do so, leaving the fund in some other state of investment. The trustees having this option to invest either in 3 per cents or on real security: *Held* the tenant for life was entitled to interest for one year after the death of testator at 4 per cent on the money the property would have produced if sold at the end of that year, until the produce was invested in the 3 per cents not exceeding the amount of interest actually received.

Robinson v Robinson (1851) 1 De GM&G 247; 21 LJ Ch 111; 18 LTOS 293; 16 Jur 255; 42 ER 547, LJJ

ANNOTATIONS **Consd** Re Campbell, Campbell v Campbell [1893] 3 Ch 468 **Dbtd** Nestle v National Westminster Bank plc [1994] 1 All ER 118

3049 Four per cent on value — Value taken one year from testator's death

Re Nash, Sweet v Nash (1894) 38 Sol Jo 478

3050 Four per cent on value — Value taken at testator's death

Part of testator's estate consisted of a contingent reversionary interest in £3,000 which was sold by the trustees seven years after testator's death: *Held* the reversion must be valued as at the time of testator's death, and interest on the valuation at 4 per cent from testator's death paid to the tenant for life.

Gibbs v Gibbs (1872) 26 LT 865

3051 Four per cent on value — Value taken at testator's death

As between tenant for life and remainderman interested under a will directing the conversion of residuary estate with a power of postponement the tenant for life will be entitled to interest at 4 per cent upon the capital value, ascertained at testator's death, of unauthorised income producing investments.

In my opinion, in view of the present financial position, it is time to revert to the old rule, and to hold that as between tenant for life and remain-

derman the tenant for life is entitled to 4 per cent interest (*Eve J*).
Re Beech, Saint v Beech [1920] 1 Ch 40; 89 LJ Ch 9; 122 LT 117; 63 Sol Jo 801

3052 Four per cent on value — Calculation on aggregate value of unauthorised securities
Re Owen, Slater v Owen no 3568 post

3053 Four per cent on value
Re Nicholson, Nicholson v Nicholson [1895] WN 106

3054 Four per cent on value
By a marriage settlement certain funds were settled upon trust to invest and pay the annual produce during the joint lives of the husband and wife as therein mentioned, and after the death of one of them to the survivor for life, and after the death of the survivor to distribute among the children of the marriage as the husband and wife should jointly appoint, and in default thereof as the survivor should by deed or will appoint. The husband died without exercising the joint power of appointment, and the wife made several successive appointments in favour of certain of her children, and appointed the residue in favour of another child. The wife having died, and an action having been brought for the administration of the trusts of the settlement, and it appearing that the appointees had assigned, in some cases to two or three persons, and incumbered their shares: *Held* interest was payable in respect of the several appointments at the rate of 4 per cent per annum as from the death of the tenant for life.
Re Hill's Settlement Trusts, Hill v Equitable Reversionary Interest Society Ltd (1896) 75 LT 477; 41 Sol Jo 142

3055 Four per cent on value — Unconverted ships earning freights
Testator directed his trustees to allow his estate to remain invested as it might be at his decease, if they should think fit, and, subject to such direction, to convert it and pay the income to his widow for her life, remainder over. The trustees proceeded to realise his estate as soon as possible after his death, but in the interval certain ships in which he was interested as partner earned freight, and dividends were paid on certain shares held by testator in partnership; on the sale of these ships and shares a considerable profit was also realised: *Held* the tenant for life was not entitled to the freight or dividends or to the profits on the sales as income, but they formed part of the capital, and she was entitled to interest thereon from the death of testator.

In this case strictly 4 per cent only would have been allowed; but 5 per cent has been given in chambers and has not been objected to, and will therefore stand (*Malins V-C*).
Cooper v Laroche (1869) 38 LJ Ch 591

3056 Four per cent on value — For period to one year of testator's death
Re Lynch Blosse, Richards v Lynch Blosse (1899) 43 Sol Jo 297

ANNOTATION **Folld** Re Woods, Gabellini v Woods [1904] 2 Ch 4

3057 Four per cent on value
In applying the rule in *Re Chesterfield's (Earl) Trusts* (no 3063 post), as to the apportionment between capital and income of the amount of an unconverted reversionary interest which has fallen in, interest at 4 per cent ought now to be adopted as the basis of calculation.
Re Baker, Baker v Public Trustee [1924] 2 Ch 271; 93 LJ Ch 599; 131 LT 763; 68 Sol Jo 645

3058 Three per cent on value
In future, in applying the rule in *Re Chesterfield's (Earl) Trusts* (no 3063 post) as to the apportionment as between capital and income of the amount of an unconverted reversionary interest which has fallen in, interest at 3, instead of at 4 per cent ought to be adopted as the basis of calculation. So held in a case where the reversion in question formed part of the estate of a testator who died in 1854.
Re Goodenough, Marland v Williams [1895] 2 Ch 537; 65 LJ Ch 71; 73 LT 152; 44 WR 44; 39 Sol Jo 656; 13 R 454

ANNOTATIONS **NF** Re Hill's Settlmt Trusts, Hill v Equitable Reversionary Interest Soc (1896) 41 Sol Jo 142 **Folld** Re Lynch Blosse, Richardson v Lynch Blosse (1899) 43 Sol Jo 297 **Expld** Re Baker, Baker v Public Trustee [1924] 2 Ch 271

3059 Three per cent on value
Re Cleveland's (Duke) Estate, Hay v Wolmer no 3571 post

3060 Three per cent on value
Re Woods, Gabellini v Woods no 3041 ante

3061 Three per cent on value
Testator devised and bequeathed all his real and personal estate not by his will otherwise disposed of to trustees upon trust to sell and convert same, with power to postpone conversion as long as the trustees thought proper and to retain any investments subsisting at his death, whether of the kind thereinafter authorised or not, and out of the proceeds to pay debts and legacies, and at the discretion of the trustees to invest the residue and to stand possessed of the residuary trust moneys and the investments for the time being representing same, thereinafter called "the residuary trust funds," in trust to pay the income thereof to his wife during his life. At the time of his death testator was possessed of preference and ordinary shares in a coal mining company. The ordinary shares, although

not of a wasting character, were not authorised by the investment clause in the will. The trustees therefore sold some of them, and proposed to sell more on a favourable opportunity. They declined to pay to the widow in the meantime the full dividends on the ordinary shares thus retained: *Held* in the absence of any express or implied gift of the income pending conversion, the widow was entitled only to interest at 3 per cent on the value of the ordinary shares at testator's death, and the rest of those dividends must be invested. This rule was well settled, and applied to unauthorised securities whether they were of a wasting character or not.
Re Chaytor, Chaytor v Horn [1905] 1 Ch 233; 74 LJ Ch 106; 92 LT 290; 53 WR 251

ANNOTATIONS **Distd** Re Wilson, Moore v Wilson [1907] 1 Ch 394; Re Inman, Inman v Inman [1915] 1 Ch 187; Re Beech, Saint v Beech [1920] 1 Ch 40 **Consd** Re Parry, Brown v Parry [1964] 2 All ER 412; Re Berry, Lloyds Bank Ltd v Berry [1961] 1 All ER 529

3062 Three per cent on value — Value taken one year from testator's death
Re Lynch Blosse, Richards v Lynch Blosse (1899) 43 Sol Jo 297

ANNOTATION **Folld** Re Woods, Gabellini v Woods [1904] 2 Ch 4

4 Apportionment of amount realised on sale

LAW See Halsbury's Laws (4th edn) vol 42 para 952

3063 Method of apportionment
Where testator has bequeathed his residuary personal estate to trustees upon trust for conversion, with power to postpone such conversion at their discretion, and to hold the proceeds upon trust for a person for life with remainders over, and such residue includes outstanding personal estate, the conversion of which the trustees, in the exercise of their discretion, postpone for the benefit of the estate, and which eventually falls in some years after testator's death, as, for instance, a mortgage debt with arrears of interest, or arrears of an annuity with interest, or moneys payable on a life policy, such outstanding personal estate should, on falling in, be apportioned as between capital and income by ascertaining the sum which, put out at interest of 4 per cent *per annum* on the day of testator's death, and accumulating at compound interest calculated at that rate with yearly rests and deducting income tax, would, with the accumulations of interest, have produced, at the day of receipt, the amount actually received; and the sum so ascertained should be treated as capital, and the residue as income.
Re Chesterfield's (Earl) Trusts (1883) 24 Ch D 643; 52 LJ Ch 958; 49 LT 261; 32 WR 361

ANNOTATIONS **Apld** Re Hobson, Walker v Appach (1885) 55 LJ Ch 422; Re Flower, Matheson v Goodwyn (1890) 62 LT 216; Re Morley, Morley v Haig [1895] 2 Ch 738 **Consd** Re Goodenough, Marland v Williams [1895] 2 Ch 537 **Folld** Re Hollebone, Hollebone v Hollebone [1919] 2 Ch 93 **Distd** Re Woodhouse, Public Trustee v Woodhouse [1941] Ch 332 **Apld** Re Fisher, Harris v Fisher [1943] Ch 377; Re Payne, Westminster Bank Ltd v Payne [1943] 2 All ER 675 **Consd** Re Holliday's Will Trusts, Houghton v Adlard [1947] 1 All ER 695 **Apld** Re Chance, Westminster Bank Ltd v Chance [1962] 1 All ER 942 **Consd** Re Guinness's Settlmt [1966] 2 All ER 497

3064 Necessity of conversion into permanent securities
General rule, that, where personal property is bequeathed for life with remainders over, and not specifically, it is to be converted into the 3 per cents, subject in the case of a real security to an inquiry, whether it will be for the benefit of all parties; and the tenant for life is entitled only upon that principle.
Howe v Dartmouth (Earl), Howe v Aylesbury (Countess) (1802) 7 Ves 137; 32 ER 56, LC

ANNOTATIONS **Consd** Holland v Hughes (1809) 16 Ves 111 **Apld** Dimes v Scott (1828) 4 Russ 195 **Expld** Alcock v Sloper (1833) 2 My&K 699 **Consd** Pickering v Pickering (1839) 4 My&Cr 289; Hinves v Hinves (1844) 3 Hare 609; Cafe v Bent (1845) 5 Hare 24; **Apld** Pickup v Atkinson (1846) 4 Hare 624 **Consd** Cotton v Cotton (1850) 14 Jur 950 **Apld** Morgan v Morgan (1851) 14 Beav 72; Blann v Bell (1852) 2 De GM&G 775; Meyer v Simonsen (1852) 5 De G&Sm 723 **Expld** Baud v Fardell (1855) 7 De GM&G 628 **Consd** Gurney v Gurney (1855) 3 WR 353 **Distd** Simpson v Lester (1858) 33 LTOS 6 **Apld** Craig v Wheeler (1860) 29 LJ Ch 374 **Expld** Stroud v Gwyer (1860) 28 Beav 130 **Apld** Pidgeon v Spencer (1867) 16 LT 83; Tickner v Old (1874) LR 18 Eq 422 **Consd** Thursby v Thursby (1875) LR 19 Eq 395; Macdonald v Irvine (1878) 8 Ch D 101 **Apld** Re Smith's Estate, Clifford v Washington (1879) 48 LJ Ch 205 **Consd** Re Nicholson, Nicholson v Nicholson [1895] WN 106; Re Pitcairn, Brandreth v Colvin [1896] 2 Ch 199 **Apld** Re Game, Game v Young [1897] 1 Ch 881 **Consd** Re Bland, Miller v Bland [1899] 2 Ch 336; Re Hammersley, Heasman v Hammersley (1899) 81 LT 150; Re Van Straubenzee, Boustead v Cooper [1901] 2 Ch 779; Stanier v Hodgkinson (1903) 73 LJ Ch 179; Re Bentham, Pearce v Bentham (1906) 94 LT 307; Re Bates, Hodgson v Bates [1907] 1 Ch 22; Re Nicholson, Eade v Nicholson [1909] 2 Ch 111 **Apld** Re Wareham, Wareham v Brewin [1912] 2 Ch 312 **Consd** Re Evan's Will Trusts, Pickering v Evans [1921] 2 Ch 309 **Apld** Re Trollope's Will Trusts, Public Trustee v Trollope [1927] 1 Ch 596 **Distd** Re Sullivan, Dunkley v Sullivan (1929) 45 TLR 590 **Consd** Re McKee, Public Trustee v McKee [1931] 2 Ch 145; Re Bate, Public Trustee v Bate [1938] 4 All ER 218; Re Berton, Vandyk v Berton [1939] Ch 200 **Apld** Re Fawcett, Public Trustee v Dugdale [1940] Ch 402 **Consd** Re Woodhouse, Public Trustee v Woodhouse [1941] Ch 322 **Apld** Re Fisher, Harris v Fisher [1943] Ch 377 **Consd** Re Parry, Brown

v Parry [1946] 2 All ER 412; Re Lucas, Bethune v Lucas [1947] 2 All ER 213n **Distd** Re Gough, Phillips v Simpson [1957] 2 All ER 193 **Apld** Re Berry, Lloyds Bank Ltd v Berry [1961] 1 All ER 529

Scottish, Irish and Commonwealth Cases

3065 Whether interest equal to interest on authorised investments

A tenant for life is entitled to be paid, pending conversion, the amount allowed by the rule in *Howe v Earl of Dartmouth* notwithstanding that the income actually received falls short of the amount allowed under that rule, and is entitled to a charge on capital accordingly. The tenant for life has the same rights pending conversion in a case where the court authorises postponement of the sale of assets which without such authorisation the trustees would be bound to realise under the rule in *Howe v Earl of Dartmouth. Quaere*: whether the tenant for life is entitled pending conversion to require the amount of any deficiency in the actual income to be raised by enforcement of the charge.

Union Trustee Co of Australia Ltd v Graham (1931) 31 SRNSW 528; 48 NSWWN 194 (AUS)

3066 Whether interest equal to interest on authorised investments — Right of tenant for life

The rule in *Howe v Earl of Dartmouth* was intended to operate in favour of a life tenant as well as of remaindermen. In a case, therefore, in which that rule applies, a tenant for life is entitled to be paid, pending conversion, the amount allowed by that rule, notwithstanding that the income actually received falls short of such amount, and, further, is so entitled even where the effect if the application of the rule will be to reduce the amount of capital ultimately available to the remainderman and may *pro tanto* defeat the intention of testator.

Re Tindal, Perpetual Trustee Co Ltd v Tindal (1934) 34 SRNSW 8 (AUS)

ii PARTICULAR RECEIPTS

1 Mines and minerals

LAW See Halsbury's Laws (4th edn) vol 42 para 953

CROSS REFERENCES See MINES vol 34 (reissue) no 1346 et seq; (powers of leasing); no 1983 et seq (powers of limited owners)

3067 Postponement of sale without impropriety income until sale

D, who died on 31 October 1900, by his will, dated 26 January 1899, left all his residuary real and personal estate upon trust for sale and, in the event of his dying leaving issue, which event happened, to invest and pay the income to his wife for life, and after her death for his children at twenty-one or marriage.

By lease dated in the year 1897 he had demised to W (*inter alia*) all the strata of chalk lying under certain lands at G for the term of twenty-one years from 29 September 1895, determinable at the end of the seventh or fourteenth year, with power to W during the demise to require to have additional chalk land on notice, which further pieces of chalk land were from time to time to be allotted to W on his paying by way of consideration for the purchase of the chalk and other materials £900 per acre until the whole of the same should be dug out.

The trustees under testator's will having received various sums for chalk land pursuant to the lease, asked by a summons, to which testator's infant daughter, by her next friend, and his widow were parties, the directions of the court whether the sums so received should be treated by them as capital or income: *Held* the sale having been postponed without any impropriety, the rents and profits of real estate until sale were payable to the person who would be entitled to the income of the proceeds of sale.

Re Darnley (Earl), Clifton v Darnley [1907] 1 Ch 159; 76 LJ Ch 58; 95 LT 706; 23 TLR 93; 51 Sol Jo 82

ANNOTATION **Folld** Re Oliver, Wilson v Oliver [1908] 2 Ch 74

3068 Postponement of sale without impropriety income until sale

When by a will real and personal estate are directed to be sold and converted and the proceeds held in trust for one for life and then for others and without any impropriety the sale is postponed, the tenant for life of the proceeds is entitled to the rents and profits of the real estate until sale.

Re Oliver, Wilson v Oliver [1908] 2 Ch 74; 77 LJ Ch 547; 99 LT 241

2 Leaseholds

LAW See Halsbury's Laws (4th edn) vol 42 paras 954, 955

3069 Compensation — Waiver of claim to renewal

Tenant for life, with remainders over of a Crown lease for years, applies for a further term; a powerful opponent applies for a grant; the tenant for life gives up her pretensions for a sum of money; the money shall be settled, to the same uses as the estate was.

Owen v Williams (1773) Amb 734; 1 Bro CC 199n; 27 ER 474, LC

ANNOTATION **Consd** Randall v Russell (1817) 3 Mer 190

3070 Damages — Breach of covenant

Devise to trustees and their heirs during the life of A in trust for A and after his decease, to B in fee. The trustees recover, in A's lifetime, damages for breach of covenants in a lease granted by testatrix,

and still subsisting. A dies. The damages belong to her estate.

Noble v Cass (1828) 2 Sim 343; 57 ER 817

ANNOTATIONS **Distd** Re Francis Barrett v Fisher (1905) 74 LJ Ch 198 **Apprvd** Re Lacon's Settlmt, Lacon v Lacon [1911] 2 Ch 17

3071 Damages — Breach of covenant

Testator by his will devised and bequeathed his residuary real and personal estate to his trustees upon trust for sale and conversion with power to suspend conversion for such period as they should judge expedient, and pending the conversion of his real estate to pay for repairs either out of capital or income, and he provided that for the purposes of enjoyment and transmission under the trusts therein contained his real and personal estate should be considered as money from the time of his decease and that the "rents, dividends and interests and other produce thereof" respectively to accrue due after his decease and until the actual sale, conversion, and getting in thereof should be deemed the annual income thereof. Testator then directed his trustees to hold the proceeds of his residuary estate, after payment thereout of his debts and funeral and testamentary expenses, upon trust to divide the same into certain shares, some of which he settled.

At his death testator was entitled to a freehold theatre which was subject to a lease granted by him. The lease contained certain repairing covenants by the lessee. The lessee did not perform these covenants, and some years after the testator's death the trustees brought an action against him for breach of covenant and recovered a certain sum of money by way of damages: *Held* the money recovered by the trustees as damages must be treated as corpus of testator's residuary estate.

Re Pyke, Birnstingl v Birnstingl [1912] 1 Ch 770; 81 LJ Ch 495; 106 LT 751; 56 Sol Jo 380

3072 Damages — Breach of covenant — Lease granted under statutory powers

Premises were devised to trustees upon trust to pay the rent and profits thereof to a person for life with remainder over. The tenant for life granted a lease of the premises by which the lessee covenanted to keep the premises in repair. The lessee having committed a breach of the covenant to repair: *Held* the tenant for life, in granting the lease, was by reason of Settled Land Act 1882 (c 38) s 53 (repealed) in the position of a trustee for all parties entitled under the settlement; the damages were recoverable by the tenant for life as trustee for the trust estate.

Mitchell v Armstrong (1901) 17 TLR 495

ANNOTATION **Dbtd** Re Lacon's Settlmt, Lacon v Lacon [1911] 2 Ch 17

3073 Damages — Breach of covenant — Lease granted under statutory powers

A tenant for life, not impeachable for waste, in 1888 granted, with the consent of the trustees of the settlement, a lease of the mansion house comprised in the settlement for twenty-one years, the lessee covenanting to keep the mansion house, which the lessor has put in repair, in good and substantial repair. The lessor died during the currency of the lease, and on its expiry the succeeding tenant for life, who also was not impeachable for waste, claimed and was paid a sum of money as damages for breach of the covenant: *Held* Settled Land Act 1882 (c 38) s 53 (repealed) had no application as the tenant for life was not exercising any power under Settled Land Acts (repealed), but was only asserting his legal right under a covenant which ran with the land, and the money must be taken to represent the damages which he had suffered, and was therefore not payable to the trustees of the settlement as capital money, but could be retained by him for his own benefit.

Re Lacon's Settlement, Lacon v Lacon [1911] 2 Ch 17; 80 LJ Ch 610; 104 LT 840; 27 TLR 485; 55 Sol Jo 551, CA

ANNOTATIONS **Distd** Re Pyke, Birnstingl v Birnstingl [1912] 1 Ch 770 **Apld** Re Dealtry, Davenport v Dealtry [1913] 108 LT 832; Re Williams' Settlmt, Williams Wynn v Williams [1922] 2 Ch 750

3074 Damages — Breach of covenant — Lease granted under statutory powers

By lease dated 7 February 1898, which lease was determined on 12 June 1912, defendant as tenant for life under Settled Land Act 1882 (c 38), demised to lessees a quarry, part of the real estate. The lessees covenanted that when part of the quarry was exhausted they would fill it up for agricultural purposes "under a penalty to be recovered as rent in arrear or as liquidated damages by the lessor of £150 an acre." The lessees left 2 Acres 3 roods 5 poles uncovered in breach of their covenant, and arranged to pay at the rate of £150 per acre in respect of this land a sum amounting to £416 6*s* 10*d*, which sum had been paid to defendant. On a summons by the trustees asking whether defendant was entitled to retain all or any part of such sum or whether it should be held by them as capital: *Held* defendant was entitled to retain such sum.

Re Dealtry, Davenport v Dealtry (1913) 108 LT 832

3075 Sale of leaseholds — Without authority — Life tenant surviving term

(1) Where a term of years is bequeathed to a legatee for life, with remainder over, and the legatee for life, having joined with the executors in selling and assigning the term to a purchaser for a sum of stock, survives the duration of the term, the legatee for life,

and not the legatee in remainder, is entitled to the stock, although the latter was not a party to the sale.

(2) If the legatee in remainder, not being a party to the conversion, sues for a portion of the purchase-money in the lifetime of the tenant for life, *quaere* whether the court will do more than secure the fund, or whether it will apportion the fund according to the value of the respective interests.

Phillips v Sarjent (1848) 7 Hare 33; 68 ER 13

3076 Sale of leaseholds — Life tenant entitled only to amount equal to rent

During the lifetime of a tenant for life freeholds were sold under the provisions of Settled Land Act 1882 (c 38). At the time of the sale the property was subject to a lease for sixty years from 1851 at a rent of £200, which, at the date of the lease, had been a rack rent: *Held* the tenant for life was, during the continuance of the term, only entitled to be paid out of the income a yearly sum of £200, and the balance of the income must be accumulated for the benefit of the remaindermen.

Cottrell v Cottrell (1885) 28 Ch D 628; 54 LJ Ch 417; 52 LT 486; 33 WR 361

ANNOTATIONS **Distd** Re Wix, Hardy v Lemon [1916] 1 Ch 279 **Apld** Re Westminster's SE, Westminster v Shaftesbury [1921] 1 Ch 585

3077 Sale of leaseholds — Life tenant entitled only to amount equal to rent

Re Bowyer's Settled Estate (1892) 8 TLR 441; 36 Sol Jo 347

ANNOTATION **Apld** Re Westminster's SE, Westminster v Shaftesbury [1921] 1 Ch 585

3078 Sale of leaseholds — Sale by court — No trust for sale

Re Lingard, Lingard v Squirrell [1908] WN 107

3079 Fine on renewal

Simpson v Bathurst, Shepherd v Bathurst no 2999 ante

3080 Fine on renewal

In 1838 property was demised for a term determined on the dropping of three lives, reserving a yearly rent and a heriot payable on the dropping of each life, with a covenant for perpetual renewal at a specified fine on the dropping of each life. In 1869 the persons who had then become absolute owners subject to the lease settled the property in strict settlement, giving to a trustee ample powers of management, with powers to grant leases with or without covenants for renewal, and to perform any covenant for renewal previously entered into by any previous owner, or by the trustee for the time being, so that in every such appointment, lease or demise that best rent be reserved without taking any fine or premium. During the continuance of a tenancy for life under this settlement two lives dropped, and on each occasion a heriot was paid and the lease renewed by the trustee at a fine in pursuance of the covenant: *Held* the powers given to the trustee did not effect the question, and the fines and heriots were casual profits payable to the tenant for life.

Brigstocke v Brigstocke (1878) 8 Ch D 357; 47 LJ Ch 817; 38 LT 760; 26 WR 761, CA

3081 Consideration for accepting surrender

In the absence of *mala fides*, money paid to a legal life tenant as the consideration for accepting the surrender of lease, granted without recourse to the powers of Settled Land Acts (repealed), belonged to him as a casual profit.

Re Hunloke's Settled Estates, Fitzroy v Hunloke [1902] 1 Ch 941; 71 LJ Ch 530; 86 LT 829

ANNOTATIONS **Distd** Re Rodes, Sanders v Hobson [1909] 1 Ch 815 **Extd** Re Penrhyn's Settlmt, Penrhyn v Pennant [1922] Ch 500

3082 Consideration for accepting surrender

Money paid to an equitable tenant for life by a lessee as consideration for accepting a surrender of a lease, which had been granted by the tenant for life under the powers of the Settled Land Acts (repealed) did not belong to him as a casual profit, but had to be paid by instalments to him and other persons entitled to the rent.

Re Rodes, Sanders v Hobson [1909] 1 Ch 815; 78 LJ Ch 434; 100 LT 959

ANNOTATIONS **Distd** Re Lacon's Settlmt, Lacon v Lacon [1911] 2 Ch 17; Re Wix, Hardy v Lemon [1916] 1 Ch 279

3083 Consideration for accepting surrender

Where a legal tenant for life granted a lease under the power conferred upon him by Settled Land Act 1882 (c 38) s 6 (repealed), money paid as the consideration for accepting the surrender of the lease belonged to him as a casual profit.

Re Penrhyn's Settlement, Penrhyn (Lord) v Pennant [1922] 1 Ch 500; 91 LJ Ch 490; 126 LT 789; 66 Sol Jo 315

3084 Surrender and grant of fresh lease for longer term — Excess rent for unexpired period of surrendered term

Where a tenant for life, in *bonâ fide* exercise of the powers conferred upon him by Settled Land Act 1882 (c 38) s 13 (repealed), accepted a surrender of an existing lease of settled land and granted a new lease of the same land for a longer term at an increased rent he was entitled to retain for his own benefit the excess rent during the unexpired period of the surrendered term and no portion of it ought to have been retained and capitalised by the trustees.

Re Wix, Hardy v Lemon [1916] 1 Ch 279; 85 LJ Ch 192; 114 LT 455; 32 TLR 257; 60 Sol Jo 291

3085 Application of fire insurance money

By a lease dated 14 October 1948, plaintiffs became the lessees of a mansion house with grounds, where they established and maintained an hotel. The lease contained a full repairing covenant on the part of plaintiffs, which proved very onerous. After negotiations, that lease was superseded by another lease dated 10 February 1961, granted to plaintiffs by the first defendant under her power as tenant for life under Settled Land Act 1925 (c 18). Under that lease, plaintiffs were to pay, in addition to the rent, a yearly insurance rent equal to the premium for keeping the property insured against comprehensive risks by the lessor and an additional rent towards the cost of making good any one major damage occurring to the mansion house. The lessor covenanted to keep the exterior parts and the main structure of the mansion house in good tenantable order and to keep the mansion house adequately insured against comprehensive risks. There was no policy of insurance under the new lease against comprehensive risks, but the property was insured under a fire policy taken out in 1956 and revised in 1959, the total sum insured on the advice of the insurance company being £29,172. Plaintiffs paid the insurance premiums, were informed of the amount insured, and raised no objection about the adequacy of the cover. On 22 February 1961, the main portion of the mansion house was completely gutted by fire and damage was done to a wing. The insurance company apportioned £20,250 of the sum insured to the building destroyed and damaged, but the amount was not sufficient to make good the damage. The insurance moneys were paid to the defendant and to the second defendant (a trustee) as trustees for the purposes of the Settled Land Act 1925 (c 18). By letter dated 12 July 1961, to the first defendant's agents the question of liability to reinstate the part of the premises damaged, but not destroyed, was raised. Plaintiffs claimed (i) against the first defendant damages for failure adequately to insure the premises, and (ii) against both defendants a declaration that they were bound to expend the moneys received from the insurers towards the rebuilding and restoration of the hotel: *Held* (1) plaintiff's claim for damages against the first defendant failed because the first defendant when insuring the property, had taken proper advice (*viz*, the advice of the insurance company) and had followed it, and thus had fulfilled her obligation under the lease to insure adequately; (2) defendants were bound to use the money received by them under the policy as far as it would go towards reinstatement of the property, since, on the true construction of the lease, the landlord's obligation to insure, done as it was at the tenants' expense, was an obligation intended to enure for the benefit of both the landlord and the tenants; (3) the declaration giving effect to (2) above would be granted against the independent trustee as well as against the first defendant (who was also the tenant for life), since the independent trustee must be taken to have had notice of the lease; (4) before, but not after, receipt of the letter of 12 July 1961, the first defendant could not properly assent to the application of the insurance money in the ordinary course as capital moneys under the settlement, and accordingly the declaration giving effect to (2) above would be qualified by excepting payments properly made as expenditure of capital moneys under Settled Land Act 1925 (c 18), before 12 July 1961.

Mumford Hotels Ltd v Wheler [1964] Ch 117; [1963] 3 All ER 250; [1963] WLR 735; 107 Sol Jo 810

ANNOTATION **Apld** Mark Rowlands Ltd v Berni Inns Ltd [1985] 3 All ER 473

Scottish, Irish and Commonwealth Cases

3086 Fine on renewal

By agreement between the tenant for life, and the tenants, and with the sanction of the court, £800 was paid to the credit of the matter, in full for all renewal fines and interest, in respect of a lease for lives renewable for ever, dated 2 January 1699, and of which no renewal had ever been granted. A condition of sale was inserted on the rental, that the purchaser should execute a renewal to the tenants: *Held* as the renewal was the act of the court, and as what was lost to the inheritance by the renewal was restored by giving it the £800, which was added to the corpus of the fund, the personal representative of a deceased tenant for life was not entitled to any part of the £800. *Semble*: the personal representatives of parties who have not executed a renewal have no claim for fines upon a subsequent renewal.

Re Tibeaudo's Estate (1863) 141 Ch R 322; 15 Ir Jur 339 (IR)

3087 Sale of lease for lump sum and royalty

Re Barker Estate [1939] 2 WWR 379 (CAN)

3 Stocks and shares

A In general

LAW See Halsbury's Laws (4th edn) vol 42 para 956 et seq

3088 Provisions of settlement prevail — Bonus

Stock stood in the names of trustees upon trust, under a marriage settlement, to pay the dividends "of the said stock, together with such bonuses as should from time to time be allowed thereon, when and as the same should become payable," to A and his wife, and the survivor, for life: *Held*

A was absolutely entitled to a bonus declared pending his life estate.
Re Mittam's Settlement Trusts (1858) 4 Jur NS 1077

3089 Provisions of settlement prevail — Bonus — Not within terms of settlement
On the marriage of H and D, sixteen shares in the P & O Company were vested in trustees in trust to pay the interest, dividends, and yearly proceeds to D his wife, for her life, or such person as she should direct, to her separate use; and there was a proviso that if any bonus should be declared in respect of the shares, that should be invested in augmentation of the settlement. The company being their own insurers, carried over 5 per cent on their floating stock to the insurance fund and declared a dividend out of the surplus, if any, year by year among the shareholders, and carried forward small sums left out of such surplus to the following year, and so on *de anno in annum*: *Held* these additional payments were not bonuses, and the wife was entitled to them for her life.
Hollis v Allan (1866) 12 Jur NS 638; 14 WR 980

3090 Provisions of settlement prevail — Bonus — Not within terms of settlement
Testatrix, who died in 1917, bequeathed to trustees 300 ordinary shares in a limited company upon trust to pay the "dividends, bonuses and income" thereof to RS and JS his wife during their lives and to the survivor of them during the life of such survivor, and after the death of the survivor the trustees were directed to hold the shares upon trust for the H infirmary absolutely. The court had accumulated out of profits a large reserve fund and also had in hand certain undistributed profits not carried to reserve. In 1919 the company proposed to distribute, by way of bonus, amongst its shareholders the sum of £634,980. The method adopted by the company was to capitalise that sum, and instead of distributing it in the shape of cash, to distribute it in the shape of fully paid shares. The transaction was carried out by appropriate resolutions and recorded in an agreement between the company and its shareholders which, after reciting the accumulations and the company's proposal to distribute the sum as bonus, provided that the company would pay the sum by the issue and allotment of fully paid shares, and the shareholders agreed to accept those shares in satisfaction of their respective proportion of that sum. On 31 July 1919, during the lives of the tenants for life, the company allotted to the trustees 9,000 £1 fully paid bonus shares, the proportion to which they were entitled in respect of the 300 shares bequeathed to them. A summons was taken out to have it decided whether the bonus shares so allotted to the trustees ought to have been transferred to the tenants for life or were rightly retained by the trustees as capital subject to the trusts of the will. RS died after the allotment of the bonus shares to the trustees, leaving his wife surviving him: *Held* as a question of fact the issue of the new shares by the company must be regarded as a distribution of capital, and not of income; and in the construction of the will the words "dividends, bonuses and income" did not cover the shares in question so as to pass them to the tenant for life.
Re Speir, Holt v Speir [1924] 1 Ch 359; 93 LJ Ch 225; 130 LT 564; 68 Sol Jo 251, CA

ANNOTATION **Folld** Re Wright's Settlement Trusts, Wright v Wright [1945] Ch 211

3091 Provisions of settlement prevail — Bonus
A marriage settlement contained a proviso that, if the wife survived the husband and remarried while children of the marriage were alive, the trustees should, from her remarriage until twenty-one years after the husband's death or so long as she and any of the children were living pay her £150 a year out of the income of the husband's fund, and accumulate and invest the surplus income and stand possessed of the accumulated fund on trust to divide it equally *per capita* between the wife and any child or children then living or, if no children were then living, on trust for the wife absolutely without power of alienation or anticipation of her expectant interest. The husband's fund included shares in a company, and a further proviso directed that, if the husband died during the wife's lifetime leaving a child or children of the marriage, the trustees were to accumulate by way of compound interest any dividends on the shares exceeding in any year 7 per cent on their nominal value, and to hold the accumulations on trusts precisely similar to those of the rest of the husband's fund. At later dates the capital of the company was increased, bonus shares were issued and the whole of the share capital of the company was converted into stock. The husband predeceased the wife, leaving children, and the wife did not remarry: *Held* the bonus shares were an accretion for all relevant purposes to the original shares, and the proviso for accumulation applied to the bonus shares and therefore applied also to that part of the stock in the hands of the trustees which represented bonus shares.
Re Wright's Settlement Trusts, Wright v Wright [1945] Ch 211; [1945] 1 All ER 587; 114 LJ Ch 196; 172 LT 345; 61 TLR 307; 89 Sol Jo 306

3092 Dividends declared before death — Death of testator
By the terms of the deed of settlement of the company, their net profits were to be divided rateably to

such an amount as should be declared at their half-yearly meeting, and were to be paid within twenty-one days afterwards; and it was provided, that a shareholder was not to receive any dividend after the period at which he ceased to be a proprietor of shares; but the dividends on such shares were to continue in suspense until some other person should have become proprietor of them. A shareholder died sixty-nine days after the half-yearly meeting at which a dividend was declared, but before notice had been given that such dividend was payable, having by his will bequeathed the interest and annual income arising from all his shares to one for life, and then to others: *Held* the dividend belonged to the legatee for life, and not to the general personal estate of testator.

Clive v Clive (1854) Kay 600; 2 Eq 913; 23 LJ Ch 981; 24 LTOS 33; 69 ER 255

ANNOTATIONS **Expld** Wright v Tuckett (1860) 1 John&H 266 **Consd** Browne v Collins (1871) LR 12 Eq 586

3093 Dividends declared before death — Death of testator

In June 1865, a dividend of 7 per cent *per annum* on certain shares held by testatrix was declared payable on 15 July 1865, and 15 January 1866. Testatrix died on 31 December 1865: *Held* the January dividend formed part of the corpus of her residuary estate and did not pass under a bequest of the annual income of such residuary personal estate.

De Gendre v Kent (1867) LR 4 Eq 283; 16 LT 694

3094 Dividends declared before death — Death of life tenant

Shares being settled on A for life and then over: *Held* a dividend declared before A's death but not payable till afterwards, belonged to A's estate.

Wright v Tuckett (1880) 1 John&H 266; 70 ER 747

ANNOTATION **Folld** De Gendre v Kent (1867) LR 4 Eq 283

3095 Directors' fees received by trustees — Trustees holding shares belonging to trust

Where trustees hold shares belonging to the trust, and they are appointed directors of the company in respect of such holding, and there is no provision in the will enabling them to retain their remuneration as such directors for their own benefit, they must account for such remuneration to the trust, and the remuneration is to be treated as capital and will go to the remainderman as an accretion to their shares.

Re Francis, Barrett v Fisher (1905) 74 LJ Ch 198; 92 LT 77

ANNOTATION **Apld** Re Macadam, Dallow v Codd [1945] 2 All ER 664

3096 Purchase of stock with capital money — When dividend declared but not paid — Purchase carrying dividend

Re Peel's (Sir Robert) Settled Estates no 3254 post

3097 Repayment of debentures postponed — Interest until repayment

Re Pennington, Pennington v Pennington no 3557 post

3098 Issue of new debenture stock — Company not able to pay interest on settled stock

Re Pennington, Stevens v Pennington [1915] WN 333

3099 Conversion of preference shares — Compensation to preference shareholders

The trustees of a will appropriated preference and ordinary shares in a company to answer a settled legacy. Subsequently the company converted the preference shares into ordinary shares, and also allotted shares in a Dutch company to the ordinary shareholders, with the result that the trustees received a payment of £147 in respect of their preference shares and twenty-six shares in the Dutch company in respect of their ordinary shares: *Held* the £147 constituted capital, being a payment made to preference shareholders in consideration of their giving up their preferential rights, but under the circumstances the twenty-six shares must be treated as a bonus, and belonged to the tenant for life.

Re Tedlie, Holt v Croker (1922) 91 LJ Ch 346; 126 LT 644; 66 Sol Jo 250

ANNOTATION **Consd** Re MacIver's Settlement, MacIver v Rae [1936] Ch 198

3100 Conversion of preference shares — Compensation to preference shareholders — Issue of new shares

By her will made in 1920 testatrix bequeathed 600 15 per cent cumulative preferred ordinary shares of £1 each in a company to trustees upon trust to pay the income to a tenant for life during his life and with a direction that after his death the shares should fall into residue. Subsequently during the lifetime of testatrix the company reorganized its capital by (*inter alia*) changing its 15 per cent cumulative preferred ordinary share into a like number of 8 per cent cumulative A preference share of £1 each and at the same time issuing to a former holder of 15 per cent cumulative preferred ordinary share the same number of new 8 per cent cumulative A preference shares of £1 each paid for in full out of reserves: *Held* the tenant for life was entitled only to the income of the 600 8 per cent cumulative A preference shares, which were really the original 600 15 per cent cumulative preferred ordinary shares with an altered name and a reduced right to dividends; and he took no interest in the new 600 8 per cent cumulative A preference shares which were issued to testatrix by way of com-

pensation for the reduction in the rights attached to her original holding of shares.

Re Kuypers, Kuypers v Kuypers [1925] 1 Ch 244; 94 LJ Ch 253; 133 LT 468; 69 Sol Jo 366

ANNOTATIONS **Consd** Re O'Brien, Little v O'Brien (1946) 175 LT 406; Re Dorman (deceased) [1994] 1 All ER 804

3101 Conversion of preference shares — Distribution of shares in another company

Re Tedlie, Holt v Croker no 3099 ante

3102 Distribution of capital assets

A limited company not in liquidation can make no payment by way of return of capital to its shareholders except as a step in an authorised reduction of capital. Any other distribution of money, whether called dividend or bonus or any other name, can only be made by way of dividing profits. Moneys so paid to a shareholder who is a trustee consequently will belong *primâ facie* to the person beneficially entitled to the income of the trust estate. If the moneys or any part of them are to be treated as *corpus*, there must be some provision of the trust deed which brings about that result; no statement by the company or its officers can affect the rights of the beneficiaries in the matter.

In 1925 a pastoral company in New South Wales sold substantially the whole of its lands, live stock and other assets, and ceased to carry on its business. In 1926 a dividend was declared and paid as "a distribution of capital assets in advance of the winding up." No question arose in the appeal as to that dividend. In November 1927, the company declared and paid a dividend, stating that it was paid out of the sale of the breeding stock. Upon an originating summons issued by trustees, who held over two-thirds of the shares issued, the Supreme Court held that the dividend should be treated as capital of the trust estate. Upon appeal to the Privy Council respondents, while supporting that decision, contended alternatively that the dividend could not have been paid but for a breach of duty that trustees in not opposing resolutions passed in 1926 altering one of the company's articles of association: *Held* the dividend should be treated as income of the trust estate, but the moneys should be retained by the trustees for a limited period, in order that the beneficiaries might, if they wished, assert in hostile litigation a claim based upon the alternative contention above stated, the materials necessary to dispose of that point not being fully before the board.

Hill (RA) v Permanent Trustee Co of New South Wales Ltd [1930] AC 720; [1930] All ER 87; 144 LT 65; sub nom

Re Hill (Richard), Hill v Permanent Trustee Co of New South Wales (1930) 99 LJPC 191, PC

ANNOTATIONS **Consd** Re Ward, Ringland v Ward [1936] 2 All ER 773 **Apld** Re Sechiari, Argenti v Sechiari [1950] 1 All ER 417 **Consd** Re Whitehead's Will Trusts, Public Trustee v White [1959] 2 All ER 497, Bicber Ltd v Income Tax Comrs [1962] 3 All ER 294 **Distd** Re Outen's Will Trusts, Starling v Outen [1962] 3 All ER 478

3103 Distribution of capital assets

A testator, who died in 1928 and whose estate largely consisted of shares in a steamship company, by his will directed that they should not be sold during the continuance of the trusts upon which he settled them, and gave the dividends, interest, and annual income thereof to his widow during her life or until she should remarry, and subject thereto to his children during their lives and then to their issue. The company adopted an article enabling it to distribute surplus moneys representing proceeds of sale of ships and investments among the shareholders on the footing that the same should be received as capital. In 1934 it distributed £819,000 among the shareholders in exercise of this power, of which the trustees of the will received £16,000: *Held* on the true construction of the will and in the events which had happened the £16,000 must be treated as an accretion to the capital of the trust fund.

Re Ward's Will Trusts, Ringland v Ward [1936] Ch 704; [1936] 2 All ER 773; 105 LJ Ch 315; 155 LT 346; 52 TLR 605; 80 Sol Jo 486

ANNOTATION **Consd** Re Harrison's Will Trusts, Harrison v Milborne-Swinnerton-Pilkington (1949) 65 TLR 573

3104 Dividends in arrear — Issue of certificates redeemable out of future profits

Where dividends on cumulative preference shares are in arrear and the company issues funded dividend certificates, saleable and redeemable, the future profits of the company to be used in redeeming them, in lieu of payment of the arrears, the certificates, as between income and capital, are to be treated as income and belong to the tenant for life.

Re Sandbach, Royals v Douglas [1933] Ch 505; 102 LJ Ch 173; 149 LT 44

3105 Waiver of arrears of dividend on preference share — In consideration of ordinary shares

Dividends on preference shares in a company being several years in arrear, a scheme was approved by the shareholders and sanctioned by the court, whereby the ordinary shareholders surrendered part of their holding to the preference shareholders, the latter consenting to waive their right to the arrears of dividends. Under the scheme trustees of a settlement received ordinary shares in lieu of the arrears of dividend due on a block of preference shares forming part of the trust estate: *Held* the ordi-

nary shares received by the trustees were to be treated as income and belonged to the tenant for life.

Re MacIver's Settlement, MacIver v Rae [1936] Ch 198; [1935] All ER 889; 105 LJ Ch 21; 154 LT 339; 52 TLR 25

ANNOTATION **Consd** Re Smith's Will Trusts, Smith v Melville [1936] 2 All ER 1210

3106 Interest falling into arrears — Cancellation — Issue of new securities — Apportionment

A testator, who died in 1907, bequeathed a fund on trusts under which various persons were interested either in the income or in the capital. The fund included first mortgage debentures of P Limited. From 1933 until 1955, P Limited entered into a series of arrangements with holders of its first mortgage debentures. The arrangement so made in 1933 provided that the half-yearly payments of interest on the debentures falling for payment between 1 January 1933, and a date not earlier than 31 December 1933, nor later than 31 December 1935, should be paid to a limited extent only, and that all instalments of interest, if not paid on the due date, should carry interest at six per cent per annum from that date until payment. The interest on unpaid interest was to be paid when and on and subject to the same terms and conditions as the instalment of interest in respect of which it was payable. Subsequent schemes extended the period of postponement of interest provided by the 1933 scheme. On 30 June 1955, the sums owing on the security of the debentures were £3,946,900 for principal, £1,361,681 for interest, and £1,434,965 for interest on interest. In December 1955, P Limited put forward a final scheme of arrangement which was that, against delivery of the debentures and unpaid interest coupons, P Limited should procure the allotment and payment to the holders by PTC Limited, of (*a*) £100 six per cent debenture stock of PTC Limited, (*b*) £70 five per cent convertible debenture stock of PTC Limited, and (*c*) £40 sterling, in respect of each £100 of the debentures held. It was provided in the scheme (1) that on the scheme becoming operative, all obligations of P Limited in respect of interest on the debentures and interest on unpaid interest should be cancelled, and also (2) that the principal moneys secured by the debentures should be satisfied by the allotments and payments by PTC Limited. This scheme was approved by the court under Companies Act 1948 (c 38) s 206. At the date when the 1955 scheme became operative there was due to the trustee of testator's will in respect of the debentures then held by him £4,300 in respect of principal, £1,526 10*s*, less tax, in respect of unpaid instalments of interest, and £1,733 0*s* 8*d*, less tax, in respect of interest accured on interest not paid on the due date. Pursuant to the scheme, there was allotted to the trustee of the will (*a*) £1,720 in cash, and (*b*) £4,300 six per cent debenture stock and £3,010 five per cent convertible debenture stock of PTC Limited. The aggregate value of the two holdings of debenture stock in PTC Limited, so allotted was approximately £2,580, so that the total value of the assets so allotted to the trustee was about £4,300. The question arose whether the assets so allotted should be apportioned between capital and income (and if so in what manner), or the whole should be treated as capital, or how otherwise the assets should be dealt with: *Held* a fraction of the assets so paid and allotted to the trustee should be treated as income and that fraction should be one which bore the same proportion to the whole assets as the amount of the arrears of the interest (and interest on interest) bore, at the time when the 1955 scheme was approved, to the total sum of principal, interest and interest on interest, then secured by the £4,300 debentures of P Limited, because the provisions of the scheme cancelling the obligations of P Limited, in respect of interest and interest on interest, though binding as between the trustee debenture holder and P Limited did not affect beneficial rights to income and capital as between tenant for life and remaindermen and did not exclude apportionment.

Re Morris's Will Trusts, Public Trustee v Morris [1960] 3 All ER 548; [1960] 1 WLR 1210; 104 Sol Jo 934

3107 Distribution of ordinary shares to preference shareholders — In satisfaction of unpaid dividends

Two shares of the residue of testator's estate were directed to be settled and the trustees appropriated to such shares certain cumulative preference and ordinary shares in a company. For some years the company was unable to pay the dividend on the preference shares, and ultimately an arrangement was made by the company with the sanction of the court that the preference shareholders should receive two-thirds of the ordinary shares in satisfaction of all outstanding dividends. The trustees of the will were not entitled by their holdings of shares to control the action of the company in this respect. The trustees having received these ordinary shares it was contended by those interested in the capital of the shares of the residue that some part of such ordinary shares should be treated as capital: *Held* the ordinary shares were income and must be transferred to those entitled to the income.

Re Smith's Will Trusts, Smith v Melville [1936] 2 All ER 1210; 155 LT 248; 80 Sol Jo 612

3108 Payments out of share premium account

Settlement trustees were registered holders of 33,917 £1 shares in a company which, from time to time, allotted shares at a premium, and, in accordance with Companies Act 1948 (c 38) s 56, transferred the aggregate of the premiums to a share premium account.

In 1950 that account stood at £254,625 12*s* 6*d*, the company passed a resolution to pay thereout 2*s* 6*d* in respect of each fully paid share, on 27 March the court sanctioned the resolution and, pursuant to the resolution, the company paid to the trustees £4,243 7*s* 6*d* in respect of the trust holding. The trustees took out a summons to have determined whether, as between the tenants for life and remaindermen, that sum was capital or income: *Held* (1) s 56 took the share premium account out of the category of divisible profit and prevented it from being distributed by way of dividend; (2) the section showed that where, as in the present case, the transaction was a distribution of all or part of the share premium account among shareholders, it was to be treated as if the company were reducing their capital by paying off paid up share capital, which nationally paid up share capital was to be treated as paid up on the shares participating in the distribution; (3) in the present case, the effect of the section was that the company were to be considered as having, with the sanction of the court, paid off 2*s* 6*d* per share of the capital paid up on each of their issued shares by way of reduction of capital; each fully paid £1 share was to be treated as a fully paid share of 32*s* 6*d* reduced by a return of capital to a fully paid share of 30*s* 0*d*; the sum distributed must be deemed to have left the company as paid up capital returned to the members; the trustees' proportion of the distribution must similarly be treated in their hands as paid up share capital returned by the company; and the shares participating in the distribution must, by virtue of s 56 be treated as if their nominal amounts and the amounts paid up on them included the proportions attributable to them respectively of the share premium account; (4) in the present case, whether the origin, or the mode and character of distribution, of the share premium account was considered, the £4,243 7*s* 6*d* was to be treated as capital and added to the corpus of the settled funds.

Re Duff's Setttements Trusts, National Provincial Bank v Gregson [1951] Ch 932; [1951] 2 All ER 534; [1951] 2 TLR 474; 95 Sol Jo 595, CA

ANNOTATION **Consd** Courtaulds Investments Ltd v Fleming [1969] 3 All ER 1281

3109 Duty of trustees — Distribution by investment trust

By her will a testatrix bequeathed her residuary estate to her executors and trustees on trust for sale and conversion and to hold the net proceeds and the investments thereof and any unsold property on trust for persons in succession. The trustees were expressly empowered to retain investments held by testatrix at the date of her death. The estate included sub-units in a fixed investment trust which was governed by a trust deed. The trust deed provided for a trust period of twenty years during which all produce of the investments held by the trustees, whether cash or other property, was to be distributed in cash among holders, of sub-units. The deed provided also that the trustees in making a distribution were to distinguish between the amounts payable by way of capital and income respectively. On the question whether the trustees of the will of testatrix ought to treat sums distributed as capital by the unit trust as capital or income: *Held* the trust deed did not affect the character of the produce of the unit, and the trustees of the will must, in any case of doubt, inquire into the source of a distribution described as a capital distribution in order to establish its true nature.

Re Whitehead's Will Trusts, Public Trustee v White [1959] Ch 579; [1959] 2 All ER 497; [1959] 3 WLR 33; 103 Sol Jo 491

Scottish, Irish and Commonwealth Cases

3110 Redemption of shares

Re Fleck [1952] 2 DLR 657; [1952] OWN 260; [1952] CTC 205 (CAN)

3111 Redemption of shares

A private Dominion Company elected to invoke s 95A to the Income Tax Act RSC 1952 (now s 105) and thereupon paid a tax on undistributed income, and thereafter it issued redeemable preference shares which were immediately redeemed with the balance of the undistributed income: *Held* on appeal, the facts were indistinguishable from those in *Re Fleck* [1952] 2 DLR, by which the court was bound, and it must be held that the redemption proceeds were income.

Re Hardy's Trusts [1955] 5 DLR 10; [1955] OWN 835; [1955] CTC 220; affg [1955] 2 DLR 296; [1955] OWN 273; [1955] CTC 183 (CAN)

3112 Issue of redeemable preference shares in lieu of dividend

The directors of a company issued redeemable preference shares rather than cash dividends to its shareholders in order to put undistributed profits in their hands free of further tax. No date was set for redemption and no fund had been earmarked to pay the redemption price: *Held* in the circumstances the issue of the preferred shares constituted an issue of capital rather than income and therefore should be treated as capital in the hands

of the trustee and added to the corpus of the trust estate for the remaindermen.
Re McAvity [1955] 1 DLR 586; 34 MPR 323 (CAN)

3113 Issue of redeemable preference shares in lieu of dividend
Where a testatrix left her estate to trustees in trust for life tenants and remaindermen, and the estate included shares of a private Ontario Corporation: *Held* redeemable preference shares (and redemption money representing such shares) received by the trustees as stock dividend, pursuant to by-laws and supplementary letters patent consequent upon a tax election by the company in respect of undistributed income, were capital and not income.
Re Waters [1954] 4 DLR 852; [1954] OWN 649; affd [1955] 2 DLR 176; [1955] OR 268; [1955] OWN 233; [1955] CTC 130 (CAN)

3114 Redemption of redeemable preferred shares
The money received by the trustee of the will in question herein from the redemption of redeemable preferred shares of a certain company held to have been received by it as income, and not as capital, for the purpose of administering the trusts under said will and was properly paid to the respective life tenants.
Re Galt Trusts (1955) 16 WWR (NS) 401 on appeal (1956) 20 WWR 95 (CAN)

3115 Redemption of redeemable preferred shares
Re Ommundsen (1956) 4 DLR (2d) 84 (CAN)

3116 Whether capital or income
Where trustees under a will hold shares in a company as part of deceased's estate on trust to pay income with remainder over, and the company has on hand undistributed surplus profits which it desires to divide among its shareholders, the question whether the profits reach the shareholders as income or capital depends not only on the form of the transaction used by the company, but also upon its substance.
Re Mills [1953] 2 DLR 80; [1953] OR 197; [1953] OWN 172; [1953] CTC 115 (CAN)

3117 Bonus shares
A company issued to trustees of a will, by virtue of their holding of shares as part of the trust property, bonus shares, credited as fully paid up, out of an assets revaluation reserve account in the company's books without the trustees having to make any payment for the shares and without having the option of taking in lieu of the shares a cash payment: *Held* in the absence of any contrary intention expressed in the will, the bonus shares formed part of the corpus of the trust property.
Re Wilkinson, Elder's Trustee & Executor Co Ltd v Henty [1954] VLR 486; [1954] ALR 866 (AUS)

3118 Sale to British Transport Commission
Part of a trust estate consisted of ordinary stock of a company owning a road transport undertaking. On 17 March 1949, the company sold their road transport undertaking to the British Transport Commission at a price which was paid partly by an allotment to the company of British Transport stock. On 16 September 1949 the company resolved to reduce their capital. On the same day the company also resolved that, on the reduction becoming effective, most of the British Transport stock, being a realised accretion of capital assets, would be divided proportionately among their ordinary stockholders, including the trustees. The reduction of capital was confirmed by the court on 7 June 1950, but meantime, on 18 May 1950, the trustees had sold their holding of ordinary stock, the date agreed for settlement being 13 June 1950. The sale price reflected the anticipated distribution of British Transport stock: *Held* (1) the trustees, in selling their holding of the company's ordinary stock, had sold not merely a capital asset but also the right attached to it to receive a block of British Transport stock, and accordingly the part of the sale price attributable to the value of the latter stock fell to be treated as income; (2) that the value of the stock fell to be ascertained as at the date of the contract of sale, and not the date agreed for settlement.
Thomson's Trustees v Thomson [1955] SC 476 (SCOT)

B Dividends out of profits

3119 General rule
Tenant for life of bank stock held entitled to a dividend "of 5 per cent interest and profits for the half-year."
Barclay v Wainewright (1807) 14 Ves 66; 33 ER 446

3120 General rule
Testator gave his residuary real and personal estate to trustees upon trust for certain persons for life, with remainders over. His estate comprised fully paid shares in the S Company. In each year from 1894 to 1906, the company returned to its shareholders out of profits available for dividends a part of the capital paid up on their shares, increasing the unpaid capital by the same amount. These returns purported to be made under the Companies Act 1880 (c 19) (repealed), but no special resolution was passed until 1905. In that year a special resolution was passed that 7*s* 6*d* per share should be so returned in that year, that all similar returns in past years should be confirmed, and that the directors should be authorised to make similar returns in the future: *Held* the special resolution was invalid so far as it purported to have a retrospective or prospective effect, and valid only so far as concerned the return made in 1905; and a tenant for life is entitled to all payments made out of profits in respect of shares in a company except such as have been validly capitalised by the company. All the returns except the 7*s* 6*d* per share in 1905 were therefore payable as income to the tenants for life.
Re Piercy, Whitwham v Piercy [1907] 1 Ch 289; 76 LJ Ch 116; 95 LT 868; 51 Sol Jo 113; 14 Mans 23

3121 Effect of increase of rate of interest
For several years prior to 1846 an assurance company declared half-yearly dividends of 2½ per cent on their stock, but in the year they declared a half-yearly dividend of 12½ per cent: *Held* a tenant for life of

their stock was entitled to the whole amount of that dividend.
Price v Anderson (1847) 15 Sim 473; 60 ER 703

3122 Bonus
Tenant for life of bank stock, held entitled to a bonus of 1 per cent directed to be made out of the interest and profits on the capital stock of the bank.
Preston v Melville, Melville v Preston (1848) 16 Sim 163; 60 ER 835

3123 Bonus

Testator who died in 1846, bequeathed his property to trustees, upon trust for AB during her life, and after her death for his children. Part of the property consisted of shares in an insurance company, and in 1848 a bonus on these shares was declared: *Held* this bonus was income, and AB was entitled to it.
Johnson v Johnson (1850) 16 LTOS 455; 15 Jur 714

3124 Bonus
Three bonuses upon certain bank shares having been paid as part of the dividend: *Held* having been made by way of annual payment, they were interest and not capital.
Hebert v Bateman (1853) 1 WR 191

3125 Bonus
Where a banking company divided a certain part of the actual profits of the then last half-year among the shareholders, under the names of "dividend" and "bonus," such bonus was held, as between tenant for life, and remainderman, to be income, and not capital.
Plumber v Neild (1860) 29 LJ Ch 618; 2 LT 417; 6 Jur NS 529; 8 WR 337

ANNOTATION **Consd** Dale v Hayes (1871) 40 LJ Ch 244

3126 Bonus — Accruing since testator's death
The tenant for life of the income of testator's property is entitled to all bonuses accruing since his death and paid out of profits.
Murray v Glasse (1853) 1 Eq Rep 541; 23 LJ Ch 126; 22 LTOS 35; 17 Jur 816

3127 Bonus — Money received in respect of old debt
A person who was a shareholder in and manager of a company bequeathed some of his shares specifically to several persons absolutely, and gave the residue of his property to tenants for life, with remainders over. After his death it was discovered that large sums were due from him as manager to the company, and a compromise was entered into with the sanction of the court, by which his estate was to pay the court £220,000, a considerable part of which was attributable to interest accrued during testator's life on the sums due from him. Immediately after the payment the company disposed of this sum by declaring a bonus on its shares: *Held* as between the tenants for life and remaindermen, the whole of the bonus on those shares which formed part of the residue belonged to the tenants for life as income.
Maclaren v Stainton (1861) 3 De GF&J 202; 30 LJ Ch 723; 4 LT 715; 7 Jur NS 691; 9 WR 908; 45 ER 855, LJJ

ANNOTATION **Apld** Re Bates, Mountain v Bates [1928] Ch 682

3128 Bonus — Money received in respect of old debt — Necessity for considering time when bonus declared
For a long series of years the manager of a public company had fraudulently retained large sums, whereby the dividends declared, from time to time, were much less than they otherwise would have been. After his death, a considerable sum was recovered by the company from his estate, in respect of his defalcations, and thereupon the company declared a large bonus: *Held* as between the tenant for life and remainderman of some shares, the bonus belonged solely to the person entitled to the share at the time it was declared.
Edmondson v Crosthwaite (1864) 34 Beav 30; 55 ER 543

3129 Bonus — Presumption that bonus provided out of current profits
A sum of East and West India Dock stock was bequeathed to certain persons for life, with remainders over, and bonuses were from time to time declared out of the profits generally in respect of it: *Held* in the absence of any evidence that such bonuses arose from profits which did not accrue during the lives of the tenants for life, they were not capital, but income and ought to be treated as such.
Dale v Hayes (1871) 40 LJ Ch 244; 24 LT 12; 19 WR 299

3130 Bonus
The directors of a company owning and operating steam trawlers, having sold some of their vessels for sums largely exceeding the values at which they stood in the company's balance sheet, carried the proceeds to a suspense account and afterwards distributed them as cash bonuses to the shareholders, with a covering letter stating that such bonuses were capital payments not liable to income tax or super tax: *Held* not having been capitalised by the issue of bonus shares increasing the total capital, the payments were income receivable by the tenant for life during his life.
Re Bates, Mountain v Bates [1928] Ch 682; 97 LJ Ch 240; 139 LT 162; 72 Sol Jo 468

ANNOTATIONS **Apprvd** Hill (RA) v Permanent Trustee Co of New South Wales Ltd [1930] AC 720 **Consd** Bicber Ltd v Income Tax Comrs [1962] 3 All ER 294

3131 Dividends declared after testator's death

Dividends in a public company, earned before testator's death, but declared afterwards, from income and not corpus.

Bates v Mackinley (1862) 31 Beav 280; 31 LJ Ch 389; 6 LT 208; 8 Jur NS 299; 10 WR 241; 54 ER 1146

3132 Dividends declared after testator's death — Arrears of preference dividends

By her will testatrix bequeathed her residuary estate to her trustee upon trust for sale and conversion, but with power to postpone, and directed him to pay the income or annual produce of the trust fund to D for life, and to apply the next annual produce from the unconverted part of her estate as if it were the income of the proceeds of conversion. Testatrix owned 2,400 fully paid cumulative preference shares in a company, and under the articles was entitled to be paid out of available profits a cumulative preference dividend of 10*s* per share, in addition to a sum of £7 per share. At the death of testatrix, in 1920, there was due to her, on balance, a sum of £3 15*s* per share in respect of the £7. The right to that balance was contingent on the company making a profit and not carrying it to reserve. On 5 September 1922, the directors passed a resolution "to transfer £80,000 from reserve to profit and loss account, and to declare and pay a dividend of £1 17*s* 6*d* on the preference shares being the equivalent of three and threequarter years' dividend on account of arrears." In pursuance of the resolution £3,150 was paid to the executors of testatrix: *Held* on the contingency happening the shareholder then entitled to the shares was entitled to the money which was the equivalent of the right which was once contingent but then became absolute, and the £3,150 was income, which became payable for the first time in 1922, and passed to the tenant for life under the terms of the will as "annual produce" of the estate.

Re Marjoribanks, Marjoribanks v Dansey [1923] 2 Ch 307; 92 LJ Ch 609; 129 LT 669; 67 Sol Jo 659

ANNOTATION **Consd** Re Sandbach, Royds v Douglas [1933] Ch 505

3133 "Special dividend"

A holder of shares in both departments of the Sun Fire & Life Office bequeathed his personal estate to trustees on trust to permit his wife to receive the dividends, interest, and income thereof for her life, remainder over. He died in December 1870. In January 1873, an extraordinary dividend was declared on the life shares for five years previously; and in July 1873, a "special dividend" was declared on the fire shares for the half-year previous: *Held* these dividends were income, and belonged to the tenant for life.

Re Hopkins' Trusts (1874) LR 18 Eq 696; 43 LJ Ch 722; 30 LT 627; 22 WR 687

3134 Dividend out of surplus capital or capital profits

It was provided by the articles of association of a limited company that ". . . the company in general meeting of the directors . . . may . . . pass a resolution . . . that any surplus capital moneys or capital profits in the hands of the company whether arising from the realisation of capital assets . . . or received in respect of any capital assets . . . shall be divided among the members of the company by way of capital distribution in proportion to their rights." A testator, part of whose estate consisted of shares in the company directed by his will that the income of the estate should be paid to his widow for her life and that the estate should be held on trust for other beneficiaries thereafter. On a summons taken out by the executors of the will for determination of the question whether sums paid to them as shareholders, as a result of exercise by the company, of its powers under the articles in question, should be paid to the tenant for life as income or added to the corpus of the estate, the sums in question not having been capitalised under the particular article in the articles of association referring to capitalisation of profits, and there being no direction in the will that they were to be treated as part of the corpus of the estate: *Held* the article, on its true construction, merely authorised distribution of capital profits, and did not purport to fix their character as between tenant for life and remainderman; and accordingly the sums received by the executors must be treated as income and paid to the tenant for life.

Per *Somervell LJ*: the principle established by *Re Bates, Mountain v Bates* (no 3130 ante), and *Hill v Permanent Trustee Co of New South Wales Ltd* (no 3102 ante), that capital profits distributed by a company during the life of the tenant for life of an estate consisting of shares in the company, though not subject to income tax in the hands of the recipient, fall under the word "income" or similar words in the gift of the estate, is not affected by the fact that one of the company's articles of association prescribes a special procedure to be followed when capital profits are distributed.

Re Doughty, Burridge v Doughty [1947] Ch 263; [1947] 1 All ER 207; 176 LT 173; 63 TLR 257, CA

ANNOTATIONS **Consd** Re Harrison's Will Trusts, Harrison v Milborne-Swinnerton-Pilkington (1949) 65 TLR 573; Re Whitehead's Will Trusts, Public Trustee v White [1959] 2 All ER 497

3135 Dividend out of surplus capital or capital profits

A testator by his will made in 1916 bequeathed his shares in a company to the trustees thereof who, at the date of this summons, held some of them on the

trusts of the will and of a resettlement effected by a disentailing deed and a settlement both executed in 1947. The company had not power in its articles to increase its capital but, in 1919, adopted an article enabling it at any time to resolve that any surplus moneys in its hands representing moneys received or recovered in respect of or arising from any of its capital assets or any investments representing them be distributed among its members on the footing that they receive them as capital. The company made distributions under the article and the trustees of the will applied the sums which they received in respect of the shares held by them as capital. Doubts as to the correctness of so doing having arisen, in 1946 they took out this summons to decide whether a sum received by them in 1948 and attributable to the shares held under the will and the resettlement of 1947 ought to be treated as income or as an accretion to the capital of the shares: *Held* in deciding that it ought to be treated as income for the purposes of the will and the subsequent settlement, the principle that, if a company had no power under its articles to increase its capital, it could distribute to its shareholders money impressed with the obligation that it should be treated as part of the capital of a settled property as between tenant for life and remainderman was entirely inconsistent with the principles enunciated *Re Doughty* (no 3134 ante), and with those laid down by *Lord Russell of Killowen* in *Hill v Permanent Trustee Co of New South Wales* (no 3102 ante).

Re Harrison's Will Trusts, Re Harrison's Settlement, Harrison v Milborne-Swinnerton-Pilkington [1949] Ch 678; 65 TLR 573; 93 Sol Jo 601

3136 Capital profits dividend — Sale of interests to British Transport Commission — Distribution of British Transport stock

By her will testatrix, who died in 1924, settled her residuary estate which included £4,000 ordinary stock of a company which had considerable interests in passenger road transport and road haulage undertakings. As a result of Transport Act 1947 (c 49), these interests were sold by the company to the British Transport Commission for the sum of £24,800,000, which was satisfied by an allotment to the company of British Transport 3 per cent guaranteed stock at 101 per cent. At an extraordinary general meeting of the company its memorandum was altered so that the company then became entirely an investment and holding company, and, by an ordinary resolution at the same meeting, the company resolved to pay a special capital profits dividend on its ordinary stock by distributing to each stockholder £5 British Transport stock for each £1 of the company's ordinary stock held by him. As a result of this resolution, £20,000 British Transport stock was received by the trustees of the testatrix's residuary trust fund, and the question to be determined was whether this sum was to be treated as income or as an accretion to the capital of the fund: *Held* as a limited company not in liquidation could make no payment by way of return of capital to its shareholders except as a step in an authorised reduction of capital, the sum of British Transport stock was to be treated as income of testatrix's residuary trust fund.

Re Sechiari, Argenti v Sechiari [1950] 1 All ER 417; 66 (pt 1) TLR 531; 94 Sol Jo 194

ANNOTATIONS **Apld** Re Kleinwort's Settlement Trusts Westminster Bank Ltd v Bennett [1951] 2 All ER 328 **Distd** Re Winder's Will Trusts, Westminster Bank Ltd v Fausset [1951] 2 All ER 362

3137 Capital profits dividend

The trustees of a settlement owned £2,000 ordinary stock in a limited company. By a resolution of 17 March 1949, that company ordered the distribution of a special capital profits dividend by which the holders of the ordinary stock received £5 British Transport 3 per cent guaranteed stock for every £1 ordinary stock in the company. The question on a summons taken out by the trustees was whether the £10,000 stock received by them by reason of this resolution was to be treated as capital or income of the settlement: *Held* (1) the sum was distributed as a dividend and accordingly was income belonging to the tenants for life; (2) the court had, in special circumstances, jurisdiction to apportion such a payment between capital and income, but there were not here any special circumstances justifying an apportionment.

Re Kleinwort's Settlements, Westminster Bank Ltd v Bennett [1951] Ch 860; [1951] 2 All ER 328; [1951] 2 TLR 91; Sol Jo 415

ANNOTATIONS **Consd** Re Maclaren's Settlement Trusts, Royal Exchange Assurance v Maclaren [1951] 2 All ER 414 **Apld** Re Rudd's Will Trusts, Wort v Rudd [1952] 1 All ER 254

3138 Capital profits dividend

On 8 November 1948, Thomas Tilling & Co Ltd announced that, having sold their interests in road transport to the British Transport Commission in consideration of the allotment of a large holding of British Transport 3 per cent stock, they would pay to stockholders as a special capital profits dividend £5 of transport stock in respect of every unit of stock of Thomas Tilling & Co Ltd held. On 20 November 1948, the trustees of a settlement, having wide powers of investment with the consent of the tenant for life, proposed to the tenant for life that certain capital moneys should be invested in the purchase of stock of Thomas Tilling & Co Ltd. The tenant

for life agreed, and on 1 December 1948, the purchase was effected. In March 1949, Thomas Tilling & Co Ltd distributed the British Transport stock as proposed. The trustees later sold both the Thomas Tilling stock and the British Transport stock, receiving in the aggregate for both holdings less than the amount of capital moneys originally invested in Thomas Tilling stock. The proceeds were applied (under a power given by the settlement) together with other capital moneys in the purchase of a house as a residence for the tenant for life. In reliance on the decision in *Re Sechiari*, (no 3136 ante), the tenant for life claimed to be entitled to an equitable charge on the house or the proceeds of its sale of an amount equivalent to the proceeds of sale of the British Transport stock: *Held* the tenant for life had assented to the purchase of the transport stock as a capital investment and to the sale of that stock and the reinvestment of the proceeds as capital in real estate for his benefit knowing that the trustees would not have embarked on the transaction if they had been aware of the possibility that the capital distribution by Thomas Tilling & Co Ltd would be income in their hands, and, in the circumstances, there was no equity in the tenant for life that he should be given a charge on the house or its proceeds of sale or be recouped the value of the transport stock.

Per curiam: the jurisdiction exercised in special circumstances to apportion between capital and income seems to be only the exercise of a right to make a more exact distinction of income from capital. As a matter of convenience, the practice is in the ordinary case that no apportionments are made, with the result that capital sometimes gets what, on a more exact scrutiny, would prove to be income and *vice versa*. Where this produces a glaring injustice, the court will cause a more exact calculation to be made, but it does not treat as income that which is capital, or as capital that which is income.

Re Maclaren's Settlement Trusts, Royal Exchange Assurance v Maclaren [1951] 2 All ER 414; [1951] 2 TLR 209; 95 Sol Jo 624

ANNOTATION **Consd** Re Rudd's Will Trusts, Wort v Rudd [1952] 1 All ER 254

3139 Capital profits dividend

After the passing of Transport Act 1947 (c 49), a company sold their transport and road-haulage business to the British Transport Commission in consideration of an allotment of British Transport stock. On 21 February 1949, notice was given to the stockholders of a meeting to be held on 17 March to pass a resolution to distribute British Transport stock to persons who were ordinary stockholders of the company on 21 February. The distribution proposed was £5 British Transport stock for every £1 of the stock of the company held by each stockholder on the company's register in the relevant date. The payment was described in the resolution as being a special profits dividend payable out of the profits realised by the company on the sale of part of their undertaking. The distribution was to be made on 1 April, but the company's stock was quoted ex dividend as from 21 February. On 27 February, six days after notice convening the meeting of 17 March had been given, a stockholder died. By his will his stock formed part of a settled fund, and the question was asked whether the British Transport stock, received in respect of the testator's holding in the company, was capital or income of that settled fund: *Held* although the distribution was not actually made until after testator had died, the payment must be regarded as income that had accrued due before he died, for although, at the time of his death, he had only a contingent or future right to the British Transport stock, it was nevertheless part of his property, and, when the payment was received, it did not form part of the income of the residuary trust fund, but was capital of the fund.

Re Winder's Will Trust, Westminster Bank Ltd v Fausset [1951] Ch 916; [1951] 2 All ER 362; [1951] 2 TLT 93; 95 Sol Jo 467

3140 Capital profits dividend

By his will, dated 3 January 1939 testator gave his residuary estate to trustees on trust for sale and conversion "(with full power to postpone such sale . . . and conversion . . . and to retain any of the investments in the same state of investment as at my decease for so long as my trustees shall in their absolute discretion think fit without being personally liable . . . for any loss occasioned by such postponement or retention). . . ." He directed that the proceeds of sale should be invested in authorised investments and he then settled the residue. He died on 21 August 1939, and at the time of his death his investments included a sum of stock of Thomas Tilling Ltd which was then valued at 46*s* per £1 stock. The trustees retained £9,950 of this stock as part of the residuary trust fund. On 8 November 1948, the company issued a circular to shareholders in which it stated that, having sold its interest in road transport to the British Transport Commission in consideration of the allotment of a large holding of British Transport 3 per cent stock, it proposed to recommend, at a meeting to be convened later, that on 1 April 1949, "a capital distribution be made out of the amount received to holders of [the company's] ordinary stock at the rate of £5 of British Transport . . . stock . . . in respect of each £1 stock held." On receiving the circular that trustees did not reconsider the question whether their holding of the company's stock, or any part of

it, should be sold, and it did not occur to them that the sum received in payment of what was described as a "capital" bonus might be distributable as income. The company's stock was quoted on the London Stock Exchange, and on 15 February 1949, its mean price was £6 4*s* per £1 stock, while on 16 February 1949, it was quoted ex the capital profits dividend, the mean price being then approximately £1 8*s* per £1 stock. On 17 March 1949, the company passed a resolution to pay a capital profits dividend in its ordinary stock by distributing the British Transport stock as proposed in the circular of 8 November 1948, to shareholders on the register on 21 February 1949 (the date of the notice of the meeting), and as a result of the resolution, the trustees received the sum of £49,750 British Transport stock. The beneficiaries interested in capital contended that, although, under the decision in *Re Sechiari* (no 3136 ante), this sum was to be treated as income of the testator's residuary trust fund, it should, nevertheless, be apportioned as between the capital and income of the fund, as the trustees had committed a breach of trust by failing, after receiving notice of the company's intention to declare the dividend to sell the whole or part of their holding of the company's stock before 16 February 1949, when it went ex dividend: *Held* on the true construction of the will, both the power to postpone sale and the power to retain investments were ancillary to the trust for conversion; the trustees were not entitled to treat the company's stock as permanent authorised investments, but it was not their duty to realise it in order to make a large profit for capital at the expense of income; on the facts of the case, no breach of trust had been committed; and therefore, no part of the British Transport stock received by the trustees was to be apportioned to the capital of testator's residuary trust fund.

Re Rudd's Will Trusts, Wort v Rudd [1952] 1 All ER 254; [1952] 1 TLR 44

Scottish, Irish and Commonwealth Cases

3141 Bonus

A bonus, declared by the Bank of Ireland on their stock, in addition to the annual dividend, is not in the nature of annual profits, but is an accretion of the capital.

Re Hodgens, Ex p Hodgens (1847) 11 I Eq R 99 (IR)

3142 Bonus

Held a bonus or extraordinary dividend on the shares of the capital stock of a joint stock bank, paid in addition to the half-yearly dividend, and out of the net annual profits of the bank for the year, was not an accretion to the capital.

French v Craig (1858) 8 I Ch R 142 (IR)

3143 Dividends declared after testator's death

Re Sichlan's Will, Trustees, Executors & Agency Co Ltd v Sichlan [1918] VLR 431 (AUS)

3144 Dividends declared after testator's death

Where moneys of a testator were at the time of his death invested in shares in a company whose articles contained a clause empowering the company to distribute its profits as a dividend or to convert then into capital: *Held* where the company validly exercised this power, that was paid by the company as a dividend went to the tenant for life.

Re Rolland, Trustees, Executors & Agency Co Ltd v Black (1911) 30 NZLR 494 (NZ)

3145 Dividends declared after testator's death

When a testator directs or permits part of his estate to remain as shares or stocks in a company which has the power either to distribute its profits as dividends or convert them into capital, and the company validly exercises this power, what is paid by the company as dividend goes to the liferenter.

Blyth's Trustees v Milne (1905) 7 F (Ct of Sess) 799 (SCOT)

3146 "Extraordinary dividend"

French v Craig (1858) 8 I Ch R 142 (IR)

3147 Dividend out of profit on sale of assets

Re Hill Permanent Trustee Co v Hill (1929) 29 SRNSW 53; 46 NSWWN 10 (AUS)

3148 Dividends declared after testator's death

Deceased died on 17 October 1950, and by his will left a number of ordinary shares in the Swan Brewery Co Ltd on specified trusts. On 25 October 1950, a dividend was declared by the company for the half-year ended 30 September 1950: *Held* the dividend belonged wholly to corpus.

Re Sears, Perpetual Executors Trustees & Agency Co Ltd v Chisholm (1951) 53 WALR 57 (AUS)

3149 Capital profits dividend

By his will testator appointed plaintiffs as his executors and trustees and devised and bequeathed to the trustees *inter alia* a holding of 1,250 ordinary £1 shares in a limited company, upon trust to pay the income thereon and therefrom to his wife during her life for her own use subject to the obligation of educating his children as therein set out and after her death in trust for his children as by the will provided. After the death of testator and during the lifetime of his widow the greater part of the company's interests, being road haulage undertakings, were acquired by the British Transport Commission under Transport Act 1947, and the consideration on the sale was paid to the company by the allotment to the company of British Transport 3 per cent Guaranteed Stock. By ordinary resolution the company decided to allot the said stock to its ordinary shareholders in the form of "a special capital profits dividend" by distributing to each stockholder £5, British Transport Stock, for each £1 of the company's ordinary stock held by such stockholder. As a result, the trustees received a sum of £3,125, British Transport 3 per cent Guaranteed Stock 1968-1973. The trustees sought the direction of the court as to whether this sum should be treated as income and paid to the tenant for life or be

retained by the trustees as part of the corpus of the estate, the subject of the trust: *Held* the said sum of £3,125 should be treated as income and it was therefore payable to the tenant for life.

Re Meacher, Bank of Ireland v Meacher [1951] IR 100 (IR)

3150 Character of distribution

The character, as a matter of company law, of any given distribution as it leaves the company determines its character in the hands of a recipient shareholder, and the fact that the latter is a trustee holding for persons successively interested does not, except in so far as the trust may otherwise provide, alter the legal character of the distribution as between such persons. The character of a distribution as a matter of company law may be determined by a governing statute or by corporate acts of the company having regard to their legal consequences in relation to the company's corporate structure, but not by any declaration which does not affect the corporate structures.

Re McIntyre [1954] 1 DLR 192; [1953] OR 910; [1953] OWN 877; [1953] CTC 372 (CAN)

3151 Stock dividend in redeemable preference shares

The word "dividend" is not a term of art and its meanings include (1) a division of profits of a joint-stock company, and (2) a portion or share of anything dividend. In determining whether a stock dividend in redeemable preference shares which are immediately redeemed in cash, passes to a life tenant to whom is given by a deceased's will "all dividends" received on certain shares, the court is not concerned with whether proceeds of the redeemed shares are capital or income but rather whether they are embraced by the word "dividends" as used by testator.

Re Carson [1963] 1 OR 373; 37 DLR (2d) 292 (CAN)

C Dividends out of accumulated profits

3152 Issue of new shares

Re Palmer, Patmer v Cassel no 3219 post

3153 Issue of new shares — Dividend appropriated in taking up shares

Re Northage, Ellies v Barfield no 3195 post

3154 Issue of new shares — Shares exchanged for more profitable shares

C, a working colliery company, had accumulated out of profits a large reserve fund invested in the shares of a trust company which also held shares in three other working colliery companies. In 1913 a combine company was incorporated for the purpose of acquiring the shares in all four working companies, the shareholders in which were offered the opportunity of exchanging their shares for shares in the combine on advantageous terms, and practically the whole of the shareholders availed themselves of the offer and deposited their shares under a provisional agreement by which provision was made for the deposit in a bank of the share certificates in the four working companies and for the allotment in exchange of shares in the combine. The annexed scheme set out the rate of exchange in the case of each of the four working companies, and under the heading dealing with C added a note that C's assets in the trust company, referring to the reserve fund, would be distributed among C's ordinary shareholders. Immediately after the adoption of the provisional agreement the directors of the trust company exchanged all shares held by that company in the three other working companies for shares in the combine, and subsequently went into liquidation. Other steps were taken, and a resolution was passed by C in the distribution of the assets to be received by C for the liquidation of the trust company, representing the reserve fund, by way of dividend amongst their ordinary shareholders. As a result of these transactions the shares in the combine thus acquired by C and some cash were distributed among their ordinary shareholders. On a summons taken out by trustees raising the question whether the shares and cash so distributed to them ought as between tenant for life and remaindermen to be treated as capital or income: *Held* the scheme proceeded on the footing of a distribution of the reserve fund as undivided profits by way of dividend and not by way of reduction of capital; looking at the real transaction, there was no intention to capitalise the reserve fund; and the shares and cash in the hands of the trustees must be treated as income and not as capital.

Re Thomas, Andrew v Thomas [1916] 2 Ch 331; 85 LJ Ch 519; 114 LT 885; 32 TLR 530; 60 Sol Jo 537, CA

3155 "Special bonus"

The memorandum and articles of association of a company provided for increase of capital. The articles provided that the directors with the sanction of a meeting of share holders might declare dividends; that, before recommending a dividend, they might set aside, out of profits, a reserve fund for contingencies, equalising dividends and other specified objects and that they might declare and pay interim dividends. Shares in the company were settled by will. At the death of testator, in 1884, there stood in the accounts of the company, to the credit of a reserve fund £3,000. By the date of the annual meeting of the company in October 1888, the reserve fund had risen to £9,000. Up to October 1888, the shareholders had received each year, partly as "dividend," partly as "bonus," sums of various amounts; in 1888 equal to £2 10*s* a share. In April 1889, the directors resolved to divide £15,000, £25 a share, as "special bonus"; and this amount was paid as "interim dividend" in April 1889. About £5,000 of extraordinary

expenses were incurred, and a further dividend of £10 a share was paid in November of that year. The reserve fund was by that time reduced to £2,000: *Held* the tenant for life of the settled shares was entitled to the whole of the amount divided.
Re Alsbury, Sugden v Alsbury (1890) 45 Ch D 237; 60 LJ Ch 29; 63 LT 576; 39 WR 136; 2 Meg 346

3156 "Bonus dividend"
Re Northage, Ellis v Barfield no 3195 post

3157 "Special dividend"
Re Despard, Hancock v Despard (1901) 17 TLR 478

Scottish, Irish and Commonwealth Cases

3158 "Special bonus"
Re Carson, Carson v Carson (1915) 1 IR 321 (IR)

3159 "Special dividend"
Re Hassell, Knowles v Ballarat Trustees, Executors & Agency Co Ltd, Haslem v Ballarat Trustees, Executors & Agency Co Ltd (1916) VLR 594 (AUS)

3160 Special payment
A testator by his trust-disposition and settlement directed his trustees to hold the residue of his estate for the alimentary life-rent of his wife, and after her death of his children. At his death his estate included a holding of stock in a company. Thereafter the company, which was about to go into liquidation, passed a resolution authorising the payment to stockholders before the liquidation of (1) a final dividend, and (2) a special payment out of capital profits accumulated in past years from the realisation of investments. On the next day the company passed a special resolution that it be wound up voluntarily, and also an ordinary resolution appointing a liquidator. At the date of the liquidation the trustees still held stock, and in respect of it they received the special payment: *Held* as there was nothing in the trust deed to indicate the testator's intention as to how such a payment should be treated, and as the company had made the payment before it went into liquidation and not as part of an authorised reduction of capital, the payment fell to be regarded as an income payment; and the fact that the company was about to go into liquidation did not make it a capital payment.
Forgie's Trustees v Forgie [1941] SC 188 (SCOT)

3161 Whether capital or income
Re Mills [1953] 2 DLR 80; [1953] OR 197; [1953] OWN 172; [1953] CTC 115 (CAN)

3162 Issue of stock dividend
If a company incorporated under the Dominion Companies Act elects under s 95A of Income Tax Act 1948 to pay tax on its undistributed income, and thereafter creates preference shares issues them to the shareholders as a stock dividend, and immediately redeems them out of the undistributed profits, the proceeds of the redemption reach the shareholders not as tax-free income but as non-taxable capital. A trustee, therefore, who, holding shares in the company as a trust asset, receives moneys in redemption of preference shares so issued, receives them as capital of the trust rather than as income. From the time that the trustee becomes entitled to receive a certificate for these shares their status, as between the settlor and the remaindermen under the trust, does not differ from that of the shares originally received by the trustee, and a capital asset (the shares) in the hands of a trustee will not be transformed into income merely because the company uses surplus profits to redeem the shares.
Re Hardy Official Guardian v Toronto General Trusts Corpn [1956] SCR 906 (CAN)

3163 Issue of stock dividend
A company incorporated under the Ontario Companies Act obtained supplementary letters patent authorising the creation of 500,000 new preference shares, redeemable by the company on notice to the shareholders, and, on redemption, to be cancelled and not reissued. These supplementary letters were obtained pursuant to a decision by the company to avail itself of s 95A of the Income Tax Act 1948, as enacted in 1950, as a means of making available to the shareholders a large undistributed surplus. After payment of the tax provided for in that section the company, pursuant to by-laws, issued 240,000 preference shares "as fully paid and nonassessable", and in the following two years about one-third of these shares were redeemed, at various times. A block of shares in the company was held by the trustees of an estate, and 64,000 of the new shares were issued to the trustees as a stock dividend; of these about 18,000 were subsequently redeemed: *Held* the trustees received the shares so issued, and the proceeds of those that were redeemed, as capital of the estate, for the benefit of the remaindermen, and not as income for the benefit of the life-tenants. Once shares were issued as paid-up, the portion of the undistributed profits appropriated for the purpose of paying them up immediately became capitalised, and the shares were themselves an addition to the capital stock of the company.
Re Waters, Waters v Toronto General Trusts Corpn [1956] SCR 889; 4 DLR (2d) 637 (CAN)

D Capitalisation

LAW See Halsbury's Laws (4th edn) vol 42 para 957

3164 Question of fact
Bouch v Sproule no 3182 post

3165 Question of fact
Catthorpe's (Lord) Will Case (circa 1795) cited in 14 Ves at p 77; 33 ER 450

ANNOTATION **Distd** Barclay v Wainewright (1807) 14 Ves 66

3166 Question of fact
In these cases, the decision of the company acting within the scope of its constitution binds the persons interested in succession to testator's shares, and determines what is capital and what is income (*Chitty J*).
Re Paget (Lord), Listowel v Paget (1892) 9 TLR 88

3167 Question of fact
Re Malam, Malam v Hitchens no 3201 post

3168 Question of fact
Re Evans, Jones v Evans no 3184 post

3169 Question of fact
Re Thomas, Andrew v Thomas no 3154 ante

3170 Question of fact
Re Speir, Holt v Speir no 3090 ante

3171 Question of fact
Re Taylor, Waters v Taylor no 3197 post

3172 Question of fact
Subject to certain bequests and dispositions, a testator who died in May 1931, by his will gave the residue of his estate to his trustees for conversion and investment and directed that the investments representing such residue should be held upon trust as to certain parts for his children therein named, such part to be settled upon certain trusts. Testator's residuary estate consisted (*inter alia*) of £100 preference shares and £100 ordinary shares in BB Limited. By the articles of BB Limited, it was provided that "the profits of the company which it shall from time to time be determined to divide in respect of any year or other period shall be applied first in paying the fixed cumulative preference dividend on the capital paid up on the preference shares to the close of such year or other period and subject thereto in paying a dividend for such year or other period on the capital paid up on the ordinary shares." At the date to testator's death £1 per share had been paid up on the ordinary shares, but nothing on the preference shares. No dividend had been declared before March 1931. By legislation in the Union of South Africa, BB Limited would become liable, in the event of its not distributing in each year dividends amounting to 75 per cent of its profits in the Union, to a special super-tax. By an arrangement with the inland revenue, BB Limited which owed a large sum in respect of income tax, super-tax and surtax, was not to make any distribution by way of dividend until such sum should be discharged. In 1932 an interim dividend was declared on the ordinary shares "out of the profits of the company for the year 1931." In 1933 an interim dividend was declared which was to be paid "first out of the accumulated profits of the year to 31 December 1924, and if these should not suffice then recourse to be had to the profits of the year to 31 December 1925." Interim dividends were declared in 1934, and 1935, payable similarly out of undistributed profits for the years 1925, 1926 and 1927. When these dividends were declared calls were made upon the ordinary shares which were satisfied out of the dividends declared. A summons was taken out to determine whether the dividends were income or capital of testator's residuary estate or fell to be apportioned between income and capital, and if so on what basis: *Held* the interim dividends were for the years in which they were respectively declared; upon the evidence the intention of the company was a distribution of profits and not the capitalisation of the amount of the dividends and the dividends declared after testator's death must be treated as income.

Re Joel, Johnson v Joel [1936] 2 All ER 962

3173 Question of fact
A company which was empowered by its articles to capitalise profits, capitalised some £40 million of reserves representing capital profits by issuing to ordinary shareholders 10*s* nominal of unsecured loan stock for every £1 ordinary stock held by them. Trustees of the will of a testatrix who held ordinary shares, were accordingly allotted loan stock, and the question arose whether, as between the tenant for life and the remainderman under the will, the stock was capital or income. There was no provision in the will affecting the question and on fact giving rise to any question of apportionment: *Held* although the company's decision to distribute income-bearing loan stock, and not to distribute the profits as income, did not involve the creation of new shares, it effected a capitalisation under which any further character of divisible profits was taken away from the assets that were the subject of the capitalisation; the decision was binding on the shareholders and, accordingly, loan stock issued to the trustees of the testatrix' will was capital of her estate.

Re Outen's Will Trusts, Starling v Outen [1963] Ch 291; [1962] 3 All ER 478; [1962] 3 WLR 1084; 106 Sol Jo 630

3174 Company without power to increase capital — Distribution of profits
The 5 per cent annuities of 1797 created upon the subscription of the Bank for the public service and in pursuance of a resolution of the Bank divided among the proprietors of bank stock *pro rata* are considered as an accretion to the capital; and therefore a person entitled for life can have the benefit of it by way of dividend only.

The same thing in effect has been done, when the Bank has increased the dividend; the ground of which has been, that there has been a gradual saving; of which they give the benefit to the proprietor, not by payment of a sum of money, but by additional dividend. It would be a neater way to convert it into bank stock. They could not do that without an Act of Parliament (*Lord Lough-borough C*).

Brander v Brander (1799) 4 Ves 800; 31 ER 414, LC

ANNOTATIONS **Consd** Barclay v Wainewright (1807) 14 Ves 66 **Apld** Cuming v Boswell (1857) 28 LTOS 344 **Consd** Bouch v Sproule (1887) 12 App Cas 385

3175 Company without power to increase capital — Distribution of profits

An extraordinary division of profit by the Bank of England among the proprietors of bank stock considered as capital.

Clayton v Gresham (1804) 10 Ves 288; 32 ER 855, LC

3176 Company without power to increase capital — Distribution of profits

By a marriage settlement some shares in the London Assurance Company were settled on the husband and wife for their lives, and after their deaths on their children; and it was provided that if any bonus should be given by way of increase of capital of the trust funds it should be added to the capital: but, if it should be given by way of interest of dividend, it should be paid to the person entitled to receive the dividends of the trust funds for the time being. At a meeting of the company the usual dividend of £1 per share was voted; and it was resolved that a certain sum should be taken out of the profits of the company and dividend amongst the proprietors in proportion to their shares: *Held* the addition made in pursuance of the resolution was to be considered as part of the capital of the trust fund.

Ward v Combe (1836) 7 Sim 634; 58 ER 981

ANNOTATION **Consd** Bouch v Sproule (1887) 12 App Cas 385

3177 Company without power to increase capital — Distribution of profits — In money

An extraordinary division of a sum of money by the Bank of England among the proprietors of bank stock, beyond the usual dividend, considered as capital, and therefore not the absolute property of the tenant for life.

Paris v Paris (1804) 10 Ves 185; 32 ER 815, LC

ANNOTATIONS **Consd** Barclay v Wainewright (1807) 14 Ves 66; Hooper v Rossiter (1824) M'Cle 527 **Apld** Re Barton's Trust (1868) LR 5 Eq 238 **Distd** Re Bromley, Sanders v Bromley (1886) 55 LT 145

3178 Company without power to increase capital — Distribution of profits — As bonus

Distribution by the bank of extraordinary profit, beyond the regular dividend, not by way of increased dividend, but as a bonus, taken as capital; and the manner, in which it is given, makes no difference.

Witts v Steere (1807) 13 Ves 363; 33 ER 330, LC

ANNOTATION **Distd** Barclay v Wainewright (1807) 14 Ves 66

3179 Company with power to increase capital — Authorisation by special statute — Distribution of additional stock

Tenant for life of the interest, dividends, profits and proceeds of bank stock and residuary legatee of testator's estate, not entitled to the principal sum, but only to the dividends, of the increase of stock apportioned amongst the proprietors at the rate of 25 per cent in pursuance of the resolution of the general court of 24 May 1816, and 56 Geo 3 c 96, out of the capital of £2,910,600 added to the former capital of the bank stock. Defendants, representatives of the tenant for life, charged with the costs of the suit transferring the additional stock to the reversioners, allowed the expense of taking out administration, *de bonis non* to testator they having saved plaintiffs that charge.

Hooper v Rossiter (1824) M'Cle 527; 13 Price 774; 147 ER 1151

3180 Company with power to increase capital — Allotment of new shares

Five shares in a joint stock company were settled upon trust for A for life, with remainder to her children. During the life of A in pursuance of resolutions passed by general meetings of the company, the capital of the company was on several occasions increased by converting into shares a portion of the half-yearly profits of the company, and distributing such shares among the shareholders rateably according to the number of their shares. In this manner several new shares were allotted to the trustees of the settlement. After A's death, these new shares were claimed by her personal representative: *Held* the new shares formed part of the capital of the settlement fund.

Re Barton's Trust (1868) LR 5 Eq 238; 37 LJ Ch 194; 17 LT 594; 16 WR 392

ANNOTATIONS **Folld** Baring v Ashburton (1868) 16 WR 452 **Distd** Re Hopkins' Trusts (1874) LR 18 Eq 696 **Apld** Bouch v Sproule (1887) 12 App Cas 385

3181 Company with power to increase capital — Allotment of new shares

When a company divides its profits by allotting extra shares in its capital to its shareholders, the shares so allotted are capital as between tenant for life and tenant in remainder.

Baring v Ashburton (Lady) (1868) 17 LT 557; 16 WR 452

ANNOTATION **Apld** Straker v Wilson (1870) 39 LJ Ch 463

3182 Company with power to increase capital — Allotment of new shares — Bonus dividend as payment therefor

Testaor bequeathed his residuary personal estate to his executor, T, in trust for testator's wife for her life and after her death to T. Part of the residuary estate consisted of shares in a company whose directors had power, before recommending a dividend, to set apart out of the profits such sum as they thought proper as a reserved fund, for meeting contingencies, equal-

ising dividends or repairing or maintaining the works. After testator's death the directors of the company proposed to distribute certain accumulated profits, which had been temporarily capitalised, as a bonus dividend, to allot new shares partly paid up, to each shareholder, and to apply the bonus dividend in part payment of the new shares. This proposal was carried out, and with T's consent new shares were allotted to him and registered in his name, the bonus dividend on testator's old shares being applied in part payment of the new shares: *Held* looking at all the circumstances the real nature of the transaction was that the company did not pay or intend to pay any sum as dividend, but intended to and did appropriate the undivided profits as an increase of the capital stock; the bonus dividend was therefore capital of testator's estate, and the life tenant was not entitled to the bonus or the new shares.

I come now to the question whether the company did in the present case distribute the accumulated profits as dividend or convert them into capital. . . . I think we must look both at the substance and form of the transaction (*Lord Herschell*).

Bouch v Sproule (1887) 12 App Cas 385; [1886–90] All ER 319; 56 LJ Ch 1037; 57 LT 345; 36 WR 193, HL; revsg SC sub nom

Re Bouch, Sproute v Bouch (1885) 29 Ch D 635, CA

ANNOTATIONS **Distd** Re Alsbury, Sugden v Alsbury (1890) 45 Ch D 237 **Consd** Re Paget, Listowel v Paget (1892) 9 TLR 88; Re Armitage, Armitage v Garnett [1893] 3 Ch 337 **Apld** Re Eastern & Australian SS Co (1893) 68 LT 321; Re Malam, Malam v Hitchens [1894] 3 Ch 578 **Distd** Re Despard, Hancock v Despard (1901) 17 TLR 478; Re Hume Nisbet's Settlmt (1911) 27 TLR 461 **Apld** Re Palmer, Palmer v Cassel (1912) 28 TLR 301; Re Evans, Jones v Evans [1913] 1 Ch 23; Re Thomas, Andrew v Thomas [1916] 2 Ch 331; Re Ogilvie, Ogilvie v Ogilvie (1919) 88 LJ Ch 159; IR Comrs v Blott, IR Comrs v Greenwood [1921] 2 AC 171; Re Speir, Holt v Speir [1924] 1 Ch 359 **Consd** IR Comrs v Fisher's Exors [1926] AC 395 **Folld** Re Taylor, Waters v Taylor [1926] Ch 923 **Apld** IR Comrs v Wright [1927] 1 KB 333 **Distd** Re Bates, Mountain v Bates [1928] Ch 682; Parker v Chapman (1928) 138 LT 729; Hill (RA) v Permanent Trustee Co of New South Wales Ltd [1930] AC 720 **Consd** Re Doughty, Burridge v Doughty [1946] 2 All ER 341; Re Duff's Settlement Trusts, National Provincial Bank Ltd v Gregson [1951] Ch 721 **Folld** Re Outen's Will Trusts, Starling v Outen [1962] 3 All ER 478 **NF** Re Lee (deceased); Sinclair v Lee and another [1993] 3 All ER 926

3183 Company with power to increase capital — Allotment of new shares — Bonus dividend as payment therefor

Re Tindal (1892) 9 TLR 24

3184 Company with power to increase capital — Allotment of new shares — Bonus dividend as payment therefor

The capital of a company was divided into 10,000 shares of £10 each, or which 3,728 shares only had been issued and were fully paid up. The company was very prosperous and the market value of its shares was £30 each. In February 1912, the reserve fund of the company exceeded £50,000, and the directors proposed a scheme for distributing part of the reserve fund, representing accumulated undivided profits, amongst the shareholders, so that every shareholder would get a bonus of one new fully paid £10 share for every existing share held by him. Accordingly, resolutions were passed by the company empowering the directors to declare a bonus dividend out of the reserve fund, and sanctioning the distribution of a bonus dividend of £10 per share out of the reserve fund, authorising the further issue of 3,728 shares of £10 each out of the unissued capital of the company to be allotted *pro rata* amongst the existing shareholders and directing that such new shares be paid up in full forthwith. The directors then sent a circular letter to every shareholder with a warrant for the bonus dividend on his shares, informing him of an allotment to him of his proportion of the new shares and giving him an option to accept or refuse the allotment, and stating that if he accepted the allotment, he was to indorse and return the dividend warrant to the company to be applied in payment of the new shares. Trustees of testator's will held 200 shares of the company, and on receipt of the circular letter, accepted their allotment of 200 new shares, indorsed and returned their bonus dividend warrant for £2,000 and afterwards sold the new shares at a profit. The question then arose whether, as between the tenants for life and remainderman under the will, the bonus dividend was capital or income: *Held* on the evidence, the company intended to capitalise the reserve fund and not to distribute it as a bonus dividend, and therefore the whole of the bonus dividend was capital of testator's estate.

In my opinion it is a question of fact, and the decision must turn on what was the intention of the company (*Neville J*).

Re Evans, Jones v Evans [1913] 1 Ch 23; 82 LJ Ch 12; 107 LT 604; 57 Sol Jo 60; 19 Mans 397

ANNOTATIONS **Apld** Re Thomas, Andrew v Thomas [1916] 2 Ch 331 **Folld** Re Taylor, Waters v Taylor [1926] Ch 923

3185 Company with power to increase capital — Allotment of new shares — Bonus dividend as payment therefor

Part of the estate settled by testator consisted of shares in a limited company, and in March 1918, a resolu-

tion was passed by the company, pursuant to powers contained in the articles of association, which provided that for the purpose of capitalising the sum of £558,594, being part of the undivided profits of the company standing to the credit of the general reserve fund, a dividend of 6*s* 8*d* should be declared on each of the ordinary shares, and that the directors should be authorised to satisfy such dividend by the allotment to the shareholders of one £1 ordinary share credited as fully paid in respect of every three ordinary shares held by them: *Held* the shares allotted in pursuance of this resolution to the trustee of testator's will must be treated and dealt with by him as being capital of testator's residuary estate.

Re Ogilvie, Ogilvie v Ogilvie (1919) 88 LJ Ch 159; 120 LT 436; 35 TLR 218; 63 Sol Jo 246

3186 Redemption of shares — Distribution of additional sums out of profits

Re Paget (Lord), Listowel v Paget (1892) 9 TLR 88

3187 Effect of invalid exercise of power

Re Piercy, Whitwham v Piercy no 3120 ante

3188 Call on partly paid up shares — Bonus equal in amount

Trustees under the powers given them by the will of their testator retained, as part of his residuary trust estate, 300 shares of £10 each, with £2 10*s* per share paid up, in a prosperous Australian company. In November 1912, the company held its annual general meeting and paid a large dividend, and issued new shares which were offered rateably to the shareholders, and the trustees took up fifty-one shares, their proportion of the new shares, and paid up £2 10*s* per share thereon out of the capital of testator's estate.

In February 1913, the directors issued a circular to the shareholders stating that they had made a call of 10*s* per share and had declared a bonus of 10*s* per share, both payable on the same date, and that unless advised by the shareholders to the contrary before that date the bonus would be applied in payment of the call. The circular reached the trustees too late for them to reply to it, and the bonus was applied in payment of the call. On the question whether the bonus was to be treated as capital or income of testator's estate: *Held* the company intended to capitalise its profits to the extent of 10*s* per share, by utilising the bonus to pay the call, and therefore the tenant for life was not entitled to the bonus.

Re Hatton, Hockin v Hatton [1917] 1 Ch 357; 86 LJ Ch 375; 116 LT 281; 61 Sol Jo 253

Scottish, Irish and Commonwealth Cases

3189 Allotment of new shares — Bonus dividend as payment therefor

Where a company increases its capital by issuing new shares which are offered to shareholders, and at the same time distributes accumulated profits in the form of a dividend or bonus with which payment may be made for the new shares so offered, the amount of a dividend or bonus in respect of shares held by trustees which is applied in payment for new shares offered to and accepted by them is, as between tenant for life and remaindermen, income of the estate and not capital, unless the ordinary instincts of human self-interest of a reasonably prudent man would naturally and instantly lead him to apply the dividend or bonus in payment of the new shares notwithstanding that acceptance of the shares is legally refusable.

Mitchell v Hart (1914) 19 CLR 33 (AUS)

3190 Allotment of new shares — Bonus dividend as payment therefor

Re Hawkins, Hawkins v Hawkins (1915) 15 SRNSW 199; 33 NSWWN 47 (AUS)

3191 Allotment of new shares — Bonus dividend as payment therefor

Perpetual Trustee Co v Cohen (1916) 16 SRNSW 242; 33 NSWWN 77 (AUS)

3192 Allotment of new shares — Bonus dividend as payment therefor

Testator, by his will, settled shares in a company. Some years after testator's death the company, which had obtained the necessary powers to increase its capital, paid a bonus of 50 per cent to its stockholders out of accumulated profits, the payment being made in the form of a 40 per cent dividend payable in stock, and a 10 per cent cash dividend: *Held* the trustees of the will should deal with the 40 per cent stock dividend as an accretion to the capital of testator's estate, and with the 10 per cent cash dividend as income arising from the estate.

Re Carson, Carson v Carson [1915] 1 IR 321 (IR)

3193 Power to distribute profits as dividend or convert into capital

Where moneys of a testator were at the time of his death invested in shares in a company whose articles contained a clause empowering the company to distribute its profits as a dividend or to convert them into capital: *Held* where the company validly exercised this power, what was appropriated as an increase of the capital was to the benefit of all those interested in the capital.

Re Rolland, Trustees, Executors & Agency Co Ltd v Black (1911) 30 NZLR 494 (NZ)

3194 Power to distribute profits as dividend or convert into capital

Where a testator directs or permits part of his estate to remain as shares or stocks in a company which has the power either to distribute its profits as dividends or convert them into capital, and the company validly exercises this power, what is paid by the company to the shareholders as capital or appropriated as an increase to the capital stock

of the concern enures to the benefit of all who are interested in the capital.

Blyth's Trustees v Milne (1905) 7 F (Ct of Sess) 799 (SCOT)

E Option given to shareholder

LAW See Halsbury's Laws (4th edn) vol 42 para 959

3195 Effect of

N left his residuary estate upon trust after the death of his daughter to pay the income of one moiety to her husband for life, and subject thereto upon trust for her children. Part of the estate consisted of shares in the E Company, whose directors had power to set aside out of the profits of the company depreciation or redemption funds for various purposes, some such as are usually provided for out of capital, and others such as are usually provided for out of income. After testator's death the directors resolved to distribute among the shareholders the sum of £250,000 out of moneys standing to the depreciation of redemption fund. The capital of the company then consisted of three classes of shares, all of £10, but with £10, £7 10*s* and £5 paid up respectively. The company, after making some necessary alterations in their articles of association, passed resolutions: (*a*) That the sum of £250,545 cash standing to the credit of the depreciation and redemption account, should be distributed among the shareholders by way of bonus dividend, such dividend being at the option of any shareholders applicable to the payment of the amounts due in respect of any new shares or of calls. (*b*) That a number of new shares of £10 each should be issued and offered to the shareholders on terms of immediate payment at par in the proportion of one new share to every two with £10 paid up, and one to every eight with £7 10*s* paid up. At the same time a call was made of £2 10*s* per share on the shares of £7 10*s* and £5 paid up. The scheme was carried out by sending round to all the shareholders a dividend warrant for a sum equal to 50 per cent on the amount paid up on their shares, with a form for the shareholders' signature requesting that the amount might be applied in payment for the new shares and calls on the old. At the same time notices of allotment and forms for acceptance of the new shares were sent. The trustees accepted the new shares, and immediately sold them at a profit. This was a summons to determine the question whether the proceeds were income or capital of the trust estate: *Held* the transaction was in fact a distribution of surplus profits by way of dividend, with an option for the shareholders to invest in a new capital, not an appropriation by the company of the accumulated profits as an increase of capital, and the tenant for life was entitled to the bonus dividend, but the profit made by taking up the shares belong to the capital of the trust estate.

Re Northage, Ellis v Barfield (1891) 60 LJ Ch 488; 64 LT 625; 7 TLR 464

ANNOTATION **Folld** Re Hume Nisbet's Settlmt (1911) 27 TLR 461

3196 Effect of

Re Evans, Jones v Evans no 3184 ante

3197 Effect of

Where, on a distribution of bonus shares by a company to the shareholders, there is a doubt whether such shares are to be considered as capital of income, as between the tenant for life and remainderman under a will, the principle to be followed is that it is the intention of the company that is to be regarded. If the company intend to capitalise it is capital; if there is no such intention, it is not capital.

Therefore in determining such a question reference must be had to substance and not merely to form, and where it is found that the transaction is in form one in which an option is given to the shareholder, that is not necessarily a factor which determines that it is income and not capital.

The option would be immaterial if, from the other documents and facts, it appeared reasonably clear that the company, notwithstanding the form, intended to capitalise.

Re Taylor, Waters v Taylor [1926] Ch 923; 96 LJ Ch 17; 137 LT 17

3198 Option exercised by trustees — On behalf of all beneficiaries

Re Tindal (1892) 9 TLR 24

3199 Option exercised by trustees — On behalf of all beneficiaries

Re Colvile, Colvile v Colvile (1918) 144 LT Jo 327

3200 Company not intending to increase capital — Dividend appropriated in taking up shares — Balance of value of shares

Re Northage, Ellis v Barfield no 3195 ante

3201 Company not intending to increase capital — Dividend appropriated in taking up shares — Balance of value of shares

Testator, who died in 1889, gave his residuary estate to trustees upon trust for his widow for life, and, after her death, for division amongst others; and gave his trustees power to postpone conversion of any part of his property for so long as they should think fit. At the date of his death testator was possessed of shares in a company. In 1893 the company, by special resolution, resolved to increase its capital by the issue of new shares, and empowered the directors to offer such new shares to the existing shareholders in payment or part payment of any dividends for the time

being. A dividend was afterwards declared out of profits, which the company was in a position to pay in cash. Half of such dividend was paid in cash, and in respect of the balance an allotment of new shares was offered to the shareholders, and such as did not accept the offer received the remainder of the dividend in cash. The trustees of the will accepted the allotment, and allowed the new shares to be allotted to the tenant for life: *Held* (1) upon the evidence, the company intended to distribute its profits as dividend, and not to capitalise them.

The general principle applicable is . . . stated in *Bouch v Sproule* (no 3182 ante) . . . it was laid down that in considering whether a company has distributed its accumulated profits as dividends or converted them into capital regard must be paid both to the form and the substance of the transaction. . . . The principle of law laid down is binding on me; the decision on the question of fact is not, unless indeed the facts be substantially the same (*Stirling J*).

Re Malam, Malam v Hitchens [1894] 3 Ch 578; 63 LJ Ch 797; 71 LT 655; 38 Sol Jo 708; 13 R 38

ANNOTATION As to (2) **Consd** Re Palmer, Palmer v Cassel (1912) 28 TLR 301

3202 Company not intending to increase capital — Dividend appropriated in taking up shares — Balance of value of shares

A company resolved to pay a bonus dividend to its shareholders, and gave them the option of taking new shares fully paid instead of the dividend in cash. The trustees of a settlement, who were registered shareholders, exercised the option and took new shares, which were of greater value than the dividend: *Held* the tenant for life was entitled to the cash dividend, but the value of the shares in excess of that sum was capital.

Re Hume Nisbet's Settlement (1911) 27 TLR 461; 55 Sol Jo 536

3203 Company not intending to increase capital — Dividend appropriated in taking up shares — Balance of value of shares

Re Colvile, Colvile v Colvile no 3199 ante

Scottish, Irish and Commonwealth Cases

3204 Option exercised by trustees — On behalf of all beneficiaries

Held from a business standpoint a full and free option was left to shareholders to accept or refuse new shares, and therefore that as between tenant for life and remaindermen, although new shares accepted by trustees were capital of the estate, the tenant for life was entitled to a charge on them for the amount of the bonus.

Mitchell v Hart (1914) 19 CLR 33 (AUS)

3205 Option exercised by trustees — On behalf of all beneficiaries

Re Hawkins, Hawkins v Hawkins (1915) 15 SRNSW 199; 33 NSWWN 47 (AUS)

3206 Option exercised by trustees — On behalf of all beneficiaries

Blyth's Trustees v Milne (1905) 7 F (Ct of Sess) 799 (SCOT)

F Proceeds of sale

3207 New shares allotted in respect of settled shares — Stock purchased with proceeds of sale

Where the calls on new shares, allotted to trustees of a marriage settlement, in respect of original railway shares, held by them upon the trusts of the settlement, had been paid out of the wife's separate income: *Held* stock, purchased with the proceeds of the sale of such new shares, was subject to the trusts of the settlement as corpus, and the wife had a lien for the amount so paid for calls, by analogy to the case of tenant for life advancing money for fines payable on renewal of leaseholds.

Rowley v Unwin (1855) 2 K&J 138; 69 ER 726

ANNOTATION **Apld** Re Malam, Malam v Hitchens [1894] 3 Ch 578

3208 New shares allotted in respect of settled shares

Profits received upon trust investments by the sale of allotment scrip distributed to shareholders, are the proceeds of an accretion to the shares, and must be treated as capital.

Re Curtis, Hawes v Curtis (1885) 1 TLR 332

3209 Stock sold before dividend due — Apportionment from last dividend day to day of sale

Bulkeley v Stephens no 3249 post

3210 New stock issued in respect of settled stock

Testator, who died in 1843, by his will dated in 1841 bequeathed (*inter alia*) thirty-five shares in a gas company to trustees upon trust for his wife for life, and subject thereto he directed that the same should form part of his residuary estate. After the death of testator the gas company resolved to increase its capital by the issue of fresh stock, which it offered to its shareholders. J, acting under a power of attorney on behalf of the surviving trustee of the will, who was resident abroad, availed himself of the offer, and took up with his own moneys and in his own name some of the new stock. An action for administration of testator's estate having been instituted an order was made on the executrix of J who had died, under which the new stock was sold and the balance of the proceeds of sale, after repayment of the amount paid for the

stock and interest, and deducting therefrom the dividends received by J, was paid into court to the credit of the action. On the further consideration of the action, a question arose whether testator's widow, as tenant for life of the thirty-five original shares, was entitled to this balance or whether the same formed part of his residuary estate: *Held* the trust relating to the thirty-five shares must be treated as if it stood alone, it being in respect of that particular trust that J had obtained the power of which he had availed himself; and the benefit arising therefrom must be treated as belonging to that trust alone; the balance in court represented capital, and the widow was entitled to the income thereof for life.

It seems impossible to consider the whole amount of money obtained by the sale as profit belonging to the tenant for life (*Kay J*).

Re Bromley, Sanders v Bromley (1886) 55 LT 145

3211 Option to take up new stock

By a marriage settlement made in 1902 it was declared that the trustees thereof should hold certain investments, which had been transferred by the husband into their joint names, upon trust either to allow the same "to remain in the present state of investment thereof" or, with specified consents to sell the same, and invest the proceeds in investments therein mentioned and pay the annual income thereof to the husband for life, and after his death to his wife for life, and after the death of both, to hold the investments upon the usual trusts for the children of the marriage, with an ultimate trust, in the event of there being no children, in favour of the husband absolutely. By clause 11 of the settlement the trustees were authorised to exercise any preferential right that might be offered to them to subscribe for new or other shares in any company in which they held shares or stock, and to dispose of the same, and every premium or profit arising therefrom was to be applied by them as if the same were income. One of the investments so transferred to the trustees consisted of 109 shares in an American financial company called the Northern Securities Company, which was formed to acquire and hold shares in other corporations, and held a large number of shares in, and controlled the policy of, two American railway companies, the Great Northern Ry Co and the Northern Pacific Ry Co. In 1904 the capital stock of the Northern Securities Co was cancelled to the extent of 99 per cent, and in lieu of their 109 shares in that company the trustees of the settlement received thirty-two fully paid up shares and a fractional share in the capital stock of the Great Northern Ry Co, forty-two fully paid up shares and a fractional share in the capital stock of the Northern Pacific Ry Co, and one fully paid up share and a fractional share in the Northern Securities Co. In 1905 and 1906 the trustees received three options to take up new stock in respect of the thirty-two shares in the Great Northern Ry Co and of the forty-two shares in the Northern Pacific Ry Co, and in exercise of these options they paid certain instalments, and in one instance sold the right of option. The husband having died and there being no children of the marriage, the wife claimed the proceeds of the options as income under clause 11 of the settlement, subject to repaying the trustees what had been paid in respect of the new shares: *Held* the shares in the two railway companies were not the same shares which were transferred to the trustees at the date of the settlement, and therefore the trustees were not authorised by the terms of the settlement to retain them; the accretions to the shares, by reason of the exercise of the options, belonged to the capital of the trust estate, and could not be treated as income under clause 11 of the settlement.

Re Anson's Settlement, Lovelace (Earl) v Anson [1907] 2 Ch 424; 76 LJ Ch 641; 97 LT 472; 51 Sol Jo 686

Scottish, Irish and Commonwealth Cases

3212 Stock sold before dividend due — Apportionment from last dividend day to day of sale

Trustees, in July, sold the shares of a company, the dividend on which was annually declared in October and conveyed to the purchaser the right to all dividends accruing after the sale: *Held* the liferentrix was entitled to such a proportion of the price obtained for these shares as might be ascertained to be the value of the dividend accruing to the shares between the payment of the last dividend and the date of the sale.

Donaldson v Donaldson's Trustees (1851) 14 Dunl (Ct of Sess) 165; 24 Sc Jur 173; 1 Stuart 147 (SCOT)

3213 Stock sold before dividend due — Apportionment from last dividend day to day of sale

In a question between a liferenter and fiar: *Held* the price of shares sold in the interval between two dividends fell to be divided between capital and revenue on the basis of the dividend admitted by the parties to have been expected at the date of sale, and not of the dividend ultimately paid.

Cameron's, Factor v Cameron (1873) 1 R (Ct of Sess) 21; 11 SC LR 1 (SCOT)

3214 Surplus assets — Distribution on dissolution — Repayment ordered to be by way of return of capital

Money paid to an executor of a deceased shareholder in a winding up under an order directing the repayment to be by way of return of capital becomes part of the corpus of the estate.

Re Keating [1934] SCR 698; [1934] 3 DLR 745 (CAN)

3215 Right of life tenant
Life tenants are not entitled to moneys which represent proceeds of sale of securities over and above their value of the time of testator's death.
Re Nichol's Estate (1936) 51 BCR 214 (CAN)

3216 Sale of right to take up shares
By his will a testator left shares in a company to his trustee to "hold all dividends bonuses benefits and rights accruing therefrom" upon trust for C for life and upon her death upon trust to sell and to distribute the proceeds. In December 1950, the company issued further ordinary shares of a nominal value of 5*s* and offered them to existing shareholders at a premium of £1 in the proportion of one for every ten ordinary shares then held with the right of renunciation in favour of other parties: *Held* the proceeds of the sale by the trustee of the right to take up shares at a premium although of a capital nature belonged to the tenant for life such proceeds being included in the gift of "rights" accruing from the trust shares.
Re Sears, Perpetual Executors Trustees & Agency Co Ltd v Chisholm (1951) 53 WALR 57 (AUS)

G Effect of dissolution of company

LAW See Halsbury's Laws (4th edn) vol 42 para 956 et seq

3217 Surplus assets — Distribution on dissolution — Surplus arising from reserve dividend fund
An insurance company by their deed of settlement were directed to create a reserve fund, and pay no dividend till a specified amount was realised. This provision was departed from by the consent of the majority of the shareholders, and a bonus was distributed every three years. The company then amalgamated with another, and it was agreed that £50 per share should be paid upon all shares, and also a proportionate part of the surplus assets. Plaintiff, who was tenant for life of ten shares in the company, claimed the share of surplus assets which had been paid over to her trustee as part of her annual income: *Held* these surplus assets, which must be considered as the reserve fund, were capital, and not income.
Nicholson v Nicholson (1861) 30 LJ Ch 617; 9 WR 676

3218 Surplus assets — Distribution on dissolution — Surplus arising from reserve dividend fund
Testator gave his residuary estate in trust for his daughter for life and then in trust for his son. Part of the residue consisted of shares in a limited company, the articles of which provided for the formation of a reserve dividend fund out of the annual profits above 10 per cent to be applied in supplementing the dividend when the annual profits fell below 5 per cent. After testator's death the company went into voluntary liquidation and transferred its business to a new company. The amount distributable among the shareholders in the winding up was sufficient to provide a surplus over and above the amount of capital paid up on each share. This surplus arose from a sum of £20,000 representing the reserve dividend fund and a further sum of £17,000 representing undivided profits: *Held* as between tenant for life and remainderman the whole of the surplus ought to be treated as capital.
Re Armitage, Armitage v Garnett [1893] 3 Ch 337; 63 LJ Ch 110; 69 LT 619; 9 TLR 630; 7 R 290, CA

ANNOTATIONS **Consd** Re Sale, Nisbet v Philp [1913] 2 Ch 697; Re Thomas, Andrew v Thomas [1916] 1 Ch 383 **Distd** Hill (RA) v Permanent Trustee Co of New South Wales Ltd [1930] AC 70

3219 Surplus assets — Distribution down to dissolution
Testator at the date of his death held certain shares in the A Company. In 1905 that company sold and transferred its assets to the C Company; and in 1909 it was resolved at an extraordinary general meeting to wind up the A Company, and the liquidation was still proceeding. Since testator's death the trustees of his will had received various sums and various distributions of shares of the C Company in respect of the shares of the A Company held by the trustees. The A Company had power to distribute excess of capital as dividends: *Held* all distributions down to the winding up of the A Company were income and all payments received since the liquidation were capital.
Re Palmer, Palmer v Cassel (1912) 28 TLR 301; 56 Sol Jo 363

3220 Surplus assets — Distribution after dissolution
Re Palmer, Palmer v Cassel no 3219 ante

4 Partnerships

LAW See Halsbury's Laws (4th edn) vol 42 para 961

CROSS REFERENCE See PARTNERSHIP vol 36(2) (2nd reissue) no 3647 et seq (right of personal representative of deceased partner)

3221 Partnership articles to be regarded — Share of profits retained as additional capital
(1) Testator authorised his executors to enter into a partnership with his brother, on such terms as they should think fit, and leave his capital therein. The executors did so, and the articles of partnership stipulated that interest at 5 per cent should be paid on testator's capital, and that part of the executors' profits should be left in the concern "as additional

capital": *Held* the tenant for life was entitled to the interest, but the share of the profits retained as additional capital must, as between the tenant for life and remainderman, be considered as capital and not income.

I am of opinion that the terms of the partnership deed regulate the question as to what is properly to be considered the income and what the capital of the first partnership. It must be determined according to the terms of the articles of partnership, and I am of opinion that everything paid for interest is income to which the tenant for life is entitled, and that all the profits, which according to the terms of the deed were what I may call capitalised, and retained as capital in the business, must be treated as capital, the interest of which the tenant for life is entitled to receive (*Romilly MR*).

(2) Trustees, without authority, lent trust moneys at interest at 5 per cent: *Held* the tenant for life was entitled to the whole interest, and the remainderman had no right to insist that the excess of the interest beyond the dividends which would have been produced if the money had been invested in Consols formed capital.

Stroud v Gwyer (1860) 28 Beav 130; 2 LT 400; 6 Jur NS 719; 54 ER 315

ANNOTATIONS As to (2) **Dbtd** Re Hill, Hill v Hill (1881) 50 LJ Ch 551 **Folld** Re Appleby, Walker v Lever, Re Appleby, Walker v Nisbet (1902) 51 WR 153 **Apprvd** Slade v Chaine [1908] 1 Ch 522 **Apld** Re Hoyles, Row v Jagg (no 2) [1912] 1 Ch 67

3222 Partnership articles to be regarded — Credit balance of profit and loss account

Testator gave to his wife a life interest in his one-seventh of a colliery in which he was a partner. By the deed of partnership, the majority in value of the partners had power to dispose of the profits by adding them to the capital, or dividing them between the partners, or carrying them to the separate accounts of the partners. For several years profits were made, but retained to the credit of a profit and loss account. Afterwards profits were divided, but at the death of the tenant for life a large sum remained to the credit of the profit and loss account, the greater part of which had been sunk in the works of the colliery: *Held* under the circumstances, the share of testator in the sum standing to the credit of the profit and loss account belonged to the persons entitled in remainder, and not to the executor of the tenant for life.

This case must depend upon the articles of partnership (*Lord Hatherley C*).

Straker v Wilson (1871) 6 Ch App 503; 40 LJ Ch 630; 24 LT 763; 19 WR 761, LC

3223 Undrawn profits

By his will a testator settled his residue in equal half shares, his son, W, being tenant for life of one, and his brother, A, of the other. Clause 13 provided: ". . . I . . . declare that rents, dividends and other periodical payments in the nature of income current at the date of my death shall not be apportionable, but that the same and also all such income accrued but not received at the date of my death shall be treated as income and not as capital." Clause 14 provided: "With regard to any business . . . in which I may be interested whether solely or jointly with anyone else . . . my trustees shall have all such powers as would be possessed by a single person absolutely entitled as regards the mode and time of realisation of any such business . . . or my share or interest therein or otherwise in relation thereto. . . . My trustees may . . . continue . . . any such business . . . with power to enter into any new arrangement or agreement with any person . . . with whom at my death I may have been carrying on any such business . . . either in partnership or otherwise . . . to retain or employ in any such business . . . such part of my residuary estate . . . as my trustees may . . . think proper." Testator owned theatres in an oral partnership at will in equal shares with his brother, F, the accounts of the business being made up to 25 December in each year, 26 December to 25 December thus being the conventional period for ascertaining the profits. Testator and F left most of their shares of the profits in their capital accounts. Testator died on 28 February 1937. At that date there were standing to his credit in the accounts sums representing undrawn profits from 26 December 1935 to 25 December 1936. After testator's death his trustees carried on the business on the same terms with F, who died on 5 April 1938, and thereafter with F's executors. A died in March 1938. W, surviving tenant for life, claimed to be entitled to the profits for the periods from 26 December 1935, to 25 December 1936, and from 26 December 1936, to 28 February 1937. The children of A, deceased tenant for life, claimed that the profits of the business as at A's death should be apportioned in respect of the share of income settled on A for life: *Held* (1) although the partnership ended when testator died, the profits for the conventional period during which his death occurred were to be computed at the end of that period, namely, as at 25 December 1937, and, as the business was carried on after testator's death in accordance with his directions, so that there was one continued business, all the profits for that conventional period were income and went to W; (2) the undrawn profits for the conventional period from 26 December 1935, to 25 December 1936,

were capital, as the will did not otherwise provide, and therefore did not go to W; (3) A was not entitled to any of the profits for the conventional period, during which he died, ending 25 December 1938, all of which would go to W.

Re Robbins, Midland Bank Exor & Trustee Co Ltd v Melville [1941] Ch 434; [1941] 2 All ER 601; 111 LJ Ch 83; 165 LT 421

ANNOTATION **Consd** Re Berry, Lloyds Bank Ltd v Berry [1961] 1 All ER 529

3224 Practice of firm considered — Division of whole of profits

A trader devised and bequeathed to trustees all his real and personal estate, including his share in the business in which he was a partner, on trust as to one moiety thereof to pay the annual proceeds, including the net profits of the business, to his daughter for her life, for her separate use without power of anticipation, and after her death the moiety was to be held in trust for her children or remote issue. He directed his trustees to carry on the business after his death until the expiration of the partnership term, and authorised them to use, not only such capital as he should have in the business at the time of his death, but also such other part of the trust premises as they should think fit. The partnership deed authorised the partners to dispose of their shares by will; it did not provide how any loss in carrying on the business should be borne. The will contained no provision as to the mode in which any such loss should be borne as between the persons interested in testator's estate. It had been the practice of the firm in prosperous years to divide the whole profit among the partners, and in years in which there was a loss to write off each partner's proportion of the loss from his share of the capital. Testator died in 1879. After his death the business was carried on by his trustees in partnership, with the other partners. Up to the end of 1880 it was carried on at a profit, and half testator's share of that profit was paid by the trustees to the daughter. For the year 1881 there was a loss, and testator's share of the loss was written off from his share of the capital in the books of the firm. For the year 1882 there was a profit: *Held* the daughter was entitled to receive half that share of the profits which testator, according to the practice of the firm, would have received if he had been alive, and consequently she was entitled to receive half his share of the profits for the year 1882, without any deduction for the purpose of making good the corpus of the settled share in the interest of the remainderman.

Gow v Forster (1884) 26 Ch D 672; 51 LT 394; 32 WR 1019

3225 Practice of firm considered — Division of whole of profits

By articles of partnership it was provided that the partners should carry out certain contracts, and that the partnership should continue until the contracts were completed, but that if either of the partners should die, then that his executors should be bound by his obligations, and that there should be no division of the profits until the completion of the contracts. One of the partners died, and by his will bequeathed all of his property upon trust, after conversion and investment, for his widow for life, with remainder over. The contracts were not completed until six years after testator's death, when his share of the partnership assets was paid to his trustees: *Held* in the administration of his estate, his widow was entitled to interest at 4 per cent from his death on the value of his share in the partnership assets.

Jackson v Jackson (1869) 20 LT 354; 17 WR 547

Scottish, Irish and Commonwealth Cases

3226 Partnership articles to be regarded — Share of profits retained as additional capital

Partnership articles provided that meetings of the partners should be held, and the profits divided annually. The partners, when reduced to two, testator being one of them, met and resolved that the accounts be made up half-yearly, in March and September. The meetings were held very irregularly, but when they took place it was the partners' practice to examine the accounts and to pass a resolution disposing of the profits, and until the passing of such resolution the profits were not carried to the separate credits. Testator, who died in August 1869, by will declared that from the day of his decease, the annual income arising from his residuary personal estate should belong, in effect, to B for life, and for that purpose the clear profits arising from his partnership should be considered as annual income and be paid to B for life. In December 1869, at a meeting of the surviving partner and an executor of testator, they resolved that the profits for the year ending March 1869 should be divided, and testator's share was carried to the credit of his account under date September 1869, and it was, in December 1869, paid to his executors. At a meeting of the same two persons in March 1870, they ordered the profits of the half-year ending September 1869 to be divided, and testator's share was paid to his executors. In taking the account in Chambers a question arose whether these shares of testator should be distinguished as capital or income, and B presented a petition under 15 and 16 Victoria c 80, asking the court's opinion: *Held* the profits for the year ending March 1869 were capital, and belonged to testator's estate, and the profits for the half-year ending September 1869 were income, and belonged to B.

Browne v Collins (1871) 12 LR Eq 586 (IR)

5 Right to emblements

LAW See Halsbury's Laws (4th edn) vol 42 para 962

CROSS REFERENCE See AGRICULTURE vol 2 (2nd reissue) no 611 et seq

2 Apportionment in respect of time

i IN GENERAL

LAW See Halsbury's Laws (4th edn) vol 42 para 963 et seq

3227 Every species of income apportionable — On death of tenant for life after Apportionment Act 1870 (c 35)

Above Act applies to every kind of income, whether made payable under an instrument in writing or otherwise, to which a person may be entitled who dies subsequently to the passing of the above Act.

By an order of the court made in 1855, an annuity of £100 was directed to be paid to W during her life. W died in 1872: *Held* the annuity was apportionable to the day of her death.

Re Thacker's Trusts (1873) 28 LT 56; 21 WR 285

3228 Every species of income apportionable — Nature of instrument immaterial

Re Thacker's Trusts no 3227 ante

3229 Every species of income apportionable — Nature of instrument immaterial

Re Cline's Estate no 3236 post

3230 What amounts to exclusion of apportionment — Trust for sale with power of postponement — Direction for application of income pending sale — To be applied as income from testator's death

Apportionment Act 1870 (c 35) is not excluded by a power to postpone a trust for sale coupled with a direction that pending sale "the whole of the income of property actually producing income" shall be applied as from testator's death as income.

Re Edwards, Newbery v Edwards [1918] 1 Ch 142; 87 LJ Ch 248; 118 LT 17; 34 TLR 135; 62 Sol Jo 191

3231 Whether dividends apportionable — Sum invested for payment of portions on death of tenant for life — Income payable to tenant for life

Upon a sale in the Incumbered Estates Court of Irish property, charged with portions for younger children raisable at death of tenant for life, £25,000 was set apart by the commissioners to answer these portions, and invested in Consols. The dividends were received from them by the tenant for life, who died on 1 July 1857: *Held* the portioners were only entitled to that portion of the half-year's dividend due upon 5 July, which had accrued since 1 July, the tenant for life being entitled under Incumbered Estates Act to receive the income upon the fund set apart for portions, and not distributable during his lifetime, or if it had remained unconverted.

Wellesley v Mornington (Earl) (1857) 27 LJ Ch 150; 6 WR 177; sub nom

Mornington v Wellesley (1857) 4 Jur NS 6

3232 Whether dividends apportionable

By the deed of settlement of an unincorporated life assurance society, established in 1843, and possessing certain powers under a special Act of Parliament passed in 1868, provision was made for division of one-tenth of the surplus profits amongst the shareholders, and that such division should be made once in every five years, unless a special meeting duly convened to consider thereof should direct otherwise, and then for that time only: *Held* the society was a public company within Apportionment Act 1870, and the surplus profits for the five years ending 31 December 1878, payable in respect of shares in the society specificially bequeathed by a will dated in 1875, testator dying in the same year, were apportionable.

Re Griffith, Carr v Griffith (1879) 12 Ch D 655; 41 LT 540; 28 WR 28

3233 Whether dividends apportionable

Every company registered under 1862 Act (repealed) was a public company within Apportionment Act 1870.

Re Griffith, Carr v Griffith (1879) 12 Ch 655; 41 LJ Ch 65; 77 LT 637, CA

3234 Whether dividends apportionable — Interest on debentures

Testator bequeathed certain railway debentures to trustees to pay the interest to his children for life, and afterwards the capital to go to his grandchildren. Testator died in February, and the next half-year's payment of dividend upon the debentures was received in the following July: *Held* debentures being in the nature of mortgages upon which the interest accrued *de die in diem*, the portion of the half-year's dividend due up to testator's death was to be considered as capital and not income, as between the tenants for life and remaindermen.

Re Rogers' Trusts (1860) 1 Drew&Sm 338; 30 LJ Ch 153; 3 LT 397; 6 Jur NS 1363; 9 WR 64; 62 ER 408

3235 Whether dividends apportionable — Interests arising under power created before Apportionment Act 1870 (c 35)

There must be an apportionment of dividends between the representatives of a tenant for life and the remainderman, where the interests of the different parties arise under a power of appointment

exercised since, though created before, the passing of above Act.
Wardroper v Cutfield (1864) 3 New Rep 410; 33 LJ Ch 605; LT 753; 10 Jur NS 194; 12 WR 458

3236 Whether dividends apportionable — Dividends on fund in court
(1) Apportionment Act 1870 (c 35) applies to all instruments, whether coming into operation before or not till after the passing of the Act.
(2) Dividends on a fund in court representing real estate of testator who died in 1827: *Held* apportionable as between successive tenants for life.
Re Cline's Estate (1874) LR 18 Eq 213; 30 LT 249; 22 WR 512

ANNOTATIONS As to (1) **Consd** Patching v Barnett (1880) 43 LT 50; Lawrence v Lawrence (1884) 26 Ch D 795

3237 Whether dividends apportionable
Bequest of stock in a canal company to trustees to pay the dividends to testator's wife for life and afterwards to fall into the residue: *Held* the dividends were apportionable.
Pollock v Pollock (1874) LR 18 Eq 329; 44 LJ Ch 168; 30 LT 779; 22 WR 724

3238 Whether dividends apportionable — Dividends on bonus shares created after death of tenant for life
Re Hyde Will Trusts, Hyde v Bryce (1930) 74 Sol Jo 467

3239 What are dividends — Profits in private partnership
Profits in a private trading partnership, carried on under a deed by which it was provided that such dividends should be made from time to time amongst the partners, as the managing partners should direct, are not dividends or other periodical payments in the nature of income within the meaning of Apportionment Act 1870 (c 35), and are not apportionable as between tenants for life and residuary legatees under that Act.
Jones v Ogle (1872) 8 Ch App 192; 42 LJ Ch 334; 28 LT 245; 21 WR 236, LC&LJJ

ANNOTATIONS **Distd** Capron v Capron (1874) LR 17 Eq 288 **Consd** Re Cox's Trusts (1878) 9 Ch D 159; Patching v Barnett (1880) 43 LT 50

Scottish, Irish and Commonwealth Cases

3240 Whether dividends apportionable
Dividends to shareholders of a company are not apportionable under Apportionment Act RSO 1950, unless they are declared in respect of a defined period. The fact that they may be paid regularly, whether annually or half yearly or quarterly, does not mean that they accrue from day to day under the Act unless they are declared for a particular year or half-year or quarter or for some other stated period. Hence, where directors' resolutions declaring dividends merely set out that they were payable on a certain date to registered shareholders as of named date, such dividends are not apportionable between a life tenant and remainderman where the life tenant has died before the dividends were declared. They are payable in full to the remainderman.
Re Coulson (1959) 20 DLR (2d) 732; [1960] OR 1; [1959] OWN 381 (CAN)

3241 Rebate of interest on prepayments of taxes
Where a testator authorised his trustees to commute the tax payable on interests passing under the will (having previously directed that the estate should bear all taxes), and thereupon the trustees prepaid certain taxes instead of paying them under Succession Duty Act RSO 1950 c 378 s 15(2), and in consequence obtained a rebate of interest on the prepaid amounts as provided by s 20: *Held* the savings so effected simply formed part of the general funds of the estate and were subject to the trusts of the will for purposes of distribution. They belonged neither to the life tenants nor to the remaindermen exclusively. While it is true that the prepayments may have reduced the income yield of the life tenants, the testator must have considered this in making his direction for commutation.
Re Bronson (1958) 14 DLR (2d) 51: [1958] OR 367: [1958] OWN 210 (CAN)

ii PURCHASE AND SALE OF INVESTMENTS

3242 General rule — No apportionment
A life estate in realty was created by a deed in 1787. The estate was sold and invested in 1821 in Consols. The tenant for life died on 9 December 1841: *Held* her executors were not entitled to an apportionment of the dividends under Apportionment Act 1834 (c 22).
Michell v Michell (1842) 4 Beav 549; 7 Jur 887; 49 ER 452

3243 General rule — No apportionment
(1) Testator leaving property invested in a variety of securities, giving large time to realise and ample powers to his trustees: *Held* he intended, as between tenants for life and remaindermen, that the tenants for life should at once have the income both of the converted and unconverted property in specie as to that which was unconverted, and the actual income of that which was converted.
(2) The court will not make any apportionment of income, as between tenants for life and remainderman, with reference to the increase or decrease of price arising out of the nearness or remoteness of a period of investment to or from the day when dividends are payable.
Scholefield v Redfern (1863) 2 Drew&Sm 173; 1 New Rep 465; 32 LJ Ch 627; 8 LT 487; 9 Jur NS 485; 11 WR 453; 62 ER 587

ANNOTATIONS As to (2) **Apld** Freman v Whitbread (1865) LR 1 Eq 266 **Consd** Bulkeley v Stephens [1896] 2 Ch 241 **Distd** Re Peel's SE [1910] 1 Ch 389 **Apld** Re Walker, Walker v Patterson (1934) 177 LT Jo 325

3244 General rule — No apportionment

The court will not, as a general rule, as between tenant for life and remainderman, allow compensation by way of apportionment for loss of income occasioned by the sale of stock, sold to complete a purchase under a power to invest in real estate, being delayed beyond the time fixed for completion by the contract for purchase; even although such delay may have been unavoidable.

Where a tenant for life petitioned to have recouped out of corpus the loss of dividends sustained by her by reason of delay in completion and selling out of stock for that purpose, occasioned by difficulties arising on the title of the estate purchased, the court refused to allow such compensation.

Freman v Whitbread (1865) LR 1 Eq 266; sub nom *Freeman v Whitbread* (1865) 35 LJ Ch 137; 13 LT 550; 14 WR 188

ANNOTATIONS **Consd** Bulkeley v Stephens [1896] 2 Ch 241 **Distd** Re Peel's SE [1910] 1 Ch 389

3245 General rule — No apportionment

Stock in a public company forming part of testator's residuary estate was settled upon trust for A for life, and after her death "to pay transfer and assign my residuary estate and the stocks funds and securities upon which the same shall be invested unto and amongst" certain beneficiaries. After the death of the tenant for life the stock was sold "cum dividend" under an order of the court for the purpose of distribution. This order was made in the absence of the legal personal representatives of the tenant for life. After the sale a dividend was declared and received by the purchaser in respect of profits, a portion of which had been earned prior to the death of the tenant for life: *Held* the estate of the tenant for life was not entitled under Apportionment Act 1870 (c 33) to be paid out of the purchase-money of the stock anything in respect of the dividend; but, inasmuch as if the trust had been strictly carried out in accordance with the terms of the will, by transferring the investments to the beneficiaries, the representatives of the tenant for life would have been in a position, either directly, or through the trustees, to obtain payment of an apportioned part of the dividend, their claim ought under the special circumstances of the case to be acceded to.

Bulkeley v Stephens [1896] 2 Ch 241; 65 LJ Ch 597; 74 LT 409; 44 WR 490; 12 TLR 350; 40 Sol Jo 458

ANNOTATIONS **Distd** Re Peel's SE [1910] 1 Ch 389; Re Sale, Nisbet v Philp [1913] 2 Ch 697 **Consd** Re Firth, Sykes v Hall [1938] Ch 517, Re Winterstoke's Will Trusts, Gunn v Richardson [1938] Ch 158; Re Henderson, Public Trustee v Reddie [1940] Ch 368

3246 General rule — No apportionment

Re Shaw's Settlement, Shaw v Shaw (1919) 147 LT Jo 234

3247 General rule — No apportionment

Re Walker, Walker v Patterson [1934] WN 104; 177 LT Jo 325

3248 Exceptions to rule — Special circumstances — Sale of stock for investment in real property — Sale before time for completion

Plaintiff was tenant for life of Consols, which were subject to a trust to be invested in real estates. The trustees, in November, entered into a contract for the purchase of a large real estate, to be completed on 6 January, from which time the purchasers were entitled to the rents. In consequence of the bank books being closed between 14 December and 16 January, the trustees, to enable them to complete, sold the Consols on 26 November, to be delivered on 12 December: *Held* the tenant for life was entitled to be paid, as income on the Consols, the difference between the price obtained and the value exclusive of the next dividend.

Londesborough (Lord) v Somerville (1854) 19 Beav 295; 23 LJ Ch 646; 23 LTOS 291; 52 ER 363

ANNOTATIONS **NF** Scholefield v Redfern (1863) 2 Drew&Sm 173 **Consd** Freman v Whitbread (1865) LR 1 Eq 266

3249 Exceptions to rule — Special circumstances — Sale of stock for investment in mortgage — Sale with consent of tenant for life

A sum of foreign stock, with the current dividend, having been sold by the trustees, with the consent of the tenant for life, and the proceeds of sale of the stock, exclusive of the dividend, having been invested in mortgage for her benefit, the tenant for life was held entitled to an apportioned part of the proceeds of the sale of the dividend.

Bulkeley v Stephens (1863) 3 New Rep 105; 10 LT 225

ANNOTATION **Expld** Freman v Whitbread (1865) LR 1 Eq 266

3250 Exceptions to rule — Special circumstances — Sale under order of court to facilitate distribution

Bulkeley v Stephens no 3245 ante

3251 Exceptions to rule — Special circumstances — Sale to pay death duties

Where, on the death of a tenant for life, the trustees of the settlement sell securities "cum dividend," and part of the dividend accrued while the tenant for life

was alive, the trustees should, if requested so to do, account to the executors of the tenant for life for the proportion of the dividend which has so accrued, so as to preserve the rights which the deceased tenant for life would have had if the securities had been sold "ex dividend."

Re Winterstoke's Will Trusts, Gunn v Richardson [1938] Ch 158; [1937] 4 All ER 63; 107 LJ Ch 122; 158 LT 404; 54 TLR 20; 81 Sol Jo 882

ANNOTATIONS **Consd** Re Firth, Sykes v Hall [1938] Ch 517; Re Henderson, Public Trustee v Reddie [1940] Ch 368

3252 Exceptions to rule — Special circumstances — Sale to pay death duties

Where the trustees of a settlement, on the death of a tenant for life, sell investments cum dividend, part of which accrued during the life of the tenant for life, Apportionment Act 1870 does not apply, and the estate of the tenant for life is not entitled to share in the proceeds of sale, except in very exceptional circumstances.

Re Firth, Sykes v Ball [1938] 2 All ER 217; sub nom *Re Firth, Sykes v Hall* [1938] Ch 517; 107 LJ Ch 251; 158 LT 489; 54 TLR 633; 82 Sol Jo 332

ANNOTATION **Consd** Re Henderson, Public Trustee v Reddie [1940] Ch 368

3253 Tenant for life entitled to whole income of sum invested

Testator, after Apportionment Act 1870 (c 35), bequeathed a sum of money to trustees with interest thereon at 4 1/2 per cent until same should be paid or appropriated, upon trust, with the consent of his wife, to invest same in certain specified securities, and to pay the annual income of the legacy and the investments thereof, including in such income the interest payable in respect of such legacy to his wife for life, with remainders over. Interest was paid to the widow up to the day when, pursuant to an order of the court the bequeathed sum was invested in stocks on some of which five months' dividend had been accrued: *Held* Apportionment Acts did not apply and the widow was entitled to the whole of the dividends when received upon the purchased stocks.

Re Clarke, Barker v Perowne (1881) 18 Ch D 160; 50 LJ Ch 733; 44 LT 736; 29 WR 730

3254 Purchase of stocks on which dividends earned or declared

Where upon a direction by a tenant for life trustees have invested capital moneys in their hands in the purchase of stocks on which at the date of purchase dividends have been earned and declared but not paid the tenant for life is not entitled to such dividends.

Re Peel's (Sir Robert) Settled Estates [1910] 1 Ch 389; 79 LJ Ch 233; 102 LT 67; 26 TLR 227; 54 Sol Jo 214

Scottish, Irish and Commonwealth Cases

3255 Finality of apportionment — Unexpected increase in capital value — Right to re-apportion

For a number of years after testator's death the trustees, treating certain shares in steamships as wasting securities, apportioned the annual dividends from these shares between income and capital, the amounts determined to be income being paid by them to the liferenters of these shares, and the amounts determined to be capital being carried to the capital account of the trust. In 1917, when the shares were ultimately realised, the sum obtained for them, owing to the effect of the war, largely exceeded their value at the date of testator's death. In a question between the liferenters and the fiars: *Held* the shares were "wasting securities" within the meaning of the settlement; the allocations of the dividends between income and capital were final, and could not be reconsidered by the trustees with the object of making further payments to the liferenters out of the portions of the dividends which had been credited to capital.

Warrack's Trustees v Warrack [1919] SC 522 (SCOT)

3256 Declaration of dividend out of undistributed accumulated income

Testator died in 1938, and by his will authorised his trustees to make investments and to retain investments made by him. He then directed them to pay his mother $100 monthly out of income and to pay the balance of income to his wife in such instalments as to them may seem meet "provided that any income accumulated and not actually paid over to her at the time of her death shall be and become capital and form part of the residue." On the wife's death the residue was to be divided equally among three brothers. Testator held shares in C Company which his trustees retained. In 1946, the company elected to pay income tax on its undistributed income in accordance with Part XVIII of Income War Tax Act, as enacted by 1945 (Canada) and later that year the company declared a dividend out of its accumulated and undistributed income less the income tax under Part XVIII. This income was the total of an accumulation of surplus profits carried forward from year to year to the end of 1939, and, not having been capitalised, was available for dividend payments: *Held* the dividend so declared in 1946 was income payable to the life tenant. Apportionment Act RSO 1937 was not applicable since the dividend was not in the nature of a periodical payment nor was it declared for any fixed period of time, and moreover, testator indicated by the proviso in his will that the Act should not apply. Hence there was no ground for apportioning the dividend as of the date of testator's death.

Re Thomson [1947] 3 DLR 466; [1947] OR 469; affd [1948] 1 DLR 304 (CAN)

iii OTHER CASES

CROSS REFERENCE See EQUITY vol 20(3) (2nd reissue) no 380 et seq (apportionment in general)

3257 Trust for accumulation

Where testator directed that if any person, upon becoming beneficially entitled, either as tenant for life or in tail, to estates devised by him to trustees, should be a minor, the trustees should enter into possession, and, after providing for the maintenance of the minor out of the rents, should invest and accumulate the surplus until the minor attained twenty-one, and should then apply the accumulations to the same trusts as directed concerning the body of his estate, and an infant tenant for life attained the age of twenty-one between the days on which the rents become payable: *Held* to be a case within Apportionment Act 1834 (c 22), and the rents were accordingly apportionable.

Shipperdson v Tower (1844) 3 LTOS 199; 8 Jur 485

ANNOTATIONS **Folld** Donaldson v Donaldson (1870) LR 10 Eq 635; Clive v Clive (1872) 7 Ch App 433

3258 Trust for accumulation

(1) Testator directed that, for twenty-one years next after his death, his trustees should receive and accumulate the rents and profits of his real estate, and apply them towards payment of his debts and legacies, and, subject to that term, he gave the beneficial interest in the income of his estate to plaintiff for life: *Held* under Apportionment Act 1834 (c 22), the rent which fell due after the expiration of the twenty-one years must be apportioned between those beneficially interested in the accumulations, and the tenant for life who was entitled on the expiration of the term.

(2) A portion of the income was derived from royalties payable under mining sets or leases, when the ore should be obtained: *Held* the rent not becoming due at fixed periods, it did not come within Apportionment Act 1834 (c 22).

St Aubyn v St Aubyn (1861) 1 Drew&Sm 611; 30 LJ Ch 917; 5 LT 519; 9 WR 922; 62 ER 512

ANNOTATIONS As to (1) **Folld** Wheeler v Tootel (1867) LR 3 Eq 571; Donaldson v Donaldson (1870) LR 10 Eq 635. As to (2) **Consd** Llewellyn v Rows (1866) LR 2 Eq 27

3259 Trust for accumulation

Testator gave the residue of his real and personal estate to trustees, upon trust to receive and accumulate the rents and profits till his nephew should attain twenty-one, when he was to be put into possession of the estate for his life: *Held* there must be an apportionment of the rents up to the period of the tenant for life attaining twenty-one.

Wheeler v Tootel (1867) LR 3 Eq 571; 36 LJ Ch 221; 15 LT 529; 15 WR 382

3260 Trust for accumulation

A settlor, by deed, assigned securities to trustees upon trust after his, the settlor's death, during the minority of A to pay such portion of the income as they should think proper, for the maintenance and education of A; and when A should have attained the age of twenty-one, and thereforth until he should attain thirty, and upon further trust, when and so soon as A should have attained thirty, "to stand possessed of the funds and the annual produce thereof, upon that they and he shall pay unto and permit" A "and his assigns to receive and take the whole of the dividends, interest, and annual produce of same, during his life, for his and their own use and benefit," with limitations over. Upon A attaining thirty: *Held* there must be an apportionment of the current dividends.

Donaldson v Donaldson (1870) LR 10 Eq 635; 40 LJ Ch 64; 23 LT 550; 18 WR 1104

ANNOTATION **Apld** Re Joel's Will Trusts, Rogerson v Brudenell-Bruce [1966] 2 All ER 482

3261 Trust for accumulation

Under a will, by an order of court, and a deed of appointment dated in and between the years 1930 and 1959, a fund was held in trust for a class of grandchildren of testator contingently on their attaining twenty-one years of age. The interest was in possession and carried the intermediate income. Trustee Act 1925 (c 19) s 31 was applicable. Five grandchildren were living at the date of the deed of appointment in 1959 and three were born subsequently: *Held* (1) when a member of class of grandchildren died under twenty-one or another potential member of the class was born there was a change of interest of the other members of the class to which Appointment Act 1870 (c 35) s 2 applied, with the consequence that the income of the trust ought to be apportioned so that each member enjoyed only that portion attributable to the time when he was alive; and outgoings ought likewise to be apportioned equitably; (2) the investments representing accumulations of income belonging contingently to a grandchild dying before attaining a vested interest ought to be added to and therefore dealt with as part of the entire capital of the trust fund.

Re Joel's Will Trusts, Rogerson v Brudenell-Bruce [1966] 2 All ER 482; [1966] 3 WLR 209; 110 Sol Jo 570

3262 Profits from business carried on by trustees

Testatrix bequeathed a newspaper to trustees upon trust to continue the publication thereof as long as they thought fit, and to pay one-fourth share of the

net profits to J during his life, and after his death to his widow during her life; and testatrix declared that no person entitled to participate in the profits should have any right to interfere in the management of the publication or the mode or time of ascertaining and dividing the profits thereof, but same should be wholly in the discretion of the trustees, except that they should every January draw up a balance sheet showing the net profits during the year ending on the then preceding 31 December. The trustees carried on the paper, gave notice to J and the other beneficiaries that they intended, until further notice, to divide the net accrued profits half-yearly up to 30 June and 31 December in each year, and they did so divide same up to 30 June 1877. On 23 December 1877, J died, and his widow claimed the one-fourth share of the net profits of the half-year ending on 31 December 1877: *Held* the profits in question were neither "rents annuities, dividends, or other periodical payments," within Apportionment Act 1870 (c 35); and, Apportionment Act 1870 (c 35) did not apply, and the widow was entitled to the whole profits of the half-year in question.

Re Cox's Trusts (1878) 9 Ch D 159; 47 LJ Ch 735; 27 WR 53

3263 Policy of insurance on life of third party — Premiums paid out of interest

Part of testator's estate consisted of policies on the life of another, subject to a mortgage to the life assurance office. By his will he bequeathed his personal estate to one for life with remainders over. After the death of testator his executor paid the premiums on the policies and the interest on the mortgage out of the income of the personal estate until the death of the assured, when the office paid to the executor the surplus of the policy moneys remaining after deducting the mortgage debt: *Held* as between the tenant for life and the remaindermen, the amount of income expended in keeping down the premiums and interest ought to be recouped to the tenant for life, with interest at 4 per cent, out of the property preserved by the expenditure—that is, the surplus policy moneys; and the balance of such surplus money must be apportioned between capital and income according to the principle and form of order in *Re Chesterfield's (Earl) Trusts* (no 3063 ante).

Re Morley, Morley v Haig [1895] 2 Ch 738; 64 LJ Ch 727; 73 LT 151; 44 WR 140; 11 TLR 507; 13 R 680

3264 Benefits gained by compromise of claim against estate of testator

A claim made against the estate of testator was compromised by the payment of a large sum several years after testator's death: *Held* the amount due for principal and interest at testator's death must be treated as a debt due from his estate, and the corpus thereof reduced by that amount; and any benefit gained to the estate by the compromise must, as between the persons entitled to the corpus and income thereof, be apportioned in the ratio of the amount due from testator at the day of his death, to the further amount calculated to have been due from his estate at the time when the compromise was effected.

Maclaren v Stainton (1867) LR 4 Eq 448; 15 WR 974

3265 Insufficiency of assets — Sums received on realisation

Testator bequeathed a legacy of £10,000 with interest from his death at 4 per cent *per annum*, to trustees upon trust to pay the income to certain persons during the life of one of them, and after her death upon trust for other persons. Testator's estate was insufficient for payment in full of his legacies, and the realisation of his assets occupied several years: *Held* moneys from time to time received by the trustees and applicable to the legacy were divisible rateably between capital and income, so as to attribute to income £4 per cent from testator's death on the amount attributed to capital.

Re Tinkler's Estate (1875) LR 20 Eq 456; 45 LJ Ch 135

Scottish, Irish and Commonwealth Cases

3266 Profits from business carried on by trustees

Andrew's Trustees v Hallett [1926] SC 1087 (SCOT)

3267 Proceeds of realisation of investment — Sale of settled leasehold

Held the most equitable apportionment of the purchase-money of the sale of settled leaseholds was to give the tenant for life the interest arising from its investment together with a half-yearly sum out of the principal, such sum to be half the quotient obtained by dividing the principal moneys by the number of years that the lease would have to run at each division.

Busby v Busby (1893) 14 NSW Eq 42; 9 NSWWN 124 (AUS)

3268 Proceeds of realisation of investment — Sale of mortgaged property

Money was invested under a settlement on mortgage; the income was payable to the tenant for life, the corpus to go to the remainderman. The interest fell into arrear, the mortgagee entered into possession, and after some years sold the property, the proceeds of the sale being less than the capital invested. The income payable to the tenant for life was also very much in arrear: *Held* the sum realised by the sale must be apportioned between the tenant for life and the person entitled to it in remainder in the proportions which the arrears of interest due to the tenant for life bore to the original principal sum invested.

Equity Trustees, Executors & Agency Co Ltd v MacMeikan (1900) 25 VLR 593 (AUS)

3269 Proceeds of realisation of investment
Re Clarke, Toronto Ceneral Trusts Corpn v Clarke (1903) 24 CLT 23; 6 OLR 551; 2 OWR 980 (CAN)

3270 Compensation for expropriation by Crown
O'Mullin v Eastern Trust Co (1915) 48 NSR 219 (CAN)

3 Adjustment of burdens between capital and income

i OUTGOINGS

1 Charge on income

LAW See Halsbury's Laws (4th edn) vol 42 para 967

CROSS REFERENCE See LANDLORD & TENANT vol 31(2) (2nd reissue) no 8247 et seq (fines and expenses of renewal)

3271 Rent — Quit rent
Land tax, quit rent, etc, not apportioned as between tenant for life and the remainder.
Sutton v Chaplin (1804) 10 Ves 66; 32 ER 768

3272 Rent — Settled leaseholds
Re Baring, Jeune v Baring no 3673 post

3273 Rent — Settled leaseholds
Re Redding, Thompson v Redding no 3675 post

3274 Rent — Settled leaseholds
Re Betty, Betty v A-G no 3676 post

3275 Rent — Settled leaseholds
Re Gjers, Coopers v Gjers no 3677 post

3276 Abatements of rent
A married woman was entitled, under a deed dated in 1867, to the surplus rents and profits of certain estates for her life for her separate use without power of anticipation, but subject to a proviso that if she should succeed to an income in her own right of £8,000 or more per annum for her separate use, then her life interest in the estate should absolutely cease and determine, and the property should be held upon trust for her husband: *Held* in estimating the income, the amount coming to the married woman for her own benefit, after payment of all proper charges, must be ascertained as fairly as possible; the tithes, rentcharges and reasonable abatements of rent were properly deducted; the occupation rent of unlet farms and the mansion house in which the married woman lived could not be regarded as income; and it had not been shown that she had succeeded to an income in her own right of £8,000, or more *per annum*.
Bateman (Lady) v Faber (1900) 83 LT 9; 48 WR 625; 44 Sol Jo 590, CA

3277 Sums paid to relieve future liabilities under a lease — Apportionment
When part of the residuary estate of a testatrix who died on 24 March 1932, consisted of two houses held on lease for terms expiring in 1944 and 1945 respectively and subject to the payment of heavy ground rents and other liabilities; and, before the expiration of the first year after testatrix's death, the executors in pursuance of their obligations under the leases, expended £353 in payment of rent and other outgoings; and, for the purpose of relieving the estate from future liabilities thereunder, acting under proper advice assigned the leases and paid out of the capital of the estate the sums of £500 and £100 to the respective assignees thereof in consideration of their undertaking those liabilities: *Held* as between tenant for life and remainderman under the trusts of the residuary estate, the remainderman was not entitled to have the whole of the sums of £500 and £100 recouped to capital out of the income accruing to the tenant for life, although the effect of that payment out of capital was to relieve the tenant for life from the obligations he would have been under to meet out of income the liabilities under the leases, but for the assignment thereof; the obligation to pay the sum of £353 ought not to be wholly borne by the tenant for life, as he was not put in possession of any of the income of the residuary estate until the estate had, within the due period of one year from testatrix's death, been freed from the leasehold liabilities; but, thirdly, those three sums amounting together to £953 ought to be apportioned as between capital and income upon the principle recognised in *Allhusen v Whittell* (no 3423 post).
Re Shee, Taylor v Stoger [1934] Ch 345; [1934] All ER 623; 103 LJ Ch 183; 150 LT 451

3278 Deductions from rent under Licensing Act 1904 (c 23) (repealed)
The deductions which, under Licensing Act 1904 (c 23) (repealed), a licence holder was allowed to make from his rent in respect of charges imposed by quarter sessions to form a compensation fund for non-renewal of licences under that Act (repealed) were a charge upon the rent. In cases where the reversion was settled a tenant for life had no right in the absence of special directions in the will or settlement to have any part of these deductions paid out of capital.
Re Smith, Smith v Dodsworth [1906] 1 Ch 799; 75 LJ Ch 442; 94 LT 643; 70 JP 169; 54 WR 449; 22 TLR 412; 50 Sol Jo 376

3279 Rentcharges
Bateman (Lady) v Faber no 3276 ante

3280 Repairs
Where the rents of real estate devised in strict settlement were directed to be accumulated during the

minority of any person who should become tenant for life, and the accumulated fund and interest thereon were from time to time to be invested in the purchase of other lands to be settled to the same uses: *Held* no part of such accumulated fund could be applied, at the instance of a tenant for life in necessary repairs and improvements on the estate.

Brunskill v Caird (1873) LR 16 Eq 493; 43 LJ Ch 163; 29 LT 365; 21 WR 943, LC

3281 Repairs

Re Courtier, Coles v Courtier, Courtier v Coles no 3672 post

3282 Repairs

Re Baring, Jeune v Baring no 3673 post

3283 Repairs

Re Redding, Thompson v Redding no 3675 post

3284 Repairs

Re Tomlinson, Tomlinson v Andrew no 3674 post

3285 Repairs

Re Betty, Betty v A-G no 3676 post

3286 Improvements

Trustees allowed a tenant for life to enter into possession, and she paid the interest of incumbrances and expended money on improvements. The trustees did not call for any account of the rents, and the evidence, both as to the income being insufficient to keep down the incumbrances, and as to the improved value of the estate, was unsatisfactory. The tenant for life purchased the property, and the trustees allowed her to deduct from the purchase-money the money expended in paying interest and in improvements: *Held* she ought not to have been allowed those sums.

Dixon v Peacock (1855) 3 Drew 288; 61 ER 913

3287 Insurance

Re Baring, Jeune v Baring no 3673 post

3288 Management expenses — Incurred in settlor's life

Testator devised estates to uses in settlement, and bequeathed to the person who should at his death become entitled to possession, all arrears of rent which might be due to his estate at his death, and all proportions to become due to his estate after his death, of rents accruing due at but payable after his death, "but so, nevertheless, that all outgoings of the said hereditaments properly chargeable against such arrears and proportions, and not discharged in my lifetime, shall be paid out of such arrears and proportions": *Held* the outgoings properly chargeable against the arrears and proportions of rent included all such expenses due and remaining unpaid at testator's death, as in the ordinary course of management as carried on by him, would, at his death, come into charge against such arrears and proportions.

Re Cleveland's (Duke) Estate, Wolmer (Viscount) v Forester [1894] 1 Ch 164; 63 LJ Ch 115; 69 LT 807; 10 TLR 118; 38 Sol Jo 96; 7 R 328, CA

ANNOTATION **Follo** Re Ford, Myers v Molesworth [1911] 1 Ch 455

3289 Management expenses

By settlement of freehold property contained in testator's will a power of management was given to the trustees, with power to pay the costs of management out of rents and profits. The property consisted of 650 houses let on repairing leases for ninety-nine years at very small ground rents. The trustees employed a surveyor to report on the state of the property, and as a result served notices to repair on a large number of the tenants. The costs of so doing amounted to about half the annual income of the settled estate: *Held* these expenses were costs of management, and payable therefore out of income under the provision in the will, but the court had power under Settled Land Act 1882 (c 38) s 36 (repealed) to direct their payment out of capital, if it thought fit, and in the special circumstances of the case it would do so.

Re Tubbs, Dykes v Tubbs [1915] 2 Ch 137; 84 LJ Ch 539; 113 LT 395; 59 Sol Jo 508, CA

ANNOTATION **Apld** Re Stamford & Warrington, Payne v Grey [1916] 1 Ch 404

3290 Expenses of receiver

(1) A was sole legatee and executor of testator's personal estate, and tenant for life of his real estate, with remainder to his son. At the death of testator, he was largely indebted, and his personal estate was outstanding, owing, as to the greater part, to his having advanced large sums to a bank, of which his son was a partner, and which failed and became bankrupt. For a long period, about eleven years, the tenant for life kept down the interest of the debts out of his life estate, which was wholly or nearly absorbed by such payment. Ultimately, enough personalty was got in to pay a large portion of the debts, and was so applied, and then the real estate was sold: *Held* no portion of the money representing the corpus of the real estate could be applied in recouping the tenant for life the interest he had paid.

(2) A receiver had been appointed both of the real and personal estate: *Held* the tenant for life must bear the receiver's poundage.

Shore v Shore (1859) 4 Drew 501; 28 LJ Ch 940; 7 WR 390; 62 ER 192

3291 Private Act authorising sale — Costs of obtaining

Where an estate was settled on legal limitations in favour of one for life, with remainder to an infant in tail, the court declined to order that the costs of an application to Parliament for a private Act to carry into effect a proposed sale which was beneficial to the estate should be borne by the estate whether such application were or were not successful. But the tenant for life consenting, the court, being of opinion that the proposed application to Parliament would be for the benefit of the infant, sanctioned the application on the terms that the costs were to be borne by the tenant for life, unless an Act of Parliament was obtained otherwise directing.

Stanford v Roberts (1882) 52 LJ Ch 50; 48 LT 262

3292 Settlement of ships — Expenses of fitting out and repairing

Testator, a shipowner, gave to his sister for life the interest of an investment to be made of certain parts of his residuary personal estate, and which should arise under the following direction in his will; he directed that his executors should not sell any of his ships, or private share in ships, for a period of seven years from the time of his death, unless the keeping of them should cause loss to or diminution of his estate, and in such case he gave his said executors a discretionary power to sell same; but, subject as aforesaid, he directed them to retain his said ships and shares of ships for the period of seven years at the least, upon trust to superintend and manage same. At the time of testator's death many of his ships were employed in various voyages, all of which turned out profitably. Some of the other ships in which he had shares incurred losses: *Held* the whole must be considered as one general mercantile adventure, and that the amount of the necessary outfits, repairs, alterations, permanent improvements, and general expenses incurred before and subsequently to his death, should be deducted from the profits made and received after his death. The tenant for life entitled to the interest of the balances invested.

Green v Britten (1867) 16 LT 825; 2 Mar LC 564

3293 Depreciation of machinery in business settled

Testator gave his trustees authority to carry on his business and bequeathed to his widow during her life "the profits arising from my business": *Held* the trustees had properly charged against the profits before paying them to the widow a yearly sum for depreciation of the machinery used in the business in addition to the cost of repairs.

Re Crabtree, Thomas v Crabtree (1911) 106 LT 49, CA

3294 Drainage works — Ordered by local authority

C, by will, bequeathed a leasehold house in London to trustees in trust, after payment of all ordinary outgoings for ground rent, repairs, taxes, expenses of insurance or otherwise, to pay the rents to his wife for life, with remainders over. The local authority ordered certain drains to be made, under Metropolis Local Management Act 1855 (c 120) s 73 (repealed). The trustees paid all the expenses of their construction out of the rents. The tenant for life took out a summons to have them paid out of the corpus of testator's estate: *Held* upon the construction of C's will, this was one of the expenses to be paid out of the rents before the income was paid to the tenant for life, *semble*: in no case would any part of similar expenses under the Act be thrown upon the remainderman in favour of the tenant for life.

Re Crawley, Acton v Crawley (1885) 28 Ch D 431; 54 LJ Ch 652; 52 LT 460; 49 JP 598; 33 WR 611

ANNOTATION **Apld** Re Smith, Smith v Dodsworth [1906] 1 Ch 799

3295 Compensation for unexhausted improvement by tenant

Under a parol agreement for a lease of a farm for a term of years the tenant went into possession. The lease was to contain a covenant by the landlord to pay the tenant for unexhausted improvements at the expiration of the term, but it was never executed. During the term the landlord died, having devised the farm to plaintiff for life, with remainders over. On the expiration of the term the tenant gave up possession and plaintiff went into possession. The question then arose, who was to pay the tenant for the valuation of the unexhausted improvements: *Held* the obligation to pay for unexhausted improvements was in the nature of a covenant running with the land; and, consequently, the valuation was payable not out of testator's estate but by plaintiff as landlord for the time being.

Mansel v Norton (1883) 22 Ch D 769; 52 LJ Ch 357; 48 LT 654; 31 WR 325, CA

3296 Cost of rendering accounts for succession duty

Held (1) the expense of fencing waste lands granted to a trustee for the benefit of the estate must be paid out of capital; (2) the costs of rendering accounts for the succession duty, payable for the first equitable tenant for life, must be paid out of income.

Cowley (Earl) v Wellesley (1866) LR 1 Eq 656; 35 Beav 635; 14 LT 245; 14 WR 528; 55 ER 1043

3297 Calls on shares

Testator bequeathed residuary personalty to trustees upon trust, either to continue existing investments

or sell any part of the estate, and invest in certain stocks, shares and bonds. He directed calls, if any, which, at or after his death, might be or become due in respect of shares for the time being constituting part of his residuary personal estate, to be paid out of income: *Held* the direction applied to calls on railway shares held by testator at his death, but not to such shares acquired by the trustees.

Bevan v Waterhouse (1876) 3 Ch D 752; 46 LJ Ch 331

Scottish, Irish and Commonwealth Cases

3298 Rent — Settled leaseholds

Testator directed his executors and trustees to allow his wife, if she pleased to occupy his house during her life, with the use of the furniture, and after her death the same might be sold and the proceeds divided among testator's children: *Held* the widow was liable to pay all headrent and taxes payable in respect of the period during which she occupied the premises, and to keep them in such repair as a tenant would be liable for in the absence of express contract.

Re Kingham (Deceased), Kingham v Kingham [1897] 1 IR 170 (IR)

3299 Repairs

The cost of effecting ordinary recurring repairs, which last only a short time, such as painting and papering, is to be borne by income. The cost of structural repairs of such a character that both the life tenant and the remainderman will derive substantial benefit therefrom are to be apportioned between income and corpus in such a manner as the trustees in their discretion think fit.

Wilkie v Equity Trustees, Executors & Agency Co Ltd [1909] VLR 277 (AUS)

3300 Repairs

The repairs of a tenant for life, however substantial and lasting, are his own voluntary act, and do not arise from any obligation, and he cannot charge the inheritance with them.

Re Smith's Trusts (1854) 4 OR 518 (CAN)

3301 Repairs

Re Kingham (Deceased), Kingham v Kingham [1897] 1 IR 170 (IR)

3302 Repairs

Trustees executed improvements and repairs on settled property consisting of (*a*) new work, (*b*) work of reconstruction, (*c*) new fixtures or fittings in substitution for old, (*d*) painting necessitated by constructional alterations, (*e*) painting not so necessitated. The money to meet this expenditure was borrowed on the security of other heritage belonging to the trust, and the interest on the sum so borrowed was paid out of the revenue of the whole trust estate: *Held* the expenditure on items (*a*), (*b*) and (*d*) was chargeable against capital, but the costs of items (*c*) and (*e*) fell to be charged against the revenue of the trust estate.

Shaw's Trustees v Bruce [1917] SC 169 (SCOT)

3303 Improvements

Where a liferenter expends money in improving the subject of his liferent, he is presumed to do so with a view of enhancing his own benefit as liferenter of the estate, but the presumption may be rebutted by facts and circumstances.

Morrisons v Allan (1886) 13 R (Ct of Sess) 1156; 23 SC LR 846 (SCOT)

3304 Improvements

Alkaff v Alkaff [1942] 2 All ER 346, PC (STRAITS SETTLEMENTS)

3305 Insurance

Re Woods (Ont) [1927] 1 DLR 63 (CAN)

3306 Taxes

Semble: a tenant for life of the whole estate of the testator, consisting of an improved farm, and of wild lands, is bound to keep down the taxes on the whole.

Biscoe v Van Bearle (1858) 6 Gr 438 (CAN)

3307 Rates

The tenant for life of settled property is liable for the payment of road board, county and municipal rates, water and otherwise.

Re Hudson, Cooper v Hudson (1906) 25 NZLR 626 (NZ)

3308 Rates

Clark (1871) 9 Macph (Ct of Sess) 435; 43 Sc Jur 213 (SCOT)

3309 Rates

Rodger's Trustees v Rodgers (1875) 2 R (Ct of Sess) 294; 12 SC LR 204 (SCOT)

3310 Rates

By the will of a testatrix an equitable tenant for life was in occupation of the estate of the testatrix, which consisted solely of a cottage property. For a period of three years the tenant for life had neglected to pay the rates on the property: *Held* the tenant for life must pay the rates, and in the event of her not paying them the trustee of the will should pay the rates and enter into possession of the property to recoup himself for the amount paid.

Foley v Cannon (1936) 53 NSWWN 223 (AUS)

3311 Rates

Unless there is a contrary intention in the will creating a trust, the general rule is that a life tenant is liable to pay municipal and Board of Works rates and State land tax in respect of the subject property.

Re Dawes, Perpetual Executors & Trustees Assocn of Australia Ltd v Dawes [1954] VLR 76; [1954] ALR 174 (AUS)

3312 Management expenses

On the questions arising what should be given to life tenants under a will, what expenses should be charged against income and what against capital: *Held* any expenses incurred in connection with the management and safeguarding of the estate, as an estate, should be charged against the *corpus*; but expenses incurred in the management, safeguarding and collection of income should be charged to income.

Re Mitchell's Estate, National Trust Co Ltd v Carson [1936] 3 WWR 249; [1937] 1 WWR 165 (CAN)

3313 Expenses of sale

A tenant for life of settled land under the Settled Land Act 1928 (Victoria), is entitled to be paid, from capital moneys arising under the Act, costs and expenses reasonably incurred in offering settled land for sale, although the attempt to sell be unsuccessful.

Re Dawes, Perpetual Executors & Trustees Assocn of Australia Ltd v Dawes [1954] VLR 76; [1954] ALR 174 (AUS)

2 Charge on capital

LAW See Halsbury's Laws (4th edn) vol 42 para 968

3314 Repairs

Testator gave the residue of his real and personal estate upon trust to permit his wife to receive the rents, issues and profits, interest, dividends, and annual proceeds, after paying all outgoings; and after the decease of his wife, as to all the residuary real and personal estate, of which she was to have the clear yearly income for her life, subject as aforesaid, upon trust for his son absolutely. Testator had freeholds and leaseholds; the leaseholds being dilapidated at the death of testator, the wife repaired them under notice from the superior landlord: *Held* the amount expended in repairs might be charged on the estate.

Harris v Poyner (1852) 1 Drew 174; 21 LJ Ch 915; 16 Jur 880; 61 ER 418

ANNOTATION **Apld** Pinfold v Shillingford (1877) 25 WR 425

3315 Repairs

Repairs and permanent improvements to a large amount upon an estate of which a lunatic was tenant in tail in possession were found to be expedient. There was in court a sufficient fund of personalty to which the lunatic was absolutely entitled, and his income was much more than sufficient for his requirements. The amount required for repairs and improvements was ordered to be raised by mortgage or charge of the settled estate.

Re Gist (A person of unsound mind) (1877) 5 Ch D 881; 26 WR 22, CA

ANNOTATION **Consd** Re Gist [1904] 1 Ch 398

3316 Repairs

Testator devised a freehold mansion house to the use of trustees in trust for his sister for life, "subject to the condition that she shall keep the premises in the state of repair in which she finds them at my death," with remainder in trust for his nephews successively for life subject to the same condition, with remainders over, and he bequeathed personal estate upon trusts corresponding to those of the mansion house. The will did not impose on the trustees any trusts whatever for the management, maintenance, or repairs of the mansion house. At testator's death the house was in general disrepair. Upon the application by the trustees as to whether they could apply capital moneys in their hands in putting the house into good repair: *Held* as the evidence did not show the case to be one of "salvage," the court could not, either under the Settled Land Acts (repealed), which admittedly did not apply, or its general jurisdiction, authorise the proposed expenditure.

Re Willis, Willis v Willis [1902] 1 Ch 15; 71 LJ Ch 73; 85 LT 436; 50 WR 70; 46 Sol Jo 49, CA

3317 Repairs — Expenses of compelling tenants to repair

The expenses incurred by trustees in compelling tenants of the settled property to fulfil their obligations to repairs, such as costs of survey and of serving notices on the tenants, must be borne in fair proportion by the tenant for life and remainderman and that can be effected by raising the amount on a mortgage of the property. Such expenses are not "outgoings."

Re McClure's Trusts, Carr v Commercial Union Insurance Co (1906) 76 LJ Ch 52; 95 LT 704; 23 TLR 42; 51 Sol Jo 67

3318 Repairs

By clause 11 of his will a testator devised all his landed property (which was therein defined and was agricultural land) on trust for sale and to hold the income of the proceeds of sale on trust to divide it into two equal parts and pay one part to each of the first and second defendants during their joint lives and to pay the whole of the income to the survivor of them during his life with remainders over the third and fourth defendants. By clause 16 he directed that his trustee should out of the income of his general estate (defined therein to include his landed property and the proceeds of sale thereof) pay all the legal and other costs of estate management "and pay all costs of repairs insurance rates taxes tithe . . . and other outgoings in [the trustee's] opinion properly attributable to income and shall also out of the said income pay all such parts as [the trustee] shall not in [the trustee's] discretion charge to capital of . . . improvements . . ." Testator died on 20 January 1932. The court found that clause 16 on its true construction obliged the trustee to pay for repairs out of income but gave a discretion to pay for improvements out of capital or income. Since March 1946, the trustee had done repairs to the agricultural property and until 1 April 1952, the costs had been paid out of income. Some or many of these repairs were improvements within Sch 3 to Agricultural Holdings Act 1948 (c 63), and by virtue of s 81(1) of that Act were deemed to be improvements within Sch 3 to Settled Land Act 1925 (c 18), the cost of which there was power of defray out of capital under that Act as applied to trustees for sale by Law of Property Act 1925 (c 20)

s 28. Since 1 April 1952, the cost of the repairs had not been allocated as between capital and income. On the question whether the cost of the repairs prior to April 1952 should be recouped to the life tenants and whether the cost after March 1952 should be borne by capital or income, it was contended on behalf of the life tenants that by virtue of s 81(1) of the 1948 Act the whole cost of the improvements within that Act must be borne by capital: *Held* the trustee's powers under Law of Property Act 1925 (c 20) s 28, and Settled Land Act 1925 (c 18) ss 73, 84, were additional to powers under the will and by these statutory powers as applied by Agricultural Holdings Act 1948 (c 63) s 81(1), the trustee had a discretion to apply capital in paying for improvements within Sch 3 to that Act but was not bound to do so; it would not be proper the question having been decided by the trustee, for the court to order any part of the cost of repairs or improvements prior to April 1952, to be recouped to the life tenants; the court would leave the trustee to decide in the exercise of his discretion how the subsequent costs should be borne as between capital and income.

Re Wynn, Public Trustee v Newborough [1955] 2 All ER 865; 99 Sol Jo 542

ANNOTATION **Follld** Re Boston (Lord) Trusts, Inglis v Boston (Lord) [1956] 1 All ER 593

3319 Repairs

Where both a tenant for life's statutory power to direct repairs for agricultural holdings to be paid for out of capital moneys subject to the Settled Land Act 1925 (c 18), and the settlement trustees' duty of controlling the exercise of a tenant for life's powers are vested in the same persons, eg, in trustees for sale of land, they ought not to apply capital money in paying for "income" repairs to agricultural holdings without regard to their duty to preserve the capital value of the estate of which they are trustees. Considerations to which trustees for sale may have regard in exercising their discretion instanced. The decision in *Re Duke of Northumberland* (no 2117 ante) encroached on the general principle that a tenant for life of settled land when exercising his powers under the Settled Land Act 1925 (c 18), was bound to hold the balance fairly between his own interests in income and those of persons interested in capital, eg, by not allowing the cost of unimportant and impermanent reparations, ordinarily defrayed out of income, to fall on capital. The decision showed that settlement trustees, who ordinarily could control any unfair exercise of powers by a tenant for life and were primarily (but not exclusively) concerned to conserve the settled property for the remaindermen, could not legally prevent a tenant for life causing income repairs to agricultural holdings to be paid for out of capital (*viz*, by directing under Settled Land Act 1925 (c 18) ss 73(1)(iv), 75(2), payment for the repairs as for an improvement by virtue of Agricultural Holdings Act 1948 (c 63) ss 81(1), 96(1) Sch 3 para 23). The position is different, however, where by virtue of Law of Property Act 1925 (c 20) s 28, both the power of the tenant for life and the duty of the settlement trustees are vested in the same persons as trustees for sale of land. In such circumstances the position is as stated in the first paragraph above.

Re Boston's (Lord) Will Trusts, Inglis v Boston (Lord) [1956] 1 Ch 395; [1956] 1 All ER 593; 100 Sol Jo 209

3320 Drainage works

By the will of testator, who died in 1846, certain freehold messuages were devised to trustees, their heirs and assigns, upon trust to permit A and B during their joint lives, and the survivor of them during his life, to hold, occupy, and enjoy the same, and to receive and take the rents thereof, and after the death of the survivor, upon trust for the first and other sons of B successively in strict settlement. During the life of one of the equitable tenants for life, the trustees applied certain capital moneys held by them upon similar trusts in payment of expenses incurred for drainage works in respect of the devised messuages, which were without such sufficient drains as specified in Public Health Act 1848 (c 63) s 49 (repealed): *Held* (1) as the trustees had the legal estate in the messuages, and were the persons entitled for the time being to receive the rack rents thereof, although in trust for the beneficiaries, they were "owners" within the definition of that term in Public Health Act 1848 (c 63) s 2 (repealed), had rightly paid the drainage expenses in question out of the capital moneys in their hands, but as between the tenant for life and the remainderman the capital moneys so applied must be treated as a charge upon the messuages.

(2) By a clause in his will testator declared that the parties beneficially entitled to the rents and profits "of any of his houses" should keep the same in good and absolute repair: *Held* these drainage works were not "repairs" within the meaning of that clause.

Re Barney, Harrison v Barney [1894] 3 Ch 562; 63 LJ Ch 676; 71 LT 180; 43 WR 105; 8 R 459

ANNOTATIONS As to (2) **Distd** Re Thomas, Weatherall v Thomas [1900] 1 Ch 319. Generally **Apld** Ebor Land & Development Co Ltd v Benfield (1969) 68 LGR 237

3321 Sanitary works

The cost of sanitary works executed under the Public Health (London) Act 1891 (c 76) (repealed), upon leasehold houses forming part of a residuary bequest to trustees upon trust for tenant for life and

remaindermen: *Held* payable out of the capital of the residuary estate.

Re Lever, Cordwell v Lever [1897] 1 Ch 32; 66 LJ Ch 66; 75 LT 383; 45 WR 172; 41 Sol Jo 98; on appeal, 76 LT 71, CA

ANNOTATIONS **Distd** Re Thomas, Weatherall v Thomas [1900] 1 Ch 319 **Consd** Re Farnham's Settlmt, Law Union & Crown Insce v Hartopp [1904] 2 Ch 561

3322 Sanitary works

Where a settled trust fund was invested under the powers of the settlement in the purchase of freehold houses in the city and the trustees were required by the corporation under Public Health (London) Act 1891 (c 76) (repealed), to do certain repairs on the property, and the equitable tenant for life, having by arrangement with the trustees done the repairs, applied to the court for a charge on the corpus for the cost of the repairs, but ultimately waived his claim except as to so much of the expenditure as should be found to have been incurred in respect of repairs in the nature of permanent improvements: *Held* he was entitled by subrogation to the rights of the trustees to a charge on the corpus for that amount. *Semble*: where the trustees of a settled estate apply to the court to be indemnified out of the estate for the cost of repairs done by them on the property in answer to a demand by a sanitary authority, it is competent to the court to determine according to the circumstances of the case how the cost shall be borne as between tenant for life and remainderman.

Re Farnham's Settlement, Law Union & Crown Insurance Co v Hartopp [1904] 2 Ch 561; 73 LJ Ch 667; 91 LT 780; 48 Sol Jo 604; 2 LGR 1050, CA

ANNOTATION **Apld** Re Smith, Vincent v Smith [1930] 1 Ch 88

3323 Making up road

By the leases in 1875 and 1877 of two houses abutting on a private road, the lessee covenanted to pay all rates and taxes and to keep up the road. In 1882 the lessee executed a deed of gift of the two houses to his son upon trust for the father for life he paying "all outgoings and performing the covenants in the leases" and after his death upon trust for the son absolutely. In July 1884, the local board served notices on the father under Public Health Act 1875 (c 55) s 150, requiring him to make up the portions of the road on which the houses abutted; but the notice was not complied with and the board themselves did the work, which was completed in February 1885. In June 1885, the father died and the son entered into possession of the houses. In September 1886, the son was served by the board with notices assessing a sum on each house for the proportion of expenses of making up the road and in February 1887, he was served with demands and orders for payment of the assessed amounts by instalments with interest. In an action by the son claiming payment of the assessed expenses out of the father's estate: *Held* (1) the expenses were not a debt due from the father's estate inasmuch as the relation of debtor and creditor was not created by Public Health Act 1875 (c 55), between the board and an owner of property for expenses incurred by the board; (2) the charge of the expenses under s 257 could not be recovered by the son against the estate of the tenant for life.

Re Boor, Boor v Hopkins (1889) 40 Ch D 572; 58 LJ Ch 285; 60 LT 412; 53 JP 467; 37 WR 349

ANNOTATION As to (1) **Distd** Tubbs v Wynne [1897] 1 QB 74

3324 Enlargement of canal, docks and harbour

Held the expenditure was a charge on the *corpus* of the estates comprised in the term.

Re Bute (Marquess), Bute (Marquess) v Ryder (1884) 27 Ch D 196; 53 LJ Ch 1090; 32 WR 996

3325 Cost of fencing waste lands

Cowley (Earl) v Wellesley no 3296 ante

3326 Premiums on insurance policies

Testator devised and bequeathed his residuary real and personal estate to trustees upon trust to sell and convert and to pay the income of the proceeds to his wife for life or during widowhood and after her death or remarriage to divide his estate into six equal parts which he settled upon his six children for life with remainder to their respective children absolutely, with power for his trustees to retain his estate in its then state of investment, unless directed by his wife to sell, and with a proviso that until such sale the income of this estate should be paid to the persons to whom the income of the proceeds of his residuary estate would for the time being be payable. Testator's estate included an estate *pur autre vie* in certain funds which produced about £244 a year and two policies of assurance for £1,000, and £750 respectively, the annual premiums on which amount to about £60. The *cestui que vie* had disappeared some years ago and his whereabouts was not known: *Held* the trustees were entitled to postpone the sale both of the life interest and the policies, and the premiums on the policies were payable out of capital.

Re Sherry, Sherry v Sherry [1913] 2 Ch 508; 83 LJ Ch 126; 109 LT 474

ANNOTATIONS **Folld** Carver v Duncan (Inspector of Taxes); Bosanquet v Allen (Inspector of Taxes) [1985] 2 All ER 645

3327 Capital left in business — Expenses of yearly audit and stocktaking

Re Bennett, Jones v Bennett no 1955 ante

3328 Liability for performance of covenants in lease

Testator, who had assigned during his life certain leasehold property, bequeathed by his will other leaseholds and the residue of his property to tenants for life, with remainders over. The assignees of the leaseholds became bankrupt, and the executors of testator took a reassignment of those leaseholds. Liabilities having arisen under the covenants in the original lease, it was held that those liabilities must fall upon the *corpus*, and not upon the income, of testator's estate.

Allen v Embleton (1858) 4 Drew 226; 27 LJ Ch 297; 4 Jur NS 79; 6 WR 272; 62 ER 87

ANNOTATION **Apld** Re Owen, Slater v Owen [1912] 1 Ch 519

Scottish, Irish and Commonwealth Cases

3329 Repairs

Sums properly expended by trustees for repairs to and caretaking of the trust property to preserve it from deterioration are payable out of corpus.

Re Tong's Estate, Tong v Trustees, Executors & Agency Co Ltd [1907] VLR 338 (AUS)

3330 Repairs

The cost of structural repairs of such a character that both the life tenant and the remainderman will derive substantial benefit therefrom are to be apportioned between income and corpus in such a manner as the trustees in their discretion think fit. The cost of structural repairs of such a character that the remainderman alone will derive substantial benefit therefrom are to be borne wholly by corpus.

Wilkie v Equity Trustees, Executors & Agency Co Ltd [1909] VLR 277 (AUS)

3331 Repairs

A general jurisdiction exists in the court to preserve trust property that extends in a proper case to a recognition of the propriety of expending money in preserving it after the expenditure has been incurred, and in certain cases, in which the onus is obviously on the person claiming, what may be referred to as a salvage claim may be recognised where the expenditure has been incurred by a tenant for life in preserving the property.

O'Neill v Public Trustee (1915) 34 NZLR 723 (NZ)

3332 Repairs

Ellis v Ellis's Trustees (1895) 22 R (Ct of Sess) 764; 32 Sc LR 611; 3 SLT 64 (SCOT)

3333 Repairs

Shaw's Trustees v Bruce [1917] SC 169 (SCOT)

3334 Repairs

A testatrix devised certain lands to designated life tenants without impeachment for waste and directed that the residue and remainder of her estate (subject to certain annuities previously provided) be held on trust to use so much of the income and/or capital as may be necessary "for the upkeep and maintenance of the properties" devised for life: *Held* a life tenant is not ordinarily under a duty to repair, and where he holds without impeachment of waste he remains, nonetheless, liable for equitable waste, *ie*, wilful damage. Moreover, a life tenant is ordinarily liable for taxes but not for insurance premiums. In throwing upon the trustees or residuary interests the duty of "upkeep and maintenance" the testatrix did not shift to them the burden of taxes and they remain payable by the life tenants. However, the trustees are liable to keep in and repair any damage caused by normal deterioration and to pay the cost of structural improvements necessary to preserve the buildings on the properties. They must also maintain ornamental trees, and furnish any plants, shrubs or trees necessary to keep up the garden but the cost of maintenance of the garden, eg, for the services of a gardener or for garden tools, must be borne by the life tenants as incidents of the use and enjoyment of the properties; and similarly as to the cost of snow shovelling and snow removal. However, the trustees must pay for the maintenance of the grounds and trees to preserve the properties, and also for the cost of removal of rakings, prunings and similar garden refuse if this service is not provided by the municipality. Further the trustees must pay for exterior painting and interior decorating to preserve the properties, at intervals of four and six years respectively (as dictated by experience) and also for the painting of fences, the maintenance of fences and hedges and maintenance of driveways.

Re Cox (1960) 22 DLR (2d) 597 (CAN)

3335 Premiums on insurance policies

The court authorised the payment out of capital moneys of the premium on an insurance of a mansion house against damage or fire arising out of riot or civil commotion, the subject-matter of the trust, situated in a disturbed district.

Re Kinahan's Trusts, Hamilton & Bowles v Hudson-Kinahan [1921] 1 IR 210 (IR)

3336 Improvements — To prevent forfeiture of license

Where settled estate comprises a licenced public house, the court has jurisdiction to raise money out of the estate and apply it in making improvements and additions to the licensed premises, where such are necessary to prevent the forfeiture of the license.

Re Donnelly, Donnelly v Donnelly (1901) 1 SRNSW (Eq) 150; 18 NSWWN 277 (AUS)

3337 Improvements

Wilson v Graham (1877) 13 OR 661 (CAN)

3338 Improvements

To entitle a tenant for life to recoupment out of capital moneys of sums expended by him on improvements, such expenditure must be in the nature of salvage payments, necessarily made to save the estate from actual danger of destruction, eg money expended to prevent an immediate breach in a sea-wall and consequent flooding. Money spent on ordinary improvements or current maintenance does not come within the rule; and it is immaterial that the estates commissioners insist on such improvements as a condition precedent to a sale under the Land Purchase Acts.

Re Cobden's Estate [1923] 1 IR 1 (IR)

3339 Improvements

Bayley v Gaisford [1920] NZLR 369 (NZ)

3340 Fencing

The cost of fencing land, part of the settled estate, may be ordered to be paid out of capital, and a sinking fund established out of income or repayment of the amount to capital in fifteen years.

Re Staughton's Settled Estate [1909] VLR 174 (AUS)

3341 Fencing — To utilise land for farming purposes

Re Potter (deceased) (1915) 34 NZLR 646 (NZ)

3342 Taxes

A devisee of a life estate in all a testator's property is bound to keep down the annual taxes on the land, and they form a first charge on the testator's interest.

Gray v Hatch (1871) 18 Gr 72 (CAN)

3343 Erection of retaining wall

Held the erection of the retaining wall was an act of salvage, which was necessary for the preservation of the settled property; the cost of the work should therefore be paid out of the corpus.

Eyre v O'Rorke (1905) 25 NZLR 182 (NZ)

3344 Putting down burned area in grass — Prevention of growth of noxious weeds

Re Potter (deceased) (1915) 34 NZLR 646 (NZ)

3345 Payment of commission on sale of settled property

Held payment of commission on sale of property was an outgoing properly chargeable against the estate.

Bayley v Gaisford [1920] NZLR 369 (NZ)

3346 Expenses of examination of and changes in investments

Held all expenses connected with the examination of investments from time to time and changes in them fell to be paid out of the capital.

Smith v Bennie (1890) 18 R (Ct of Sess) 441; 28 Sc LR 32 (SCOT)

3347 Composition

Held a taxed composition, eligible every fifteen years, free to be paid out of the capital of the trust estate.

Edgar's Trustees v Edgware [1915] SC 174; 52 Sc LR 135; [1914] 2 SLT 361 (SCOT)

3 Costs of legal proceedings

A Applications to court

a By tenant for life

LAW See Halsbury's Laws (4th edn) vol 42 paras 967, 968

3348 Whether payable out of income or capital — Costs of application for payment of income — Of fund in court

The costs of a petition by tenant for life under 10 and 11 Victoria c 96 (repealed) could not be ordered to be paid out of the capital of the fund in the absence of the persons entitled to such capital.

Ex p Fletcher (1848) 17 LJ Ch 169; 11 LTOS 218; 12 Jur 619

3349 Whether payable out of income or capital — Costs of application for payment of income — Of fund in court

The costs of all parties of and incident to an application by the tenant for life for the payment to her of the income of a trust fund, which had been paid into court under Trustee Relief Act (repealed) would be ordered to be paid out of the corpus of the fund, notwithstanding the parties entitled in remainder opposed such payment.

Re Field's Trust (1852) 16 Beav 146; 19 LTOS 253; 16 Jur 770; 51 ER 733

ANNOTATION **Consd** Re Turnley's Trusts (1866) 35 LJ Ch 313

3350 Whether payable out of income or capital — Costs of application for payment of income — Of fund in court

Re Lorimer (1850) 12 Beav 521; 19 LJ Ch 524; 16 LTOS 406; 14 Jur 1126; 50 ER 1160

3351 Whether payable out of income or capital — Costs of application for payment of income — Of fund in court

A sum of money having been paid into court under Trustee Relief Act (repealed), a petition was presented by the tenant for life for payment of the dividends: *Held* the corpus of the fund was not liable to bear the costs of the application.

Re Bangley's Trust (1852) 21 LJ Ch 875; 19 LTOS 269; 16 Jur 682

3352 Whether payable out of income or capital — Costs of application for payment of income — Of fund in court

Re Butler's Trust (1852) 16 Jur 324

3353 Whether payable out of income or capital — Costs of application for payment of income — Of fund in court

Costs of the application for payment of the dividends of a fund in court to the tenant for life, are payable out of income.

Re Ingram (1854) 18 Jur 811; 2 WR 679

3354 Whether payable out of income or capital — Costs of application for payment of income — Of fund in court

Where a tenant for life petitioned the court under Trustee Relief Act (repealed), the costs of petitioner ought to have been borne by himself and those of the trustees by the corpus of the fund.

Re Whitling's Settlement (1861) 30 LJ Ch 862; 4 LT 739; 7 Jur NS 754; 9 WR 830

ANNOTATION **Distd** Eady v Watson (1864) 10 Jur NS 982

3355 Whether payable out of income or capital — Costs of application for payment of income — Of fund in court

Costs of a petition by a tenant for life to obtain the income of a fund, paid into court under Trustee Relief Act (repealed), ordered to be paid out of the corpus.

Re Leake's Trusts (1863) 32 Beav 135; 1 New Rep 417; 7 LT 816; 9 Jur NS 453; 11 WR 352; 55 ER 53

ANNOTATIONS **Distd** Eady v Watson (1864) 10 LT 285 **Consd** Re Turnley's Trusts (1866) 35 LJ Ch 313

3356 Whether payable out of income or capital — Costs of application for payment of income — Of fund in court

Upon a petition in an administration suit for the payment of the income to the tenant for life, the costs of all parties must be paid out of the income.

Eady v Watson (1864) 33 Beav 481; 10 LT 285; 10 Jur NS 982; 12 WR 682; 55 ER 454

ANNOTATION **Consd** Re Turnley's Trusts (1866) 35 LJ Ch 313

3357 Whether payable out of income or capital — Costs of application for payment of income — Of fund in court

Where money was paid into court under Trustee Relief Act (repealed), and an application was made for payment of the dividends to a tenant for life the trustees only were entitled to their costs out of corpus the other costs had to be paid out of income.

Re Tchitchagoff's Will (1864) 10 LT 860; 12 WR 1100

3358 Whether payable out of income or capital — Costs of application for payment of income — Of fund in court

Where a trust fund had been paid into court under Trustee Relief Act (repealed), his costs of a petition by the tenant for life for payment to him of the dividends would have been payable out of the income.

Re Marner's Trusts (1866) LR 3 Eq 432, 36 LJ Ch 58; 15 LT 237; 12 Jur NS 959; 15 WR 99

ANNOTATIONS **Distd** Re Gordon's Trusts (1868) LR 6 Eq 335 **Apld** Re Evans' Trusts (1872) 7 Ch App 609

3359 Whether payable out of income or capital — Costs of application for payment of income — Of fund in court

On 25 July 1864, an order was made for the payment of the dividends on a sum of stock paid into court under 10 and 11 Victoria c 96 (repealed), to the person entitled thereto for life. On 12 June 1866, the court on the application of the tenant for life, made an alteration in the order of 25 July 1864, by directing the costs of petitioner to be paid out of the corpus.

Re Tanner's Trusts (1866) 35 LJ Ch 689; 14 LT 589

3360 Whether payable out of income or capital — Costs of application for payment of income — Of fund in court

The costs of all parties on a petition for payment to a tenant for life of the dividends of a fund paid in under 10 and 11 Victoria c 96 (repealed), were payable out of the corpus of the fund.

Re Turnley (1866) 1 Ch App 152; 35 LJ Ch 313; 13 LT 662; 12 Jur NS 305; 14 WR 322, LC

ANNOTATIONS **NF** Re Marner's Trusts (1866) LR 3 Eq 432 **Distd** Pratt v Jenner, Ex p Jenner (1866) 35 LJ Ch 682 **NF** Re Evans' Trusts (1872) 7 Ch App 609

3361 Whether payable out of income or capital — Costs of application for payment of income — Of fund in court

On a petition by a tenant for life of a fund transferred into court under Trustee Relief Act (repealed), the costs of the trustee were chargeable on the corpus.

Re Knight's Trusts (1868) 37 LJ Ch 409

3362 Whether payable out of income or capital — Costs of application for payment of income — Of fund in court

(1) Where a fund had been paid into court by a trustee under Trustee Relief Act (repealed), his costs, charges and expenses properly incurred in, about and preliminary to the payment into court were payable out of the capital of the fund.

(2) His costs of appearance on a petition for payment of dividends are payable out of income.

Re Whitton's Trusts (1869) LR 8 Eq 352

ANNOTATIONS As to (2) **Folld** Re Munton's Trusts (1870) 39 LJ Ch 764; Re Smith's Trusts (1870) LR 9 Eq 374; Re Evans' Trusts (1872) 41 LJ Ch 512

3363 Whether payable out of income or capital — Costs of application for payment of income — Of fund in court

Where testator has given a fund to trustees upon trust for investment in land which is to be settled to the use of several persons successively for their lives, and the fund is paid into court in an administration suit, and has not been invested in land, the costs of a

petition, by the tenant for life for payment of the dividends to him are payable out of corpus.
Scrivener v Smith (1869) LR 8 Eq 310

3364 Whether payable out of income or capital — Costs of application for payment of income — Of fund in court
Upon a petition by a tenant for life for payment of the income of a fund paid into court under Trustee Relief Act (repealed), the costs of the trustees were payable out of the income and not out of the corpus of the fund.
Re Smith's Trusts (1870) LR 9 Eq 374; 22 LT 220; 18 WR 513

ANNOTATIONS **Folld** Re Munton's Trusts (1870) 39 LJ Ch 764; Re Evans' Trusts (1872) 41 LJ Ch 512

3365 Whether payable out of income or capital — Costs of application for payment of income — Of fund in court
Re Wood's Trusts (1870) LR 11 Eq 155; 40 LJ Ch 179; 23 LT 586; 19 WR 227

ANNOTATION **Consd** Re Evans' Trusts (1872) 26 LT 682

3366 Whether payable out of income or capital — Costs of application for payment of income — Of fund in court
Where a fund had been paid into court by trustees under Trustee Relief Act (repealed), and a petition was presented by the tenant for life for payment of the income, and the costs of the trustees and of the petition were ordered to be paid out of income and not corpus.
Re Munton's Trusts (1870) 39 LJ Ch 764; 22 LT 293

ANNOTATION **NF** Re Wood's Trusts (1870) 40 LJ Ch 179

3367 Whether payable out of income or capital — Costs of application for payment of income — Of fund in court
Upon a petition by a tenant for life for the payment to her of the income of a fund in court under an administration suit, the costs of all parties were ordered to be paid out of corpus.
Longuet v Hockley (1870) 22 LT 198

3368 Whether payable out of income or capital — Costs of application for payment of income — Of fund in court
The costs of trustees appearing upon a petition by a tenant for life for payment of the dividends of a fund in court are payable out of the income of the fund.
Re Mason's Trusts, Ex p Smithett (1871) LR 12 Eq 111; 24 LT 869; 19 WR 1025

3369 Whether payable out of income or capital — Costs of application for payment of income — Of fund in court
Where a trust fund had been transferred into court under Trustee Relief Act (repealed), and a petition was presented for payment of the income to the tenant for life, the costs of the trustees, as well as of all other necessary parties, would have been paid out of the income.
Re Evans' Trusts (1872) 7 Ch App 609; 41 LJ Ch 512; 26 LT 815; 20 WR 695, LJJ

ANNOTATION **Consd** Re Battell's Trusts (1872) 21 WR 138

3370 Whether payable out of income or capital — Costs of application for payment of income — Of fund in court
Upon a petition by tenant for life of a sum of stock which had been paid into court under Trustee Relief Act (repealed), for payment out of the dividends, the trustee, who appeared on the petition after notice from petitioner's solicitor not to do so, upon the ground that the petition related to the income only, would not have been allowed his costs of the appearance out of the funds representing income.
Re Battell's Trusts (1872) 21 WR 138

3371 Whether payable out of income or capital — Costs of application for possession
Re Bagot's Settlement, Bagot v Kittoe no 1886 ante

3372 Whether payable out of income or capital — Costs of application for possession
Re Newen, Newen v Barnes [1894] 2 Ch 297; 63 LJ Ch 763; 70 LT 653; 58 JP 767; 43 WR 58; 8 R 309

ANNOTATION **NF** Re Hunt, Pollard v Geake (1900) 44 Sol Jo 314

3373 Whether payable out of income or capital — Costs of application for possession
Re Hunt, Pollard v Greake (1901) 45 Sol Jo 652, CA

3374 Whether payable out of income or capital — Costs of application for change of investment
A trust fund ordered to be invested in Bank Stock and East India Stock, on the application of a tenant for life, herself the settlor, the reversioners who opposed being volunteers.

As the change of investment is a clear loss to the reversion, the costs must come out of the income (*Page Wood V-C*).
Equitable Reversionary Interest Society v Fuller (1861) 1 John&H 379; 30 LJ Ch 497; 4 LT 50; 7 Jur NS 307; 9 WR 400; 70 ER 794; on appeal 30 LJ Ch 848, LJJ

3375 Whether payable out of income or capital — Costs of application for change of investment
Under special circumstances the court upon the petition of a tenant for life, sanctioned a change of investment from New 3 per cents to Bank Stock, but refused to allow any part of the fund to be

invested in East India Stock; and the fund being in court the costs of the tenant for life were directed to be paid out of the income, and those of respondent out of the corpus.
Re Langford's Trusts (1861) 2 John&H 458; 31 LJ 334; 5 LT 579; 8 Jur NS 114; 10 WR 121; 70 ER 1138

3376 Whether payable out of income or capital — Costs of application for change of investment
By an order dated 15 February 1878, certain estates settled by the will of C were ordered to be sold, and two trustees were appointed to receive the purchase-moneys and directed to apply same, after paying off certain incumbrances, to some one or more of the purposes mentioned in Settled Estates Act 1877 (c 18) s 34 (repealed), without any further application to the court, and it was ordered that until same could be so applied the trustees should from time to time invest same in Consols, and apply the dividends upon the trusts by the will declared of the rents of the lands ordered to be sold. A summons was taken out by the tenant for life asking that the Consols might be sold out and the proceeds invested in the debentures stocks of four leading railway companies in accordance with Settled Land Act 1882 (c 39) s 21 (repealed). On 17 January 1889, the judge made an order in chambers refusing the application on the ground that he had no power to alter the specific directions of the former order. On motion now made to discharge this order: *Held* since, if the money were invested in land, it might immediately be sold again by the tenant for life, and the purchase-money invested as asked the court would direct the investment to be made at once. Order made accordingly. The costs of the application were ordered to be paid by the tenant for life.
Re Tennant (1889) 40 Ch D 594; 58 LJ Ch 457; 60 LT 488; 37 WR 542; 5 TLR 316

Scottish, Irish and Commonwealth Cases

3377 Whether payable out of income or capital — Costs of application for payment of income — Of fund in court
When the court pays out the dividends of a fund to the tenant for life of the fund the costs of the petition will be paid out of the dividends and not out of the corpus.
Re Cameron's Trusts (1867) 15 WR 861 (IR)

3378 Whether payable out of income or capital — Costs of application for possession
The court has jurisdiction to make the costs of proceedings instituted or carried on by a tenant for life for the recovery or protection of a settled estate a charge upon the estate, and to order an immediate sale of a sufficient portion of the estate for the purpose of defraying such costs.
O'Neil v Hart (No 3) [1905] VLR 306 (AUS)

b By trustees

LAW See Halsbury's Laws (4th edn) vol 42 paras 967, 968

3379 For directions as to application of income — Costs out of income
Where testator directed the whole income of a trust fund to be paid to his widow, if she was capable of managing her own affairs, but a smaller annual sum, if she was legally declared incapable, the expenses of a reference to the master to inquire as to the propriety of issuing a commission in lunacy respecting her, on which the matter decided in her favour, were directed to be paid out of the dividends of the trust fund, and not out of the corpus.
Winthrop v Winthrop (1846) 15 LJ Ch 403, LC

3380 For directions as to application of income — Costs out of income
The property of S upon her marriage vested in trustees upon trusts for her for life for her separate use, with a life interest to her husband, if he survived her, with remainder to the children of the marriage. There were four children and the wife became of unsound mind, though not so found by inquisition. The income of the trust funds amounted to £115 and the husband's expenses by reason of the lunacy were £84 12*s* yearly. Under these circumstances, on a petition, presented by the trustees, their lordships expressed the opinion that the whole income should be paid to the husband, he undertaking to apply it for the support of his wife and children, and an order to that effect was made, but it was ordered that the income should bear the costs of the petition.
Re Spiller (1860) 2 LT 71; 6 Jur NS 386; sub nom *Re M (A Lunatic)* (1860) 8 WR 333, LJJ

3381 For directions as to application of income — Costs out of income
Trustees petitioning under Trustee Relief Act 1859 (c 35) s 30 (repealed), for the advice of the court as to the application of income to which a married woman of unsound mind not so found was entitled for her separate use, were directed to pay the whole of it to her husband on his undertaking to apply it for her maintenance, her consent in writing, which, under two of the instruments, was necessary for any investments by the trustees, being dispensed with. Costs out of the income.
Re T — (1880) 15 Ch D 78; 29 WR 42

3382 For directions as to application of income — Costs out of capital
Q by his will dated 30 August 1844, gave all his real and personal estate to trustees, upon trust to convert such part thereof as should not consist of money, or securities for money in government securities, into

money, and to invest the same in the public stocks of funds of Great Britain and to stand possessed thereof, and to lay out and invest same in the purchase of freehold lands of inheritance in Ireland, either in one purchase or from time to time, as eligible purchases might offer; the said estates, when purchased, to be vested in the trustees, to the use of C for life, and after her death to W for life, with limitations over in favour of the sons of W in tail; and testator directed that until such time as his residuary estate should be laid out in the purchase of lands as aforesaid, his trustees should pay and apply the dividends, interest, and annual produce thereof, or of such part thereof as should remain so uninvested in the purchase of lands, to and for the use of such persons, and for such estates and interest, as he or they would be entitled to in the hereditaments directed to be purchased, or as near thereto, as the law would permit. Testator died in 1858, and at the same time of his death a considerable portion of the estate was invested in English & Irish Bank Stock, and in East India Stock. Upon a special case submitted for the opinion of the court, whether the trustees were justified in retaining such part of the estate as was so invested in the English & Irish Bank Stock and East India Stock until eligible purchases of land could be obtained, and also for the direction of the court as to the proper mode of paying the income and accumulations of it, and as to future investments, and the costs of the special case: *Held* (1) according to the terms of the will, Bank and East India Stock were not securities for money in government securities; Law of Property Amendment Act 1860 (c 38) s 12 (repealed), which made Law of Property Amendment Act 1859 (c 35) s 32 (repealed), retrospective, made it so only as to instruments on which Law of Property Amendment Act 1859 (c 35) s 32 (repealed) did not previously operate, but did not alter rights which had then actually accrued and arisen; and the tenant for life was entitled to no more than the stock would have produced if placed in the state of investment which testator intended—that was to say, the income of so much 3 per cent Consols as would have been produced if the Bank Stock and India Stock had been converted into those funds at the death of testator; (2) the costs of the special case must be paid out of the surplus income, which was to be treated as capital.

Hume v Richardson (1862) 4 De GF&J 29; 31 LJ Ch 713; 6 LT 624; 8 Jur NS 686; 10 WR 528; 45 ER 1093, LJJ

3383 For directions as to application of income — Apportionment of costs

Re Chesterfield's (Earl) Trusts no 3063 ante

3384 For directions as to investment of funds — Costs out of capital

Beauclerk v Ashburnham (1845) 8 Beav 322; 14 LJ Ch 241; 4 LTOS 431, 490; 9 Jur 146; 50 ER 126

3385 For directions as to investment of funds — Costs out of capital

Hume v Richardson no 3382 ante

B Payment into court

LAW See Halsbury's Laws (4th edn) vol 42 paras 967, 968

3386 Costs out of capital

Where a fund, in which successive beneficial interests existed was transferred into court under Trustee Relief Act (repealed), the costs incurred by the trustees in proceeding under the statute were payable out of the corpus, not out of the income, of the fund.

Re Staples' Settlement (1849) 13 Jur 273

3387 Costs out of capital

Re Whitton's Trusts no 3362 ante

C Other proceedings concerning estate

LAW See Halsbury's Laws (4th edn) vol 42 para 968

3388 Costs out of capital — Proceedings for protection of estate — By trustees

The trustees of a freehold estate of which plaintiff was equitable tenant for life under a will, brought actions under the advice of counsel against two persons for interfering with the property, and compromised them for trial. Plaintiff had no notice of the proceedings, but had some time previously warned the trustees, on the occasion of an injury done by persons other than defendants to these actions, that he should hold them liable if they did not take all necessary steps to protect the property. In December 1881, plaintiff applied to the trustees for the rents accrued since May 1880. The trustees' solicitor answered stating the amount of the rents received, and saying that it was less than the costs incurred by the trustees in the action, and that they were out of pocket. A correspondence ensued, in the course of which the trustees expressed their willingness to concur in any arrangement for raising the costs out of the estate, but plaintiff insisted on having the rents paid to him irrespective of any arrangement for raising the costs, and brought his action to enforce payment. The Vice Chancellor of the Lancaster Court made an order declaring that as the actions were brought without the knowledge or consent of plaintiff, the costs were not chargeable against the income, and the court "being of opinion that the

actions were commenced under the advice of the counsel," ordered the trustees' costs of them to be raised and paid out of the estate, but ordered the trustees to pay plaintiff his costs of the present action up to the hearing. Plaintiff appealed against the direction to raise the costs of the former actions out of the estate, and the trustees from the order as to the costs of the present action: *Held* (1) the direction to raise the costs of the trustees of the old actions out of the estate ought to be affirmed, for the actions appeared to have been brought *bonâ fide* and to have been beneficial to the estate, but the reason given to the decree for allowing them ought to be varied, as that result did not necessarily follow from their having been commenced under the advice of counsel, but (2) the order on the trustees to pay costs must be reversed, and directions given for raising their costs of this action out of the estate, for the costs of trustees properly incurred in the administration of the trust are a first charge on both the capital and income of the trust estate, and the trustees were not bound to part with the income till their costs had been otherwise provided for, and they therefore had been guilty of no misconduct.

Stott v Milne (1884) 25 Ch D 710; 50 LT 742, CA

ANNOTATIONS As to (1) **Apld** Re Weall, Andrews v Weall (1889) 42 Ch D 674. As to (2) **Consd** Re Owen, Frisby, Dyke v Owen (1892) 66 LT 718; St Thomas's Hospital v Richardson [1910] 1 KB 271

3389 Costs out of capital — Proceedings for protection of estate — By trustees

Powys v Blagrave (1854) 4 De GM&G 448; 2 Eq Rep 1204; 24 LJ Ch 142; 24 LTOS 17; 2 WR 700; 43 ER 58, LC

ANNOTATION **Consd** Re Hotchkys, Freke v Calmady (1886) 32 Ch D 408

3390 Costs out of capital — Proceedings for protection of estate — Opposition to Bill in Parliament

An estate was settled by the will of a testator, his widow being the first, and his nephew the second tenant for life. During the lifetime of the widow she expended out of her own moneys various sums in making improvements upon the estate. Some of these sums were expended before, and some after the commencement of Settled Land Act 1882 (c 38) (repealed). With regard to those which were expended after the commencement of the Act (repealed), no scheme was, prior to the execution of the works, submitted for approval, either to the trustees of the settlement or to the court, in accordance with s 26 (repealed) of the Act. The widow also, prior to the commencement of the Act, paid out of her own moneys the costs of the successful opposition of the trustees to some bills in Parliament, which contained provisions injuriously affecting the estate. The repayment to the widow of all the sums thus expended by her was secured by four bonds given to her by the nephew. After the death of the widow the nephew, being then tenant for life in possession of the estate, applied to the court for a direction to the trustees to apply capital money in their hands in payment of the amounts due upon the bonds: *Held* independently of Settled Land Act 1882 (c 38) s 36 (repealed), the court, under its general jurisdiction, had power to direct the payment of the costs of the Parliamentary opposition out of the capital money, and payment was directed accordingly.

Re Ormrod's Settled Estate [1892] 2 Ch 318; 61 LJ Ch 651; 66 LT 845; 40 WR 490; 36 Sol Jo 427

3391 Costs out of capital — Proceedings for protection of estate — By committee of mentally disordered tenant for life — Opposition to Bill in Parliament

The Lords Justices sitting in Lunacy have jurisdiction to order the costs, charges, and expenses incurred in relation to an unsuccessful opposition to a Bill in Parliament, affecting the estate of a lunatic tenant for life of settled land, to be paid out of the corpus of the property subject to the settlement.

Re Blake (A Lunatic) (1895) 72 LT 280; 39 Sol Jo 330, LJJ

3392 Costs out of capital — Proceedings by tenant for life of mortgaged property — Settlement of action for foreclosure

A was tenant for life on the L estate, and his eldest son, B, an infant of sixteen years of age, was the first tenant in tail in remainder thereof. The L estate was subject to four legal mortgages, the different mortgages being on different portions of the estate; to one equitable mortgage over the whole of the estate; and to a charge for a portion over the whole estate. Under three of the legal mortgages the rate of interest was 5 per cent *per annum*, reducible to 3 per cent; and the rate of interest on the other legal mortgage and the portion charge was 4 per cent *per annum*. One of the legal mortgagees commenced a foreclosure action, and the L estate was in danger of being broken up and foreclosed, when, at A's request, C and D paid off plaintiff mortgagee and took a transfer of his security and also of the equitable mortgage. The foreclosure action was stayed, and A paid to plaintiff mortgagee his costs of the foreclosure action and of the transfer of his security. A incurred and was liable for certain costs in the foreclosure action and in connection with the transfers to C and D. The other three legal mortgagees then demanded repayment, and threatened to foreclose the estate. A then negotiated with S to advance such a sum as would enable A to pay off all the above mentioned incumbrances

on the L estate, and procure a transfer of the said incumbrances to C and D for a term of five years, at 3 3/4 per cent, and also to advance to A a further sum sufficient to pay the costs, charges, and expenses already incurred by A as above-mentioned, and also the costs, charges, and expenses of and incident to the transfer of the several mortgages. A then commenced an action against B, stating the above facts and verifying them by affidavit, and A claimed to be entitled to charge the inheritance with such costs, charges, and expenses as he had incurred, with interest for the same: *Held* A was entitled to (1) a declaration that he was entitled to a charge on the part of the L estate comprised in the legal mortgage in respect of which the foreclosure action was brought for the costs, charges, and expenses paid or incurred by A in relation to the foreclosure action, and of the transfers to C and D, with interest at 4 per cent; (2) a declaration that A would be entitled to a charge upon the several portions of the L estate comprised in the other three legal mortgages and in the equitable mortgage, and the portion charge for the costs, charges and expenses to be incurred by A and the mortgagees and transferees thereof in relation to the proposed transfers of the last-mentioned securities, or for any other costs properly incurred by plaintiff in protecting the L estate from the claims of the mortgagees thereof, with interest at 4 per cent; and (3) if necessary, the above-mentioned costs, charges, and expenses and the costs of this action might be raised by a proper mortgage of the L estate.
More v More (1889) 60 LT 626; 37 WR 414

3393 Costs out of income — Action by tenant for life against trustees — Abortive action for breach of trusts — Trustees' costs
Property was settled to the separate and inalienable use of married woman for life, and the trustees were authorised, out of the moneys which should come to their hands, to reimburse themselves all expenses to be incurred in or about the execution of the trusts or any matter relating to the settlement. A bill filed by her by her next friend, complaining of a breach of trust, and to remove the trustees, was dismissed, with costs, but, by consent, new trustees were to be appointed, and a receiver to get in the income. Before new trustees had been appointed and the costs paid by the next friend, he became insolvent: *Held* the income in the hands of the receiver was applicable to the payment of the trustees' costs.
D'Oechsner v Scott (1857) 24 Beav 239; 53 ER 349

3394 Settled legacy appropriated by executors — Action by remainderman against executors — Costs out of legacy
A stock legacy bequeathed to several in succession, was appropriated by the executors, and the residue paid over. In a suit between the remainderman and the executors alone, the legacy was transferred into court, and the costs of suit were paid thereout. The tenant for life afterwards filed a claim to have the amount of costs recouped out of the residue. It was dismissed with costs.
Richardson v Rusbridger (1855) 20 Beav 136; 52 ER 554

Scottish, Irish and Commonwealth Cases

3395 Costs out of capital — Costs of unsuccessful appeal
Re Hassell, Knowles v Ballarat Trustees, Executors & Agency Co Ltd, Haslem v Ballarat Trustees, Executors & Agency Co Ltd [1916] VLR 594 (AUS)

4 Maintenance, repair and insurance of improvements

LAW See Halsbury's Laws (4th edn) vol 42 para 970

CROSS REFERENCES See no 1955 et seq ante (insurance by tenant for life)

3396 Duties of tenant for life — In relation to trees planted as ornament
In an action to restrain the cutting of timber on the ground of equitable waste, the question to be decided is whether the timber was in fact planted or left for ornament or shelter, not whether it is ornamental or useful for shelter; but the court will accept the evidence of competent persons, founded on inference from the present appearance and condition of the timber, as some evidence that it was so planted or left.
Weld-Blundell v Wolseley [1903] 2 Ch 664; 73 LJ Ch 45; 89 LT 59; 51 WR 635; 47 Sol Jo 653

ii DUTY OF TENANT FOR LIFE TO KEEP DOWN INTEREST AND ANNUITIES

1 Duty of tenant for life

LAW See Halsbury's Laws (4th edn) vol 42 para 972 et seq

3397 Tenant for life must keep down interest
One seised in fee, and indebted by bond in which his heirs are bound, devises his lands to A for life, remainder to his first, etc, son in tail, remainder over. In a bill brought by the bond creditors, the court will not decree the devisee for life to account for the profits, but only to keep down the interest.
Manaton v Manaton (1724) 2 P Wms 234; 24 ER 711, LC

3398 Tenant for life must keep down interest
Newling v Abbot (1715) 2 Eq Cas Abr 596; 22 ER 501, LC

3399 Tenant for life must keep down interest
Husband of tenant in tail takes in a mortgage, and is in receipt of the rents and profits on a bill to redeem by reversioner after the wife's death; husband not allowed interest on the mortgage in life of his wife.

If there is a tenant for years or life subject to a mortgage, they must keep down the interest during that time. But there is a particular estate, called an estate tail, which is distinguishable: and therefore it is true that in general cases, if there is tenant in tail remainder over, subject to a preceding mortgage or incumbrance: and tenant in tail is in possession and receipt of the rents and profits the mortgage in hands of mortgagee: and he lets the interest run in arrear without applying to keep it down: neither the issue in tail nor the remainderman can come against that tenant in tail to compel the keeping down of interest. . . . Where there is tenant in tail of full age, courts of law as well as equity, consider the reversioner or remainder as in the power of that tenant in tail (*Lord Hardwicke C*).
Amesbury v Brown (1750) 1 Ves Sen 477; 27 ER 152, LC

3400 Tenant for life must keep down interest
A created a trust for the payment of incumbrances out of the rents and profits of his real estate, part of which being subject to the arrears of a rentcharge to the Crown, was discharged by a privy seal, provided £5,000 be paid to B and C, for securing which a term was created by Act of Parliament: *Held* this was a debt affecting the estate, and not within the trusts of the deed, and therefore the tenants for life must keep down the interest.
Peterborough (Earl) v Mordaunt (1760) 1 Eden 474; 28 ER 769

3401 Tenant for life must keep down interest
Kinnoul (Earl) v Money (1767) 3 Swan 202n; 36 ER 830, LC

3402 Tenant for life must keep down interest
Shrewsbury (Countess) v Shrewsbury (Earl) no 3467 post

3403 Tenant for life must keep down interest
An infant tenant in tail is bound to keep down the interest of debts charged upon the entailed estates. A tenant for life was also held to have been liable to keep down the interest of the debts, although, having the ultimate remainder in fee, he had consented to an Act of Parliament, by which the estates were vested in trustees for the payment of the debts.
Burges v Mawbey (1823) Turn&R 167; 37 ER 1060
ANNOTATION **Consd** Havelock v Havelock, Re Allan (1881) 17 Ch D 807

3404 Tenant for life must keep down interest
Hawkins v Hawkins (1836) 6 LJ Ch 69
ANNOTATION **Distd** Makings v Makings (1860) 1 De GF&J 355

3405 Tenant for life must keep down interest
The testator, by his will, charged his debts and legacies upon his real and personal estate, and gave such real and personal estate to trustees upon trust for his nephew for life, to whom also he gave a legacy, with remainder to the first and the other sons of the nephew successively in tail male, with remainder to the second and every other son of testator's brother successively in tail male, remainder to testator's own right heirs; and added: "and upon this last mentioned contingency, failing heirs male of my brother, and of my estate going to my right heirs more remote as aforesaid, then I do hereby charge, subject and make liable to my estate with the payment of the sum of £5,000 to my niece." Testator died in 1775, leaving his brother his heir-at-law. The nephew entered into possession of the real estate, which consisted of a plantation in Jamaica, subject to a mortgage created by testator in 1765. The brother afterwards died, leaving the nephew, his only son, and then heir-at-law of testator; the nephew died in 1822 without issue male. The bill was filed in 1837 against the mortgagees and the devisees of the nephew to obtain payment of the niece's legacy of £5,000: *Held* the nephew was only bound in his lifetime to keep down the interest of the debts and legacies; and he was entitled to keep on foot, as subsisting charges against the real estate, the principal of the debts and legacies paid off by him, and also his own legacy.
Faulkner v Daniel (1843) 3 Hare 199; 8 Jur 29; 67 ER 355

3406 Tenant for life must keep down interest
Testator directed his real estate to be sold, "immediately or as soon as conveniently might be," and applied in aid of his personal estate, in payment of his debts; but until the settlement should be made as after directed, the rents were to be applied in keeping down the mortgages and the residue to be paid to the persons entitled under the settlement. He then directed the unsold hereditaments to be settled on A for life, with remainder over. Testator was greatly indebted, on bonds, and his personal estate was largely deficient. More than a year elapsed before the sale of the real estates: *Held* the interest on all the debts for the first year was payable out of the corpus of the real estate, but the tenant for life was bound to keep down the subsequent interest.
Greisley v Chesterfield (Earl) (1851) 13 Beav 288; ER 111

3407 Tenant for life must keep down interest
Now it is well known that the rule with regard to how much of the burden of a charge upon an estate the tenant for life should bear has varied. Originally, a portion of the principal was thrown on the tenant for life; that was subsequently altered, and now the tenant for life is charged only with the burden of keeping down the interest and the capital, as I have before stated, is charged upon the inheritance; that is done upon the ground of the presumed intention of the grantor, to which I have referred, and as the best mode of carrying that intention into effect (*Lord Truro C*).
Kekewich v Marker (1851) 3 Mac&G 311; 21 LJ Ch 182; 17 LTOS 193; 15 Jur 687; 42 ER 280, LC; previous proceedings, sub nom
Marker v Kekewich (1850) 8 Hare 291

3408 Tenant for life must keep down interest
Where an estate, charged as a further security for a mortgage debt was devised to tenant for life and remainderman in fee; and the interest was for many years paid by the remainderman and his assignee, the tenant for life paying nothing: *Held* the tenant for life was bound to keep down the interest during his life.
Long v Harris (1855) 24 LTOS 297; 1 Jur NS 913

3409 Tenant for life must keep down interest
Where the trustees of a settlement, having power to raise a sum of given amount out of the rents and profits, or by assignment or other disposition of the settled estates, as a provision for the fines and expenses payable on the renewal of leases comprised in the settlement, exercised that power by mortgage, and also paid further sums for renewals out of the rents of the settled estates, it was held, that the tenant for life under the settlement was bound to keep down, out of the rents and profits, the interest only of the sum raised by mortgage; but that further sums paid for renewals must be apportioned between the tenant for life and the remaindermen, according to the ordinary rule of the court in such cases.
Plumtre v Oxenden (1855) 25 LJ Ch 19; 26 LTOS 55; 1 Jur NS 1037; 4 WR 29

3410 Tenant for life must keep down interest
As between tenant for life and remainderman, the interest on testator's debts must be borne by the income, as from the day of his death.
Barnes v Bond (1863) 32 Beav 653; 55 ER 256

ANNOTATION **Apld** Marshall v Crowther (1874) Ch D 199

3411 Tenant for life must keep down interest
The obligation of the tenant for life of an estate subject to incumbrances, to keep down interest on the incumbrances, exists only as between him and the remainderman, and not as between him and the incumbrancers.

Testator devised real estate to trustees for a term of 500 years upon trust to raise a sum of £9,000, with interest, for his younger children, and subject thereto to his son F for life, with remainders over. One moiety of the charge of £9,000 became vested in testator's daughter, M. No part of the charge was ever raised; and F, who had been let into possession, failed to keep down the interest. M died in the lifetime of F, having by her will left him a legacy to be paid out of her moiety of the £9,000: *Held* the legacy could not be retained by the executors of M in satisfaction of the arrears of interest due to her.
Re Morley, Morley v Saunders (1869) LR 8 Eq 594; 38 LJ Ch 552; 21 LT 132; 17 WR 959

3412 Tenant for life must keep down interest
A tenant for life of real estate upon which the debts of testator have been ascertained to be a charge, must keep down all the interest which accrues due.
Marshall v Crowther (1874) 2 Ch D 199; 23 WR 210

3413 Tenant for life must keep down interest
Testator devised all his real estate, except two specified estates, to trustees, upon trust for his son for life, with remainder in strict settlement, and he devised the two specified estates upon similar trusts in favour of his two daughters respectively for life, with remainders to their respective issue. By a deed executed on the marriage of his son, testator covenanted to pay to the son or his wife during their joint lives an annuity of £700. Testator's personal estate proved insufficient to provide for the annuity: *Held* the three real estates ought to contribute towards payment of the annuity rateably according to their respective values; and each tenant for life would have a charge upon the corpus of the estate in respect of the proportion of the annuity paid by him, or her, but would have to keep down the interest on the amount so charged.
Re Harrison, Townson v Harrison (1889) 43 Ch D 55; 59 LJ Ch 169; 61 LT 762; 38 WR 265

ANNOTATIONS **Consd** Re Bacon, Grissel v Leathes (1893) 62 LJ Ch 445; Re Perkins, Brown v Perkins [1907] 2 Ch 596

3414 Tenant for life must keep down interest — Though rents and profits insufficient
Revel v Watkinson no 3424 post

3415 Tenant for life must keep down interest — Though rents and profits insufficient
Tracy v Hereford no 3446 post

3416 Tenant for life must keep down interest — Though rents and profits insufficient
Shore v Shore no 3290 ante

3417 Tenant for life must keep down interest — Though rents and profits insufficient

(1) Apart from any question arising upon the special terms of the instrument creating the settlement, a tenant for life must keep down the interest accruing during his lifetime on all paramount incumbrances to the extent and out of the rents and profits received by him. If the current rents are insufficient to keep down the interest, subsequent rents arising during the life of the tenant for life are applicable to liquidate arrears accruing during the same life tenancy.

(2) Where several estates are included in the same settlement, the tenant for life is bound, out of the whole rents and profits, to keep down the interest on charges on all the estates.

(3) Upon principle, therefore, a tenant for life of several estates included in the same devise is liable, as between himself, and the remaindermen, to make good arrears of interest accrued during his life tenancy out of subsequent rents received by him from any of the estates, even although the charge in respect of which the arrears have arisen has been paid off by means of a sale of part of the property.

Honywood v Honywood [1902] 1 Ch 347; 71 LJ Ch 174; 86 LT 214

3418 Tenant for life with absolute power of appointment

Tenant for life with an absolute power, bound to keep down the interest on charges created by himself.

Whitbread v Smith (1854) 3 De GM&G 727, 741; 43 ER 286, 292, LC & LJJ

3419 Owner in fee — Contingent charge on estate

By a settlement made in 1862 certain property, subject to a prior mortgage, was settled upon A in fee, with a contingent charge in favour of B upon his attaining twenty-one: *Held* A during his life, and his estate after his death was bound to keep down the interest on the mortgage, so that the property might remain a security intact for the benefit of B.

Butcher v Simmonds (1876) 35 LT 304; sub nom *Butcher v Simmonds, Re Wilson* (1876) 24 WR 781

3420 Infant tenant in tail

Had there been an application to the court in the infant's life by his guardian, the court would have directed the interest of this £2,000 to be kept down out of the rents and profits of his estate, and not out of his personal estate: Suppose an infant, tenant in tail, remainder in fee, had nothing to support him but the rents and profits of real estate, and would starve if they were to be applied to keep down interest, I should not, in that case, have directed them to be so applied; but here there is a large personal estate, besides the rents and profits of the real estate, which makes the difference (*Lord Hardwicke C*).

Sergeson v Sealey (1742) 2 Atk 412; 9 Mod Rep 390; 26 ER 648, LC

ANNOTATION **Folld** Burges v Mawbey (1823) Turn&R 167

3421 Assignee of life interest — Mortgagee

Mortgagee, having permitted the tenant for life to run in arrear for the interest, purchases the estate for life, and takes possession under that purchase: he is bound to apply the surplus rents and profits beyond the current interest in discharge of the arrear; and in the account under a bill of foreclosure was charged accordingly.

The rents and profits during the estate for life must be applied to the reduction of any interest accrued prior as well as subsequent to the commencement of that estate. . . . But it must always be remembered, that both the tenant for life and the incumbrancers have a right to have the estate sold: and if so, that the tenant for life will have his interest in what remains of the money produced by the sale (*Lord Alvanley MR*).

Penrhyn (Lord) v Hughes (1799) 5 Ves 99; 31 ER 492

ANNOTATION **Consd** Sharshaw v Gibbs (1854) Ray 333

3422 Assignee of life interest — Mortgagee

If the mortgagee enters, not in his character of mortgagee only, but as purchaser of the equity of redemption, he must look to the title of his vendor, and the validity of the conveyance he takes, and if the conveyance be such as gives him only the estate of a tenant for life, he is bound, having united in himself the characters of mortgagor and mortgagee, to keep down the interest of the mortgage for the benefit of the person or persons entitled in remainder.

Raffety v King (1836) 1 Keen 601; 6 LJ Ch 87; 48 ER 439

3423 Method of apportionment

Where testator has bequeathed legacies, and given his residue to a tenant for life, with remainder over; executors, though, as between themselves and the persons interested in the residue, they are at liberty to have recourse to any funds they please in order to pay debts and legacies, yet will be treated by the court, in adjusting the accounts between tenant for life and remainderman, as having paid the debts and legacies not out of capital only, nor out of income only, but with such portion of the capital as, together, with the income of that portion for one year, was sufficient for the purpose.

Testator A, having bequeathed legacies, which his estate was amply sufficient to pay, gave the residue of his estate to B absolutely. B died within six months

after the death of A, having by his will bequeathed legacies, and given the residue of his estate to a tenant for life, with remainder over. B's personal estate, other than that bequeathed to him by A, was insignificant in amount: *Held* (1) whatever remained of A's estate, after taking such portion of the capital, as together with the income of such portion for one year, was required to pay A's debts and legacies, became the property of B; and the tenant for life was entitled from the death of B to the income of the residue of B's estate, after deducting such portion of the capital as, together with the income of such portion for one year, was required to pay B's debts and legacies; (2) he was entitled to the income of such portion of B's residue as was in a proper state of investment, *in specie*; and as to the rest, of so much Consols as would have been produced by conversion at B's death.

(3) B gave some legacies to legatees, contingent on their attaining twenty-one: *Held* the tenant for life was entitled to the intermediate income of the fund set apart to meet the contingent legacies.

Allhusen v Whittell (1867) LR 4 Eq 295; 36 LJ Ch 929; 16 LT 695

ANNOTATIONS As to (1) **Apld** Lambert v Lambert (1873) LR 16 Eq 320; Marshall v Crowther (1874) 2 Ch D 199 **Distd** Re Harrison, Townson v Harrison (1889) 43 Ch D 55 **Consd** Re Dawson, Arathoon v Dawson [1906] 2 Ch 211 **Apld** Re Perkins, Brown v Perkins [1907] 2 Ch 596 **Distd** Re Hanbury, Comiskey v Hanbury (1909) 101 LT 32 **Apld** Re Poyser Landon v Poyser, [1910] 2 Ch 444 **Expld & Distd** Re McEuen, McEuen v Phelps [1913] 2 Ch 704 **Apld** Re Wills, Wills v Hamilton [1915] 1 Ch 769 **Expld** Dr Barnado's Homes v Income Tax Special Purposes Comrs [1921] 2 AC 1 **Apld** Re Oldham, Oldham v Myles (1927) 71 Sol Jo 491 **Consd** Re Fenwick, Fenwick v Stewart [1936] 2 All ER 1096; Corbett v IR Comrs [1938] 1 KB 567 **Distd** Re Darby, Russell v Macgregor [1939] 3 All ER 6 **Apld** Re Ullswater, Barclays Bank Ltd v Lowther [1951] 2 All ER 989; Re Wynn, Public Trustee v Newborough [1952] 1 All ER 341. As to (3) **Consd** Re Bacon, Grissel v Leathes (1893) 62 LJ Ch 445 **Expld** Re Whitehead, Peacock v Lucas [1894] 1 Ch 678

3424 Future income liable

Devise, subject to pay debts and legacies, to a daughter in strict settlement, remainder over, the estate not sufficient to keep down the interest during the life of a jointress by a prior settlement, though more than sufficient afterwards, the jointress living two years and for life, arrear accrued: *Held* (1) the whole profits during the daughter's estate L should be applied to keep down the interest; (2) the surplus arising on death of the jointress being accrued to the same trust estate, must be applied to answer the former deficiency, and not to let it charge the remainder.

Revel v Watkinson (1748) Ves Sen 93; 27 ER 912, LC

3425 Future income liable

The estate of a tenant for life was charged with a sum of £25,000 and interest from the time that the life estate commenced, and it was provided that the £25,000 should not be raised until the expiration of two years from the commencement of the life estate. The tenant for life failed to keep down the interest of the £25,000, and there was raised on the estate by the trustees of the term created for the purpose of the charge, a sum considerably exceeding the £25,000. The persons entitled in remainder after the life estate, have an equity to recoup out of the future income which shall accrue to the tenant for life, the excess raised beyond the £25,000, and the tenant for life having taken the benefit of Insolvent Debtors Act, his assignees are affected by the same equity.

Waring v Coventry (1834) 2 My&K 406; 39 ER 999

ANNOTATION **Apld** Makings v Makings (1860) 1 De GF&J 355

3426 Future income liable

Testator gave all his real and personal estate to his wife for life, and after decease to his son absolutely, chargeable with the payment of a legacy of £200 to testator's daughter, within six months after his decease, and with the payment of testator's debts and funeral and testamentary expenses. There was no personal estate: *Held* the legacy was charged on the life interest as well as on the remainder of the real estate, and ought, with the arrears of interest for six years, to be raised by mortgage of the property, and the remainderman ought to be recouped out of the rents and profits to the full amount of the arrears of interest raised out of the estate.

Makings v Makings (1860) 1 De GF&J 355; 45 ER 396, LC

3427 Subsequent tenant for life not liable — Charge on inheritance

A tenant for life of an estate subject to a mortgage is not liable, as between himself and the remainderman or reversioner in fee, to pay out of the rents and profits of the estate arrears of interest on the mortgage, which accrued due during the life of a preceding tenant for life who died insolvent; but such arrears are primarily a charge upon the inheritance.

Sharshaw v Gibbs (1854) Kay 333; 2 Eq Rep 314; 23 LJ Ch 451; 23 LTOS 37; 18 Jur 330; 69 ER 141

Scottish, Irish and Commonwealth Cases

3428 Tenant for life must keep down

Pemberton v O'Neil (1851) 2 Gr 263 (CAN)

3429 Tenant for life must keep down

The general rule as between a tenant for life and the remainderman in respect of a charge upon an estate, is,

that the tenant for life must keep down the interest on such charge, and the duty of the remainderman is to pay the principal.
Reid v Reid (1881) 29 Gr 372 (CAN)

3430 Tenant for life must keep down
Coole v Milltown (Lord) (1844) 1 Jo&Lat 501 (IR)

3431 Tenant for life must keep down
Kirkwood v Lloyd (1849) 11 I Eq R 561; varied on appeal (1850) 12 I Eq RR 585 (IR)

3432 Adult tenant in tail
A tenant in tail is not bound to keep down interest on charges.
Kennedy v Daley (1858) 7 I Ch R 445 (IR)

3433 Assignee of life interest
Hill v Browne (1844) Drury temp Sug 426 (IR)

3434 Arrears — Future income liable
Baldwin v Baldwin (1856) 6 I Ch R 156 (IR)

3435 Arrears — Future income liable
Where a tenant for life has permitted arrears of charges to accumulate, the claim of a remainderman for compensation out of the life estate, for the increased burden thus cast upon the inheritance, has priority over charges on the life estate created by the tenant for life, and secured by a demise of a legal term without notice of the facts constituting the remainderman's equity.
Fitzmaurice v Murphy (1859) 8 I Ch R 363 (IR)

3436 Arrears — Future income liable
Kilworth (Lord) v Mountcashell (Earl) (1864) 5 I Ch R 565 (IR)

3437 Arrears — Future income liable
Re Fitzgerald's Estate (1867) 1 IR Eq 453 (IR)

3438 Arrears — Future income liable
A remainderman paying arrears of interest on charges which the tenant for life was bound to keep down, is entitled to be recouped out of the produce of the life estate.
Howlin v Sheppard (1870) 19 WR 253 (IR)

3439 Arrears — Future income liable
Re Gore (1874) 9 IR Eq 83 (IR)

3440 Subsequent tenant for life not liable — Charge on inheritance
Caulfield v Maguire (1845) 2 Jo&Lat 141 (IR)

3441 Subsequent tenant for life not liable — Charge on inheritance
The obligation of a tenant for life to keep down the interest on a charge only extends to interest which accrues due during his life estate. Where there are successive life estates, if a subsequent tenant for life is compelled to pay arrears of interest upon a charge affecting the inheritance which had accrued due during a prior life estate, he is entitled to repayment of that sum out of the inheritance.
Kirwan v Kennedy (1870) 4 IR Eq 499 (IR)

3442 Subsequent tenant for life not liable
A tenant for life is not bound to pay interest accrued during the life of a former tenant for life.
Kennedy v Daley (1858) 7 I Ch R 445 (IR)

3443 Right of set-off against charges vested in tenant for life at decease
Arrears of interest permitted by a tenant for life to accrue due upon charges affecting the inheritance may, after his decease, be set-off against the charges affecting the inheritance, which at the time of his decease were vested in him.
Re Whyte (1857) 7 I Ch R 61n (IR)

3444 Right of set-off against charges vested in tenant for life at decease
Howlin v Sheppard (1872) 6 IR Eq 497 (IR)

3445 No specific lien on arrears of rent
Where a tenant for life of incumbered land has permitted arrears of interest to accumulate during the continuance of his life estate and dies leaving arrears of rent due to him, the remainderman has not any lien upon such arrears of rent, nor any right to require them to be applied specifically, by the personal representative of the tenant for life, in discharge of the arrears of interest.
Dillon v Dillon (1853) 4 I Ch R 102 (IR)

2 Several estates in one settlement

LAW See Halsbury's Laws (4th edn) vol 42 para 975

3446 Charges on parts of estates — Must keep down interest out of profits of all
An estate being settled to A for life, then as to part to B for life, remainder as to the whole to uses under which defendant takes as tenant for life, with powers to A to charge, but not to encumber B's estate for life, the estate given in remainder falls in during B's life, and the interest of the charges exhausts the rents and profits. Upon B's life estate falling in, the first rents and profits of that portion of the estate shall be applied in discharge of the arrear, which shall not be a charge upon the inheritance.
Tracy v Hereford (1786) 2 Bro CC 128; 29 ER 75, LC

ANNOTATION **Consd** Penrhyn v Hughes (1799) 5 Ves 99

3447 Charges on parts of estates — Must keep down interest out of profits of all
Three estates, when put into settlement, were subject two of them to two mortgages amounting to £2,400, and the third to a third for £3,000. The husband being tenant for life, became insolvent in 1841. In 1840 a judgment was recovered against him and duly registered. From 1841 the interest on the £3,000 fell into arrear, whilst the mortgagees of the £2,400 entered and received rents in excess of interest: *Held* the tenant for life was not entitled to have the benefit of the excess on the one estate until he had kept down the interest on the other.
Scholefield v Lockwood (1863) 4 De GJ&Sm 22; 3 New Rep 177; 33 LJ Ch 106; 9 LT 400; 9 Jur NS 1258; 12 WR 114; 46 ER 822, LC

3448 Charges on parts of estates — Must keep down interest out of profits of all
Re Hotchkys, Freke v Calmady no 3634 post

3449 Charges on parts of estates — Must keep down interest out of profits of all
A tenant for life of estates settled by will: *Held* bound to keep down interest in respect of charges on the several parts of the estates out of the income of the whole.
Frewen v Law Life Assurance Society [1896] 2 Ch 511; 65 LJ Ch 787; 75 LT 17; 44 WR 682; 40 Sol Jo 621

ANNOTATIONS **Folld** Honywood v Honywood [1902] 1 Ch 347 **Apld** Re Kensington, Longford v Kensington [1902] 1 Ch 203 **Distd** Re Holt, Holt v Holt (1916) 85 LJ Ch 779

3450 Charges on parts of estates — Must keep down interest out of profits of all
Honywood v Honywood no 3417 ante

3451 Charges on parts of estates — Must keep down interest out of profits of all — Though charge cleared by sale of part of land
Honywood v Honywood no 3417 ante

3 Annuities

LAW See Halsbury's Laws (4th edn) vol 42 para 976

3452 Apportionment between capital and income
Yates v Yates no 3547 post

3453 Apportionment between capital and income
Hereditaments were granted to trustees to the use that the grantor and his wife should receive thereout a yearly rentcharge during their lives and the life of the survivor, and subject thereto to the use of M absolutely; and M entered into a covenant to pay the annuity or rentcharge: *Held* as between the persons entitled under M's will for life and in remainder to his estate, the annuity must be capitalised, and the burden borne in proportion to the values of their respective interests.
Re Muffett, Jones v Mason (1888) 39 Ch D 534; 57 LJ Ch 1017; 59 LT 499; 37 WR 9; 4 TLR 738

ANNOTATIONS **Folld** Re Bacon, Grissel v Leathes (1893) 62 LJ Ch 445 **Consd** Re Henry, Gordon v Gordon [1907] 1 Ch 30

3454 Apportionment between capital and income
Re Harrison, Townson v Harrison no 3413 ante

3455 Apportionment between capital and income
Testatrix by will gave her residuary estate, which was subject to the payment of certain life annuities secured by bonds, in trust to pay the income to one for life, with remainders over. The question being raised how the annuities ought to be provided for as between tenant for life and remainderman: *Held* any sums paid to the annuitants, out of the income of testatrix's estate, and all future payments, or the sums necessary to purchase the annuities, ought to be raised or provided by a sale or mortgage of a sufficient part of testatrix's estate, and the respective interests of tenant for life and remainderman worked out on this footing.
Re Bacon, Grissel v Leathes (1893) 62 LJ Ch 445; 68 LT 522; 41 WR 478; 37 Sol Jo 340; 3 R 459

ANNOTATIONS **Folld** Re Henry, Gordon v Gordon [1907] 1 Ch 30 **Consd** Re Perkins, Brown v Perkins [1907] 2 Ch 596; Re Poyser, Landon v Poyser [1910] 2 Ch 444

3456 Apportionment between capital and income
Testator gave property, subject to an annuity, to his daughter for life with remainder to her children. The annuitant agreed to take a fixed sum of £3,500 for the annuity, which sum the daughter paid out of her own moneys: *Held* the daughter was entitled to be repaid the £3,500 out of the estate, and it ought to be raised by sale or mortgage so as to throw a fair proportion of the burden on the tenant for life and remaindermen.
Re Henry, Gordon v Gordon [1907] 1 Ch 30; 76 LJ Ch 74; 95 LT 776

ANNOTATION **Consd** Re Poyser, Landon v Poyser [1910] 2 Ch 444

3457 Apportionment between capital and income
Testator who had covenanted to pay life annuities bequeathed the proceeds of sale to his residuary real and personal estate upon successive trusts for a life tenant and remainderman: *Held* the successive instalments of the annuities must be borne by income and capital in proportion to the actuarial values of the life estate and reversion at testator's death.
Re Dawson, Arathoon v Dawson [1906] 2 Ch 211; 75 LJ Ch 604; 94 LT 817; 54 WR 556

ANNOTATIONS **Folld** Re Perkins, Brown v Perkins (1907) 77 LJ Ch 16; Re Poyser, Landon v Poyser [1910] 2 Ch 444

3458 Apportionment between capital and income
Testator who had covenanted to pay a life annuity gave half his residue to trustees upon trust for his daughter for life if and when she attained twenty-five with remainders over. Until the daughter attained twenty-five the income, subject to maintenance up to a specified amount, was to be added to

capital. The daughter attained twenty-five on 8 October 1907. The residue was earning 3 per cent interest: *Held* each future instalment of the moiety of the annuity payable out of the daughter's share must as it accrued be apportioned between capital and income as follows: *viz*, calculate what sum with 3 per cent simple interest from 8 October 1907, to the day of payment would have met the particular instalment. Charge that sum to capital, the balance to income.

Re Perkins, Brown v Perkins [1907] 2 Ch 596; 77 LJ Ch 16; 97 LT 706

ANNOTATIONS **Follld** Re Thompson, Thompson v Watkins [1908] WN 195; Re Poyser, Landon v Poyser [1910] 2 Ch 444 **Consd** Re Fenwick, Fenwick v Stewart [1936] 2 All ER 1096 **Apld** Re Berkeley, Inghs v Berkeley (Countess) [1968] 3 All ER 364

3459 Apportionment between capital and income

Re Thompson, Thompson v Watkins [1908] WN 195

ANNOTATION **Follld** Re Poyser, Landon v Poyser [1910] 2 Ch 444

3460 Apportionment between capital and income

J by his will left his residuary real and personal estate to trustees upon trust for sale and conversion and to pay debts and legacies and then for his eight children, of whom one was to have one-fifteenth and the others two-fifteenths each, and he settled all the shares wholly, or partially upon trust for the son or daughter for life with remainders over. By a settlement made on the marriage of one of his sons before the date of his will testator had covenanted to pay to that son an annuity of £250 a year. Testator died in 1901, leaving a very large estate. His widow and all his children were living, and owing to a mistaken view of the construction of the will the son's annuity had not been paid. The trustees had sufficient funds, representing capital, in hand to pay the arrears, but the question was raised whether, as between the tenants for life and remaindermen of the settled shares, part of the burden of paying the past and future instalments of the annuity ought not to be borne by the tenants for life: *Held* each instalment of the annuity must be apportioned between capital and income by calculating what sum if set aside at testator's death would, with simple interest at $3^1/_2$ per cent to the day of payment, have met the particular instalment, and the sum so ascertained ought to be chargeable to capital and the balance to income, having regard to the number of shares into which the estate was divisible.

Re Poyser, Landon v Poyser [1910] 2 Ch 444; 79 LJ Ch 748; 103 LT 134

ANNOTATIONS **Consd** Re Shee, Taylor v Stoger [1934] Ch 345; Re Fenwick, Fenwick v Stewart [1936] 2 All ER 1096

3461 Annuity fund — Unapplied income

Re Whitehead, Peacock v Lucas [1894] 1 Ch 678; 63 LJ Ch 229; 70 LT 122; 42 WR 491; 38 Sol Jo 183; 8 R 142

3462 Annuity fund — Release of life interest — Effect on residuary estate

By a settlement made on 14 August 1935, after reciting that the settlor had transferred investments into the joint names of the trustees and after declaring administrative trusts for conversion and investment, it was declared that the trust fund should be held on trust during the joint lives of the settlor's wife, J, and two children to apply two equal third parts of the annual income for the maintenance education and benefit of the two children. Subject to this trust the trustees of the settlement were, by clause 4, to pay the annual income of the trust fund to J during her life, and by clause 6 there was a special power of appointment in favour of the issue of the settlor and J. The marriage was dissolved by a decree made absolutely on 27 July 1936. The settlor died on 10 April 1937, having by his will and four codicils given a protected life interest in his residuary estate to J. The definition of the settlor's residuary estate included "investments for the time being remaining unconverted pursuant to" a power therein contained: and the tenant for life under the will and codicils was given the whole income of unconverted property in the residuary estate. By deed of release dated 31 December 1937, J released to the trustees all her estate and interest in the income of the trust fund to become payable thereafter during her life and all her right title claim and demand to and in the same "to the intent that the settlement may henceforth be read and construed as if clause 4 thereof. . . were deleted". The trustees of the settlor's will had not hitherto exercised any discretion, under the power to retain investments unconverted, in regard to the income from the settled trust fund, since it had not been appreciated that their discretion under the will was applicable, and income of the settled trust fund had been held in suspense pending the determination of questions of entitlement to it: *Held* (1) on the true construction of the deed of release and in the events which had happened there was a resulting trust in favour of the settlor's estate in respect of the income released by the deed, which income therefore became subject to the will and codicils of the settlor; (2) the released income should be treated as capital of the settlor's residuary estate, because it was not produced by a fund forming part of his estate but was the income of the trust fund under the settlement

of 1935; (3) the definition in the settlor's will of his residuary estate did not exclude the application of the rule of apportionment in *Re Earl of Chesterfield's Trusts* (no 3063 ante), at a time when the will trustees had not yet exercised any discretion; and, accordingly, income which accrued before the trustees exercised their discretion whether to postpone conversion was subject to apportionment in accordance with the rule would thereby be excluded thereafter.

Re Guiness's Settlmt, Guiness v SG Warburg (Exor & Trustee) Ltd [1966] 2 All ER 497; [1966] 1 WLR 1355; 110 Sol Jo 636

3463 Discharge of annuity

A tenant for life as from June 1928, of real estate under a will paid instalments of capital in respect of loans made by the Lands Improvement Company and charged on the settled property by order of the Minister of Agriculture & Fisheries. She also paid tithe annuities charged upon the estate in consideration of the redemption of tithe rents charged under orders made under Tithe Act 1918 (c 54) s 4. She applied for recoupment of both of these payments out of capital money under Settled Land Act 1925 (c 18) s 73(1) paras (xiii), (xvi), respectively. Under para (xiii) capital money is made applicable "in redemption of an improvement rentcharge, that is to say, a rentcharge . . . created, whether before or after the commencement of this Act, with the object of paying off any money advanced for defraying the expenses of an improvement." Capital money is also made applicable under para (xvi) "in the purchase of an annuity charged under Tithe Act 1918 (c 54) s 4, on the settled land or any part thereof, or in the discharge of such part of any such annuity as does not represent interest": *Held* (1) as under para (xiii) capital money was only payable in redemption of an improvement rentcharge, it could not be used to recoup past payments of capital by the tenant for life; (2) the payment of the capital portion of the instalments of tithe annuity as they fell due could fairly be described as "discharging" that part of the annuity which represented capital, for "discharge" in the context of para (xvi) could not mean full discharge in relation to the annuity, confined as it was to that part of it which did not represent interest; (3) the life tenant was entitled to recoupment in respect of her payments of tithe annuity, for, as recoupment to a tenant for life of his expenditure on improvements could be authorised as equivalent to payment for those improvements, so recoupment to a tenant for life of any payment properly chargeable to capital under the 1925 Act such as the proportion attributable to capital of an instalment of a tithe rentcharge redemption annuity properly so chargeable under s 73(1)(xvi) of that Act, as construed above, should, by parity of reasoning, be capable of like authorisation.

Re Sandbach [1951] Ch 791; [1951] 1 All ER 971; [1951] 1 TLR 911; 95 Sol Jo 352, CA

3464 Tithe redemption annuity — No apportionment

The Holkham settled estates, or parts of them, were subject, until the coming into force of Tithe Act 1936 (c 43) to tithe rentcharges exceeding £700 a year. The whole of the settled land, with a small exception, was agricultural land. The Act did not provide how the redemption annuity was to be borne as between capital and income, and this summons was taken out by the trustees for the purposes of Settled Land Act 1925 (c 18), of the settled estates, for the decision of that question. The summons asked (*inter alia*) whether, on the true construction of Tithe Act 1936 (c 43) s 13, or otherwise, the tenant for life for the time being of the settled estates or his assignees, if any, was or were and would be entitled to be recouped out of capital moneys any and if so what part of all payments made by him or them on account of the redemption annuity. At the date of the summons, both the tenant for life in possession and the tenant for life in remainder had assigned their life interests: *Held* (1) Tithe Act 1936 (c 43) s 13(4) refers only to apportionment as to time, and does not elucidate the question whether there is to be apportionment as between tenant for life and remainderman; (2) even if there should be apportionment as between them, s 13(6) did not justify throwing a sixth of the annuity on capital; (3) there ought not to be any apportionment as between tenant for life and remainderman, and the tenant for life should bear the annual payments.

Re Leicester's Settled Estates, Coke v Leicester (Earl) [1939] Ch 77; [1938] 3 All ER 553; 108 LJ Ch 1; 160 LT 38; 54 TLR 1076; 82 Sol Jo 682

Scottish, Irish and Commonwealth Cases

3465 Apportionment between capital and income

Periodical payments of an annuity must be treated partly as interest which the tenant for life has to pay, and partly as principal for which he will have a charge on the inheritance, in the proportion which the value of the life estate bears to the value of the reversion.

Whitesell v Reeve & Payne (1902) 23 CLT 107; 5 OLR 352; 2 OWR 160 (CAN)

3466 Arrears of annuity raised by sale of settled land — Right of remainderman to be recouped out of produce of life estate

A tenant for life having suffered an annuity to run in arrear, the arrears were raised by a sale of part of the settled lands: *Held* remainderman had an equity against the tenant for life, and against his assignee under the Insolvent Act, to be

recouped the arrears so levied, out of the produce of the life estate.

Coote v O'Reilly (1844) 1 Jo&Lat 455; 7 I Eq R 356 (IR)

iii DISCHARGE OF INCUMBRANCES BY TENANT FOR LIFE

LAW See Halsbury's Laws (4th edn) vol 42 para 977 et seq

3467 Tenant for life entitled to retain charge

(1) Tenant in tail restrained as to alienation, but with powers of leasing, and jointuring as in case of tenant for life, considered as tenant for life, and therefore his personal representative a creditor for a charge on the estate paid by him, intent to the contrary not appearing, though the subsequent remainders were exactly of the same nature, and, the term having been very short, little more than forty years remained.

(2) Tenant for life is only to keep down the interest of an incumbrance, but not to be charged with any part of the principal.

Shrewsbury (Countess) v Shrewsbury (Earl) (1790) 1 Ves 227; 3 Bro CC 120; 30 ER 314, LC

ANNOTATION As to (1) **Apld** Re Pride, Shackell v Colnett [1891] 2 Ch 135

3468 Tenant for life entitled to retain charge

M by his will gave two leasehold estates, each of which was subject to a distinct mortgage, and all the residue of his estate, subject to the payment of his debts, to trustees for his wife E for life, with remainder as she should appoint. E paid off both mortgages and took an assignment of each to a trustee "to the end and intent that the same might be kept on foot for her benefit." She afterwards executed her power of appointment over both estates; over the one by a deed poll, by which she annexed to the gift a condition that her appointees should release a certain claim which might have been enforced against the estate; and over the other by her will, by which, after reciting her power of appointment over the premises, describing them, she appointed the same to trustees, upon trust to pay the rents etc, to certain of her children: *Held* it was E's intention to keep these charges on foot, and therefore, his appointees took subject to them.

Cole v Stutely (1842) 6 Jur 314

3469 Benefit of tenant for life

Faulkner v Daniel no 3405 ante

3470 Benefit of tenant for life

On his father's death in 1904, plaintiff became entitled as tenant in tail to the family estates, which were subject to charges and incumbrances. With a view to the reduction of mortgages out of savings of income, and in order to meet the wishes of his older relatives in that respect, plaintiff went to reside abroad giving powers of attorney for the management of his estates to one of the trustees, and with plaintiff's assent a considerable proportion of income was applied in reduction of mortgages on the estates. In February 1909, plaintiff attained twenty-one, and in October 1909, disentailed and resettled the estates, becoming the first tenant for life. The same course as to payment of incumbrances out of income was continued. Plaintiff claimed a charge on the settled estates for sums paid out of income in further reduction of these incumbrances between the date of the resettlement and 1912. His evidence was that all the payments were to be for his own benefit, and he regarded the incumbrances as *pro tanto* paid off altogether: *Held* plaintiff's intention throughout was to benefit himself alone, the presumption in favour of a limited owner who pays off incumbrances was not rebutted and plaintiff was entitled to a charge on the inheritance for the amount paid out of income in discharging incumbrances.

Williams v Williams-Wynn (1915) 84 LJ Ch 801; 113 LT 849

3471 Benefit of tenant for life — Where no intention to exonerate estate — Evidence of intention

Where tenant for life pays off an incumbrance upon the estate, he shall be considered as a creditor for the money so paid; but where tenant in tail pays, it is in exoneration of the estate of which he may make himself absolute owner.

A tenant for life, in general paying off a charge, without taking an assignment, is a creditor for the sum so paid, but the smallest demonstration that he meant to pay it off will prevent his representative from coming for the money (*Lord Thurlow C*).

Jones v Morgan (1783) 1 Bro CC 206; 28 ER 1086, LC

ANNOTATION **Consd** Kensington v Bouverie (1859) 7 HL Cas 557

3472 Benefit of tenant for life — Where no intention to exonerate estate — Evidence of intention

If a tenant for life pays off a charge on the inheritance, he is *primâ facie* entitled to that charge for his own benefit; but he may, if he think proper, exonerate the estate. In the absence of evidence, the presumption is, that he pays the charge for his own benefit, and not for the benefit of the persons entitled in remainder; but evidence may show the contrary conclusion to be true.

Burrell v Egremont (Earl) (1844) 7 Beav 205; 13 LJ Ch 309; 8 Jur 587; 49 ER 1043; sub nom

Barrell v Egremont (Earl) (1844) 3 LTOS 72

ANNOTATIONS **Consd** Patten v Bond (1889) 60 LT 583
Apld Re Harvey, Harvey v Hobday [1896] 1 Ch 137
Folld Gifford v Fitzhardinge [1899] 2 Ch 32

3473 Benefit of tenant for life — Where no intention to exonerate estate — Evidence of intention

In 1824, A purchased an estate, and he mortgaged it to raise part of the purchase-money. In February 1840, the mortgage was paid off and transferred to B, who in April 1840, executed a declaration of trust in favour of A. A died in 1848: *Held* the charge had merged.

What the court is to look at is, to see what was the intention of the person who paid off the charge. That intention, in the absence of any circumstances, is to be gathered from what it was his interest to do; but if there be any circumstances affecting the matter, they also are to be regarded (*Romilly MR*).

Pitt v Pitt (1856) 22 Beav 294; 27 LTOS 257; 2 Jur NS 1010; 52 ER 1121

3474 Benefit of tenant for life — Where no intention to exonerate estate

A tenant for life in possession having power to charge the inheritance with £20,000 and interest for his own benefit, executed the power, and assigned the charge as part security for a mortgage of a greater sum. The rents received from the estate were insufficient to pay the interest, and the tenant for life paid to the assignees of the charge this interest out of other money of his own; but did so without giving any notice whatever to the remainderman of his intention to make the deficiency a charge on the inheritance. After the death of the tenant for life the remainderman claimed to redeem, and the assignees of the charge sought, as against the inheritance, to charge it with the amount of the deficiencies: *Held* they were not entitled to do so.

Kensington (Lord) v Bouverie (1859) 7 HL Cas 557; 29 LJ Ch 537; 34 LTOS 16; 6 Jur NS 105; 11 ER 222, HL

ANNOTATION **Consd** Re Warwick's Settlement Trusts, Greville Trust Co v Grey [1938] Ch 530

3475 Benefit of tenant for life — Where no intention to exonerate estate — Evidence of intention

Cuddon v Cuddon (1876) 4 Ch D 583; 46 LJ Ch 257; 25 WR 341

3476 Benefit of tenant for life — Where no intention to exonerate estate — Evidence of intention

When a tenant for life pays off a mortgage on the estate, the fact that he is the parent of those entitled in remainder is not of itself sufficient to rebut the presumption that he intends to keep the charge alive for his own benefit.

Re Harvey, Harvey v Hobday [1896] 1 Ch 137; 65 LJ Ch 370; 73 LT 613; 44 WR 242; 40 Sol Jo 157, CA

3477 Benefit of tenant for life — Where no intention to exonerate estate — Evidence of intention

A reversionary interest in trust funds was mortgaged by the reversioner. He afterwards on his marriage assigned the same interest, subject to the mortgage, to trustees, on trust for his wife for her life, with remainder to himself for his life, with remainders over. After the marriage he paid off the mortgage debt out of his own moneys, and the mortgagee executed a deed which purported to reconvey the mortgaged property to him "absolutely discharged from" the mortgage debt and all claims under the mortgage deed. The solicitors who prepared the reconveyance were ignorant of the existence of the settlement.

In an action by the reversioner, claiming to have the reconveyance set aside or recitified he gave evidence that he did not intend to pay off the mortgage debt for the benefit of the settlement, but that he intended to keep the charge alive for his own benefit: *Held* notwithstanding the form of the reconveyance, plaintiff was entitled to have the charge kept alive for his own benefit, and the sum secured by the mortgage constituted a charge on the property having priority over the settlement, and a declaration was made to that effect.

Gifford (Lord) v Fitzhardinge (Lord) [1899] 2 Ch 32; 68 LJ Ch 529; 81 LT 106; 47 WR 618

3478 Benefit of tenant for life — Where no intention to exonerate estate — Evidence of intention

Where a jointure and interest on portions are charged on capital as well as income and a tenant for life pays out of his own pocket the amount by which the income of the estate in any year is insufficient to meet the jointure and the interest on the portions, and upon the facts there is no indication of an intention to keep the charges alive for his own benefit, he is not entitled to a charge on the estate for the amount so paid. Where, however, a sufficient indication of intention is given to entitle the tenant to such a charge, he will be entitled to an immediate right to enforce it against capital.

Re Warwick's Settlement Trusts, Greville Trust Co v Grey [1938] Ch 530; [1938] 1 All ER 639; 107 LJ Ch 233; 158 LT 319; 54 TLR 483; 82 Sol Jo 231, CA

3479 Payment of bond debts insufficient

A tenant for life discharging an incumbrance upon the estate is presumed to have intended to keep the charge alive against the inheritance for his own

benefit, and the absence of an assignment will not conclude him; but a similar presumption does not arise from the payment by a tenant for life of bond debts, which, even if assigned, only place him in the same position as any other bond creditor.
Morley v Morley, Harland v Morley (1855) 5 De GM&G 610; 25 LJ Ch 1; 1 Jur NS 1097; 4 WR 75; 43 ER 1007, LC

ANNOTATION **Consd** Re Tasker, Hoare v Tasker [1905] 2 Ch 587

Scottish, Irish and Commonwealth Cases

3480 Tenant for life entitled to retain charge
Day v Day (1903) 4 SRNSW 21; 21 NSWWN 1 (AUS)

3481 Tenant for life entitled to retain charge
Flood v Digby & Johnson (1835) 1 Jo Ex Ir 520 (IR)

3482 Tenant for life entitled to retain charge
Held the tenant for life had by the payment off of an incumbrance become entitled to a charge upon the inheritance to that amount, and that was a valid set-off against the remainderman's claim on foot of interest left unpaid.
Howlin v Sheppard (1872) 6 IR Eq 497 (IR)

3483 Tenant for life entitled to retain charge — Where no intention to exonerate estate — Evidence of intention
After an express declaration of the tenant for life to charge, it cannot, from the debts being paid by him, from no assignment of the securities being taken, or from length of time, be presumed he intended to exonerate the estate.
Redington v Redington (1809) 1 Ball&B 131 (IR)

3484 Tenant for life entitled to retain charge — Where no intention to exonerate estate — Evidence of intention
A tenant for life paid off imcumbrances and by his will declared his intention to have been not to exonerate the inheritance: *Held* this declaration of intention was sufficient.
Lysaght v Lysaght (1851) 4 Ir Jur 100 (IR)

3485 Tenant for life entitled to retain charge — Where no intention to exonerate estate — Evidence of intention
Re Lloyd's Estate [1903] 1 IR 144 (IR)

3486 Tenant for life entitled to retain charge — Where no intention to exonerate estate — Evidence of intention
A tenant for life of real estate paid off a charge on the fee, and took an absolute release of his estate in the lands, with the intention of extinguishing the charge, under an erroneous belief that he was owner in fee of the lands. He subsequently became aware that he was only tenant-for-life, and he consulted his solicitors with the view, if possible, of keeping the charge alive for his own benefit, and a case was sent to counsel in reference to the matter, who advised proceedings in Chancery, which however, the tenant for life declined to bring. He made no mention of the charge in his will. There was conflicting evidence as to various expressions of his intention, made subsequent to the payment off of the charge. After the death his executors brought an action to raise the charge as portion of his assets: *Held* notwithstanding the release of the lands and the other circumstances of the case, the tenant for life was entitled, on discovering his error, to keep the charge alive against the inheritance, and his subsequent acts and declarations sufficiently evidenced that intention.
Conolly v Barter [1904] 1 IR 130 (IR)

3487 Discharge by successive tenants for life — Repayment rateably in proportion to payments made
Testator devised certain lands, subject to an instalment mortgage to his wife for life, remainder to his children for life, remainder over. After testator's death his widow paid several instalments on foot of the mortgage. She died intestate, and further instalments were then paid by the other tenants for life. The lands were sold, and the balance of the mortgage paid off out of the proceeds. The remaining surplus of the purchase-money proving insufficient to repay the tenants for life in full: *Held* the several tenants for life were entitled to be recouped rateably, the first tenant for life having no right to be repaid the sums expended by her on foot of the mortgage in priority to the other tenants for life.
Re Nepean's Settled Estate [1900] 1 IR 298 (IR)

3488 Discharge by successive tenants for life — Repayment rateably in proportion to payments made
Re Gore Booth's Estate [1910] 1 IR 139 (IR)

iv RENEWABLE LEASEHOLDS

1 Obligation to renew

LAW See Halsbury's Laws (4th edn) vol 42 para 981

3489 Absence of direction in settlement — Tenant for life not bound to renew
The tenant for life in general cases must contribute beyond the interest, in proportion to the benefit he takes.

A person entitled for his own life is not bound to renew, except from the terms of the will or the nature and formation of the gift to him you can imply an intention, that he should be obliged to renew (*Lord Eldon C*).
White v White (1804) 9 Ves 554; 32 ER 718, LC

3490 Direction in settlement — Default by trustees — Liability as for breach of trust
Settlement of a renewable lease in trust out of the rents and profits to pay the charges of renewal, and subject thereto for husband and wife successively for life, remainder to the first son at twenty-one. The trustees, having neglected to renew, are answerable as for a breach of trust, and liable to pay to the son the amount of what he had laid out in procuring a

renewal; to be repaid to them out of the estates of the tenants for life, with reference, not to the duration of their respective possession, but to the proportions in which they would actually have suffered a diminution of rent in case the rents had been properly applied towards the renewals. The assignee of one of the tenants for life, with notice of the settlement neither primarily liable, nor to be called upon by the trustees to contribute towards their repayment; but only, in case of all the other estates proving insufficient, to make good to the son the deficiency.

Monford (Lord) v Cadogan (Lord) (1816) 2 Mer 3; 19 Ves 635; 35 ER 841, LC

ANNOTATION **Apld** Shaftesbury v Marlborough (1833) 3 LJ Ch 30

3491 Direction in settlement — "Should be lawful" — Implies discretion as to mode of renewal

Milsintown (Viscount) v Portmore (Earl) (1821) 5 Madd 471; 56 ER 976

3492 Renewal by tenant for life

Tenant for life, under a settlement of a Crown lease, gets a renewal in reversion: it shall go to the uses of the settlement.

Taster v Marriott (1768) Amb 668; 27 ER 433

3493 Renewal by tenant for life

A under a voluntary settlement of which it did not appear that she had notice, was entitled to certain leaseholds held for lives, for the term of her life with remainder to B. Under a subsequent voluntary settlement she took a life interest in the same leaseholds with an absolute power of appointment over the residue of the leasehold interest. While in possession of the property she took a renewed lease of it, and died having appointed all her interest to C: *Held* the renewal enured to the benefit of B.

Waters v Bailey (1843) 2 Y&C Ch Cas 219; 63 ER 96

3494 Renewal by tenant for life

There is no authority for the general proposition that if a person only partly interested in an old lease obtains from the lessor a renewal, he must be held a constructive trustee of the new lease, whatever may be the nature of the interest or the circumstances under which he obtained the new lease. A person renewing is only held to be a constructive trustee of the new lease if, in respect of the old lease, he occupied some special position by virtue of which he owed a duty towards the other persons interested: as, for example, in the case of a renewal by a tenant for life of settled leaseholds, or by a partner of a partnership lease, or by a mortgagee of a mortgaged lease. In all such cases the new lease is treated as engrafted on or as forming part of the original lease.

A lessor granted a lease for seven years of a house in which the lessee carried on a profitable business. On the expiration of the term, the lessor refused to renew, but allowed the lessee to remain as tenant from year to year at an increased rent. During that tenancy the lessee died intestate, leaving a widow and three children, one being an infant. The widow took out administration to her husband's estate, and she and the two adult children, one of whom was a son, continued to carry on the business under the existing yearly tenancy. The widow and son each applied to the lessor for a new lease for the benefit of the estate, which he refused to grant, but, having determined the yearly tenancy by notice, he granted to the son "personally" a new lease for three years at a still further increased rent.

In an action which had in the meantime been instituted by the three children, including the infant, against the administratrix for administration of intestate's estate, the administratrix applied to have the new lease treated as having been taken by the son for the benefit of the estate and for an account of the rents and profits received by him: *Held* the evidence took the case out of *Ex p Grace* (vol 48 (reissue) TRUSTS no 1108) in that it showed that the right or hope of renewal had been determined by the lessor himself before the son intervened, so that the new lease could not be treated as an accretion to the estate of the deceased, and also the son had in no way abused his position nor stood in any fiduciary relation towards nor owed any duty to the other persons interested in the estate; and he was therefore entitled to retain the lease for his own benefit.

The cases which really demand full consideration are those where the person renewing the lease does not clearly occupy a fiduciary position. On inquiry into those cases it appears to me, as a result, that a person renewing is only held to be a constructive trustee of the renewed lease if, in respect of the old lease, he occupied some special position and owed, by virtue of that position, a duty towards the other persons interested.

Take, for example, the case of a tenant for life under a settlement of leaseholds. Although not a trustee for the remaindermen, yet his position is not that of a stranger as regards them. He owes, by virtue of his position, certain duties towards them in respect of the settled property; and if, by virtue of his position, he is enabled to obtain a renewal of the lease, equity clearly demands that the new sight obtained in virtue of the old should be regarded as a graft on the old, and be treated accordingly as settled property (*Romer LJ*).

Re Biss, Biss v Biss [1903] 2 Ch 40; [1900–3] All ER 406; 72 LJ Ch 473; 88 LT 403; 51 WR 504; 47 Sol Jo 383, CA

ANNOTATION **Consd** Chelsea Investment Co v Marche [1955] 1 All ER 195

3495 Renewal by tenant for life — No direction for renewal — Effect of special provision

Where the tenant for life of leaseholds in settlement, being under no obligation to renew obtains an extension of the term, he is a trustee, for those claiming under the settlement; and the fact of the settlement containing a special provision that a particular renewal shall enure to the benefit of the trust, does not prevent the application of this general rule.

Leaseholds were settled on AB for life, with remainder to his wife for life, with remainder to such child or children as he should appoint, and in default amongst them equally. AB renewed the lease in his own name, and by his will confirmed the settlement, and gave all "His freeholds and leaseholds" to his son, and a legacy to his daughter; he died, having other leaseholds besides those settled: *Held* the will was not an execution of the power; and the daughter was not to be put to her election.

Tanner v Elworthy, Elworthy v Tanner (1841) 4 Beav 487; 5 Jur 1699; 49 ER 427

3496 Extent of doctrine — Confined to persons in fiduciary position

Re Biss, Biss v Biss no 3494 ante

Scottish, Irish and Commonwealth Cases

3497 Absence of direction in settlement — Tenant for life not bound to renew

G being possessed of a chattel interest under a lessee of the See of Dublin, with a *toties quoties* covenant for renewal bequeathed it to trustees, to the use of E for life with divers limitations over, and with a power to the trustees to sell the same, and invest the produce in the purchase of freehold lands, to be settled to the same uses: *Held* there was no obligation imposed on E the tenant for life, to renew.

O'Ferrall v O'Ferrall (1834) L&G temp Plunk 79 (IR)

2 Expenses of renewal

LAW See Halsbury's Laws (4th edn) vol 42 para 982 et seq

CROSS REFERENCE See LANDLORD & TENANT vol 31(2) (2nd reissue) no 8254 et seq

3498 General rule — Contribution proportionate to actual enjoyment

The rule as to a tenant for life contributing one-third does not now prevail. No contribution from an annuitant for life out of leasehold renewable interests.

It must be done in an equitable way, by a contribution of every one who is to take a chance in the benefit of the succession provided for by the will (*Lord Hardwicke C*).

Verney v Verney (1750) 1 Ves Sen 428; Amb 88; 27 ER 1123, LC

3499 General rule — Contribution proportionate to actual enjoyment

Tenant for life renews and pays fines, what proportion he shall bear with the remainderman, etc.

As to the idea that it is to be upon the payment of two-thirds or any other proportion, that cannot be the rule (*Lord Thurlow C*).

Nightingale v Lawson (1785) 1 Bro CC 440; 1 Cox Eq Cas 181; 28 ER 1227, LC

ANNOTATIONS **Consd** White v White (1804) 9 Ves 554; Shaftsbury v Marlborough (1833) 2 My&K 11 **Apld** Cridland v Luxton (1834) 4 LJ Ch 65; Bradford v Brownjohn (1868) 3 Ch App 711

3500 General rule — Contribution proportionate to actual enjoyment

White v White no 3489 ante

3501 General rule — Contribution proportionate to actual enjoyment

Hudleston v Whelpdale no 3521 post

3502 General rule — Contribution proportionate to actual enjoyment

Under a trust to renew leaseholds out of the rents or by mortgage thereof: *Held* the fines for renewal must be borne by the successive tenants for life, etc, of the estate, in proportion to their actual enjoyment of the property.

Under a trust to renew leaseholds by sale or by mortgage of an independent estate: *Held* the fines must be raised by sale or mortgage of that estate, and the successive tenants for life were only bound to keep down the interest on the mortgages.

Ainslie v Harcourt (1860) 28 Beav 313; 30 LJ Ch 686; 54 ER 386

3503 General rule — Contribution proportionate to actual enjoyment

Where a tenant for life of renewable estates of leases for lives has renewed the lives, the proportions of the fines and expenses of the renewals, payable as between his estate and that of the remainderman entitled to the property are to be estimated with regard to the actual enjoyment of the property; and compound interest at 4 per cent per annum with annual rests on the amount payable by the remainderman will be allowed to the estate of the tenant for life for the period between the renewal and his death; simple interest only after that event.

Bradford v Brownjohn (1868) 3 Ch App 711; 38 LJ Ch 10; 19 LT 248; 16 WR 1178, LJJ

ANNOTATION **Consd** Isaac v Wall (1877) 6 Ch D 706

3504 General rule — Contribution proportionate to actual enjoyment — Contribution by tenant for life not confined to keeping down interest

Allan v Backhouse no 3523 post

3505 General rule — Contribution proportionate to actual enjoyment — Contribution not determined speculatively

Jones v Jones no 3518 post

3506 General rule — Contribution proportionate to actual enjoyment — Death of tenant for life in lifetime of original life

Adderley v Clavering no 3517 post

3507 General rule — Contribution proportionate to actual enjoyment — Death of tenant for life in lifetime of original life

Certain property held upon lives was in settlement, and the surviving original life being advanced in years, a renewal was obtained under which two new lives were added, the tenant for life advancing the money necessary to pay fines on such renewal. The tenant for life afterwards died in the lifetime of the surviving original life: *Held* as he had obtained no benefit from the renewal, the estate of the tenant for life, was not bound to contribute towards the expenses of the renewal, but was entitled to be recouped out of the *corpus* of the settled property the amount paid for the fines on the renewal.

Harris v Harris (No 3) (1863) 32 Beav 333; 11 WR 451; 55 ER 130

3508 How proportion calculated — Allowance of compound interest

Nightingale v Lawson no 3499 ante

3509 How proportion calculated — Allowance of compound interest — Between time for renewal and death of tenant for life — Simple interest thereafter

Bradford v Brownjohn no 3503 ante

3510 How proportion calculated — Leases for lives

Reeves v Creswick (1839) 3 Y&C Ex 715; 160 ER 889

3511 Cost raised by mortgage — Liability of tenant for life for mortgage interest

Allan v Backhouse no 3523 post

3512 Cost raised by mortgage — Liability of tenant for life for mortgage interest

Where the trustees of a settlement, having power to raise a sum of given amount out of the rents and profits, or by assignment or other disposition of the settled estates, as a provision for the fines and expenses payable on the renewal of leases comprised in the settlement, exercised that power by mortgage, and also paid further sums for renewals out of the rents of the settled estates: *Held* the tenant for life under the settlement was bound to keep down, out of the rents and profits, the interest only of the sum raised by mortgage; but the further sums paid for renewals must be apportioned between the tenant for life and the remaindermen, according to the ordinary rule of the court in such cases.

Plumtre v Oxenden (1855) 25 LJ Ch 19; 26 LTOS 55; 1 Jur NS 1037; 4 WR 29

3513 Cost raised by mortgage — Liability of tenant for life for mortgage interest

Ainslie v Harcourt no 3502 ante

3514 Right of remainderman — Renewal on default by tenant for life — Remedy against estate of tenant for life

A, being possessed of a lease of a manor, lands, and hereditaments for twenty-one years, granted by the warden of a hospital, assigned, by his marriage settlement, the premises and all his interest, benefit, and advantage of renewal therein, etc, to trustees, upon trust, out of the rents and profits, to pay the rents, perform the covenants, raise a competent sum for renewing the lease from time to time as should be customary, and renew the lease accordingly; and subject thereto, to pay the rents to A during his life, and, after his death, to stand possessed of the leasehold premises on certain trusts for the sons of the marriage, and, on failure of those trusts, for A absolutely: A by his will devised "his manor hospital, lands, and hereditaments situate in, etc, held by lease from," etc, to the same persons who were trustees of his marriage settlement with directions to perform the covenants contained "in the new lease, or any leases hereafter" to be procured, to collect out of the rents a competent sum for renewing the lease, and to renew same from time to time. After the date of his will, A surrendered the existing lease, and obtained a renewed lease. The lease had been usually renewed every seven years, and, in February 1805, was renewed by the tenant for life under the will of A: in 1812, an exorbitant fine was demanded, and no renewal took place; and, in 1817, the warden of the hospital expressly refused to renew: the tenant for life died in January 1819; and, in the following February, the remainderman renewed: *Held* the remainderman was entitled to receive out of the assets of the tenant for life the amount of what would have been reasonable fines for renewal in February 1812, and February 1819, subject to a proportional abatement for the period which intervened between the death of the tenant for life and the renewal in February 1819.

Colegrave v Manby
(1826) 2 Russ 238; 38 ER 325, LC

ANNOTATION **Consd** Bennett v Colley (1833) Coop temp Brough 248

3515 Right of remainderman — Renewal on default by tenant for life — Set-off of costs against portions

Remainderman renewing leaseholds on default of tenants for life, cannot set off his costs against portions.

George v Tucker (1837) 1 Jur 771

3516 Right of tenant for life — Renewal by husband by putting in wife's life

Where a leasehold estate for lives was settled upon the husband for life; remainder to the wife for life, with remainders to the children, the husband, having renewed by putting in the wife's life, is to be considered as a creditor upon the estate for the fine and charges of renewal. Limitation of a leasehold estate in a marriage settlement after the decease of husband and wife, in trust for such child and children as they should appoint; and in default of appointment, to all and every the child and children equally: *Held* to be a vested remainder, which opened to take in the issue, as they came *in esse*.

Lawrence v Maggs (1759) 1 Eden 453; 28 ER 760

3517 Right of tenant for life — Renewal by last life in lease for lives — Death before expiration of original lease

Money paid as a fine, by the last life in a lease, for a renewal, ordered to be a charge on the estate.

Adderley v Clavering (1789) 2 Bro CC 659; 2 Cox Eq Cas 192; 29 ER 365, LC

3518 Right of tenant for life — Payment of whole cost of renewal — Lien for proportionate share

(1) On a devise of successive interests in leases for lives or years, where testator directs that the leases are from time to time to be renewed, without more, the fines and expenses of renewal are to be borne by the tenant for life and remainderman, or parties successively entitled, in proportion to their actual enjoyment of the estate, and not in proportion to an extent of enjoyment to be determined speculatively, or by a calculation of probabilities.

There is no difference in the rule as to the apportionment of fines for renewal between the devisees of successive interests in the estate, whether the leases are for lives or for years.

(2) If testator provides a specific fund for the renewals, or directs that the renewals shall be raised or borne by the parties in a certain manner, or in certain proportions, such direction supersedes the general rule; but if trustees, having power to direct the manner in which the fines shall be raised, do not exercise the power, the court will pursue the general rule which would be adopted in the absence of any direction as to the manner of providing for the fines.

Quaere: whether there is any difference in the rule of apportionment in cases where the parties take successive interests under wills, and in cases where such interests are taken under settlements by deed.

Quaere: whether trustees, having power to raise the fines out of the rents and profits, or by mortgage, or otherwise, as they should think fit, might so act as to throw the burden on the parties, in proportions different from those in which it would be distributed by the general rule of the court.

(3) Where the tenant for life pays the whole fine or renewal, he will have a lien on the estate for the proportion which shall ultimately appear to be chargeable on the remainderman, or parties entitled in succession, and where the remainderman renews, or the renewal is effected by means of a mortgage of the estate, the tenant for life may be required to give security to the remainderman for a proportionate part of the fine, calculated upon the assumed duration of the life interest; and if that interest should endure longer than such assumed period, he may be required to give further security, without prejudice in either case to the actual amount which, at the determination of his interest, shall appear to be his due proportion of the fine.

Jones v Jones (1846) 5 Hare 440; 7 LTOS 157; 10 Jur 516; 67 ER 984

ANNOTATIONS As to (1) **Folld** Ainslie v Harcourt (1860) 28 Beav 313 **Apld** Bradford v Brownjohn (1868) 3 Ch App 711. As to (2) **Consd** Hayward v Pile (1870) 5 Ch App 214. As to (3) **Consd** Hudleston v Whelpdale (1852) 9 Hare 775 **Distd** Solley v Wood (1861) 29 Beav 482

3519 Right of tenant for life — Repayment in lifetime

Harris v Harris no 3506 ante

3520 Security by tenant for life — For proportionable share

Jones v Jones no 3518 ante

3521 Security by tenant for life — Insurance on life of cestui que vie

(1) Where leases, which testator had directed to be renewed, were renewed by adding a *cestui que vie*, by means of a payment out of funds belonging to testator's estate, not charged with such renewal, and it was referred to the master to inquire what security the tenant for life of the leases ought to give, and to what amount, for the contribution which he might be liable to make for the benefit he should derive from the renewal, the master found, and the court had confirmed the finding, that the payment for the renewal ought to be secured by a policy of life insurance for the amount paid, in the name of the trustees, on the life of the new *cestui que vie*, the costs and premiums in respect of which ought to be paid out

of the rents and profits of the estate to which the tenant for life was entitled.

(2) Although it may be that, when provision is made of a fund for renewal, the remainderman will not suffer, this is not the principle, for the principle is that the remainderman ought to bear so much of the capital paid for renewal as may not be paid by the tenant for life under the security which he has given.

(3) The court will not retain the income of the tenant for life, because he may become liable to give security for the payments on account of renewals, before the occasion for giving such security has arisen.

(4) A rule that the obligation of the tenant for life of property subject to fines for renewal is satisfied by keeping down the interest only of the amount necessary to be paid for the renewal, would be unjust if the tenant for life survived the first *cestui que vie*, and a second renewal was necessary in his lifetime, for then the tenant for life would have had the whole benefit of the first renewal; and the rule therefore is that the tenant for life is bound, not only to bear the interest of the sum paid for the renewal, but to contribute towards the payment of such sum.

(5) A rule, which attributed one-third of the expense of renewal to the tenant for life, and two-thirds to the parties in remainder, would not remove the injustice; and therefore the court holds that the amount of contributions of the tenant for life and remainderman are to be determined by the amount of the benefit which they respectively derive for the renewal.

Hudleston v Whelpdale (1852) 9 Hare 775; 68 ER 729

3522 Liability of tenant for life — Misapplication by trustee — Of rents applicable on payment of renewal fines

If a trustee misapplies rents which ought to have been applied in payment of fines for the renewal of a lease, the loss will fall on the tenant for life, and not upon the trust estate generally.

Solley v Wood (1861) 20 Beav 482; 30 LJ Ch 813; 7 Jur NS 1225; 54 ER 714

3523 Direction to raise from rents and profits — Whether right to raise by sale or mortgage implied

(1) The words "rents and profits" extended beyond their natural meaning, annual profits, to mortgage or sale, when necessary to effect the object, raising a gross sum: for fines on renewal therefore as well as portions; and not controlled by the apparent general intention to preserve the estate entire.

(2) Contribution of tenant for life to the fine on renewal in proportion to his enjoyment; not as formerly, one-third, nor, as upon a mortgage confined to keeping down the interest.

(3) Direction to settle construed with reference to a preceding power of sale.

Allan v Backhouse (1813) 2 Ves&B 65; 35 ER 243; affd (1821) Jac 631, LC

ANNOTATIONS As to (1) **Consd** Shaftsbury v Marlborough (1833) 2 My&K 111; Haldenby v Spofforth (1839) 1 Beav 390 **Distd** Solley v Wood (1861) 9 Beav 482

3524 Direction to raise from rents and profits — Liability of party in possession

Milsintown (Viscount) v Portmore (Earl) (1821) 5 Madd 471; 56 ER 976

3525 Direction to raise from rents and profits — Liability of tenant for life — Apportionment

Isaac v Wall no 3531 post

3 Renewal impossible

LAW See Halsbury's Laws (4th edn) vol 42 para 985

CROSS REFERENCE See COMPULSORY ACQUISITION OF LAND vol 11(1) (2nd reissue) no 2867 et seq (lease taken by compulsory purchase)

3526 Right of tenant for life — Rents and profits in full

Richardson v Moore (1817) 27 Beav 629n; 54 ER 249

ANNOTATION **Distd** Maddy v Hale (1876) 3 Ch D 327

3527 Right of tenant for life — Rents and profits in full

Tardiff v Robinson (1819) 27 Beav 630n; 54 ER 250, LC

ANNOTATIONS **Follld** Morres v Hodges (1860) 27 Beav 625; Re Money's Trusts (1862) 2 Drew&Sm 94 **Distd** Re Wood's Estate (1870) LR 10 Eq 572; Maddy v Hale (1876) 3 Ch D 327

3528 Right of tenant for life — Rents and profits in full — Fund reserved from rents

By a settlement, the trustees were to use their utmost endeavours to renew an ecclesiastical lease upon reasonable terms, and to raise the fines out of the rents or by mortgage. A renewal became impracticable: *Held* the fund reserved by the trustees out of rents for the purpose of renewal belonged absolutely to the tenant for life.

Morres v Hodges (1859) 27 Beav 625; 1 LT 425; 54 ER 248

ANNOTATIONS **Follld** Re Money's Trusts (1862) 2 Drew&Sm 94 **Distd** Re Wood's Estate (1870) LR 10 Eq 572; Maddy v Hale (1876) 3 Ch D 327

3529 Trust for renewal — Investment of proceeds of sale — Right of tenant for life to income

Leaseholds for lives were devised on trust for J in fee, but, if he should die without leaving issue living at his death, then on trust for W in fee, and there was an overriding trust for renewal of the lease out of the rents. After the death of testator the reversioner refused to renew the lease or to sell the reversion, and the lease was sold under the provisions of the Settled Estates Act 1877 (c 18) (repealed): *Held* the purchase-money must be invested in ordinary securities, and the income only paid to J for his life.

Re Barber's Settled Estates (1881) 18 Ch D 624; 50 LJ Ch 769; 45 LT 433; 29 WR 909

4 Purchase of reversion

LAW See Halsbury's Laws (4th edn) vol 42 para 986

3530 Purchase by tenant for life — Whether for benefit of remainderman

Tenant for life of an ecclesiastical lease who purchases the reversion is considered in equity as a trustee for the remainderman, and is entitled to a charge on the estate for the purchase-money.

Mason v Hulke (1874) 22 WR 622

3531 Purchase by tenant for life — Whether for benefit of remainderman

A tenant for life and sole trustee of settled estates, by will, purchased reversions in fee of leases for lives, his own life being one, and for years, parts of the settled estates, and the estates were conveyed, as to the reversion of the lease for lives, to him upon the trusts of the will; as to one of the reversions of the leases for years to him absolutely; and as to the other reversion of the leases for years to him upon trusts of the will. He died while the leases for years would have been running out, and without having declared any intention that the purchase-moneys were to enure for the benefit of those entitled under the will. The first tenant in tail died in tenant for life's lifetime intestate, leaving a widow, and a son heir in tail: *Held* as to all the reversions purchased, the estate of the tenant for life was entitled to be repaid the purchase-moneys; as regarded the legal personal representative of the first tenant in tail, both the estates of which there had been leases for years must be treated as being subject to those leases for the benefit of his first tenant in tail's estate; as to the estate conveyed to the tenant for life absolutely, it belonged to the legal personal representative of the first tenant in tail; and as to the other estate conveyed to him upon the trusts of the will she was entitled to a leasehold interest of the same extent as the term would have conferred.

A tenant for life of leaseholds for years is not to contribute to the expense of renewal beyond a proportion calculated in reference to the extent of his enjoyment of the newly created interest, although the settlement may contain a trust for renewal out of rents and profits.

Isaac v Wall (1877) 6 Ch D 706; 46 LJ Ch 576; 37 LT 227; 25 WR 844

3532 Purchase by tenant for life — Whether for benefit of remainderman

The doctrine that a renewal of leaseholds by a tenant for life enures for the benefit of the remaindermen applies equally to a purchase of the reversion.

Testatrix devised leaseholds, renewable by custom, to JP for the residue of the term, and after the death of JP, during the residue of the term, to the children of JP in equal shares. JP renewed the leaseholds more than once, and finally purchased the reversion: *Held* the fee simple in the property passed by the devise in the will to the children of JP, and became subject to the trusts of the will.

Phillips v Phillips (1885) 29 Ch D 673; 54 LJ Ch 943; 63 LT 403; 33 WR 863, CA

ANNOTATIONS **Distd** Longton v Wilsby (1897) 76 LT 770 **Consd & Expld** Bevan v Webb [1905] 1 Ch 620

3533 Purchase by tenant for life — Purchase-money charged on estate

Mason v Hulke no 3530 ante

3534 Purchase by tenant for life — Purchase-money charged on estate

Isaac v Wall no 2531 ante

4 Adjustment of losses between tenant for life and remainderman

i LOSSES ON AUTHORISED INVESTMENTS GENERALLY

LAW See Halsbury's Laws (4th edn) vol 42 para 987

3535 Authorised investments — Entitlement of tenant for life to whole income — No right to capital

Tenants for life under such a settlement [of personal property] would take the whole of the income of all duly authorised investments, notwithstanding any shrinkage or decrease in their value, and would not be entitled to share in any augmentation in the value of the *corpus*, however great that might be, or

however insignificant in comparison might be the increase of the income (*Stirling J*).

Verner v General & Commercial Investment Trust [1894] 2 Ch 239; 63 LJ Ch 456; 10 TLR 341; 38 Sol Jo 308; on appeal [1894] 2 Ch 260, CA

3536 Tenant for life not entitled to recoupment out of capital — Bequest of stock to produce certain income — Dividends on stock reduced

Testator bequeathed so much of his personal estate as when invested in stock would produce £125 a year, to trustees, upon trust to pay the dividends of such stock to A for life, with a direction that the capital stock should, at A's death, fall into the residue of his, testator's estate, and a provision, that, if the stock should, before the trusts were fully performed, be paid off or reduced, by which any loss or deficiency might arise, the persons respectively interested therein should bear and sustain such loss or deficiency out of their respective interests, upon their becoming entitled thereto. The dividends on the stock were reduced during the life of A: *Held* A was not entitled to have the reduced dividends made up to £125 a year by a sale of a portion of the capital of the stock.

Bague v Dumergue (1853) 10 Hare 462; 20 LTOS 322; 1 WR 197; 68 ER 1008

3537 Tenant for life not entitled to recoupment out of capital — Sale of leaseholds — Income from investment of proceeds less than rents

Leaseholds under a dean and chapter, renewable by custom, were held by trustees upon trust for a tenant for life, with remainder over; and the trustees were directed, "two years or sooner before the time for renewal," to bring a part of the rental into a fund until a sufficient sum was raised for the renewal, "so that the estates may be always kept renewed . . . for ever." In June 1865, and February 1866, notices to treat for parts of the leaseholds then having about thirteen and five years respectively to run, were given by a railway company. At Lady Day 1866, the dean and chapter ceased to renew leases; and about the same date their property was taken over by the Ecclesiastical Commissioners. The values of the two properties having been assessed at amounts which when paid, and invested in 3 per cent stock, gave a diminished income to the tenant for life: *Held* the tenant for life was not entitled to be recouped the deficiency of income out of the *corpus* of the fund.

Re Wood's Estate (1870) LR 10 Eq 572; 40 LJ Ch 59; 23 LT 430; 19 WR 59

ANNOTATIONS **Apprvd** Maddy v Hale (1876) 3 Ch D 327 **Apld** Re Barber's SE (1881) 18 Ch D 624 **Consd** Re Ranlagh's Will (1884) 26 Ch D 590

3538 Tenant for life not entitled to recoupment out of capital — Sale of leaseholds — Income from investment of proceeds less than rents

Under an order of the court in a partition action, leasehold property settled upon trust for A for life with remainders over was sold, and the proceeds paid into court, and invested in Consols, the dividends of which were much less in amount than the yearly rents received from the leaseholds: *Held* A was not entitled to any allowance out of the *corpus* to make up the deficiency in her annual income.

Langmead v Cockerton (1877) 25 WR 315

3539 Tenant for life not entitled to recoupment out of capital — Trustees entering into possession of mortgaged leaseholds — Rents received less than interest on mortgages

Where trustees, under a power in a will, had invested trust funds on the security of mortgages on leasehold properties, and had, on the bankruptcy of the mortgagor, foreclosed, the effect of Conveyancing Act 1911 (c 37) s 9 (repealed), was to place the property which had been foreclosed so far as practicable in the same position as if it had originally formed part of the estate of testator.

Trustees, acting under a power in a will, invested trust money on the security of nine mortgages on nine leasehold properties. The mortgagor having become bankrupt, the trustees foreclosed. Four of the properties were sold, leaving five unsold. In the case of two, the net rent exceeded the amount of the interest on the mortgage. In case of two others the net rent was about equal to the former interest, and in the case of the remaining property, the net rent was less than the former interest: *Held* the tenant for life was entitled to the whole of the net rents, pending the sale of the properties; but if during that period the net rents amounted to less than the amounts he would have received by way of interest on the mortgages, he would not be entitled to claim any part of the proceeds of sale.

Re Horn's Estate, Public Trustee v Garnett [1924] 2 Ch 222; 93 LJ Ch 490; 131 LT 286; 68 Sol Jo 577

3540 Misappropriation by trustee — Loss borne by life tenant

A trustee, whose duty it was to renew leaseholds out of the rents, applied them to his own use: *Held* the tenant for life, and not those in remainder, must bear the loss.

Solley v Wood (1861) 29 Beav 482; 30 LJ Ch 813; 7 Jur NS 1225; 54 ER 714

3541 Misappropriation by trustee — Loss borne by life tenant — Money recovered from estate of defaulting trustees attributed to capital — Future income payable to tenant for life

Where a trustee made away with a trust fund, and after his death new trustees proved against his estate in an administration suit for the aggregate amount of the principal trust fund and the arrears of interest thereon, and recovered a sum less in amount than the principal of the trust fund: *Held* the moneys recovered from the estate were to be attributed to capital, but the future income thereof ought to be paid to the tenant for life.

Re Grabowski's Settlement (1868) LR 6 Eq 12; 37 LJ Ch 926

ANNOTATION **Dbtd** Cox v Cox (1869) 38 LJ Ch 569

3542 Securities bearing interest — Tenant for life receiving deficient or no interest — Death of tenant for life — Right of representative to have arrears made good

Second mortgage 6 per cent gold bonds of a Mexican railway company contained a promise by the company to pay the principal secured in 1917, and interest thereon, "accumulative, at the rate of 6 per cent per annum" on 1 March and 1 September in each year, "upon surrender of the annexed coupons, as and when earned, out of any net earnings of any year remaining after interest" on the company's first mortgage bonds had been paid for such year, and provided as follows: "If in any year the net earnings so remaining available for payment of interest upon the" second mortgage bonds "shall not be sufficient to pay such interest in full, there shall be paid any part thereof earned and available, and any deficiency shall not be waived, but shall be paid to the holder hereof out of the net earnings of any subsequent year or years, as and when there shall be any net earnings available for such purpose."

By a settlement made in May 1899, some of the second mortgage bonds were settled upon trust to pay the income to M for life, and after her death to her husband, T, for life, and after the death of the survivor, if T survived her in trust for the next of kin, excluding T or M.

Interest less than 6 per cent per annum was paid on the bonds down to 1901, and no deficiency of any year was ever made up out of the earnings of any subsequent year or otherwise.

In March 1902, the bonds, with the coupons, were sold by the trustees for £2,700, and in May 1902, M died leaving T surviving her, and he was her legal personal representative: *Held* T was not entitled to any part of the £2,700 as representing the apportioned amount in respect of any deficiency of interest in M's lifetime, but the whole of the £2,700 went to M's next of kin.

Re Taylor's Trusts, Matheson v Taylor [1905] 1 Ch 734; 74 LJ Ch 419; 92 LT 558; 53 JR 441; 49 Sol Jo 418

ANNOTATIONS **Apld** Re Sale, Nisbet v Philp [1913] 2 Ch 697; Re Grundy, Grundy v Holmes (1917) 117 LT 470 **Apprvd** Re Wakley, Wakley v Vachell [1920] 2 Ch 205

3543 Securities bearing interest — Tenant for life receiving deficient or no interest — Death of tenant for life — Right of representative to have arrears made good

Where preference shares carrying a fixed cumulative preferential divided are bequeathed in trust for a life tenant and remaindermen, and no dividend is declared or paid for the financial years including the life tenancy, the life tenant's executors are not entitled to have the arrears made good out of future preferential dividends.

Re Sale, Nisbet v Philp [1913] 2 Ch 697; 83 LJ Ch 180; 109 LT 707; 58 Sol Jo 220

ANNOTATIONS **Apld** Re Grundy, Grundy v Holme (1917) 117 LT 470 **Apprvd** Re Wakley, Wakley v Vachell [1920] 2 Ch 205

3544 Securities bearing interest — Tenant for life receiving deficient or no interest — Death of tenant for life — Right of representative to have arrears made good

Testatrix, who died on 15 July 1915, was entitled under the will of testator, who died in 1901, to a life interest in the residue of his estate, which included fully-paid preference shares conferring a right to a fixed cumulative preference dividend at the rate of 7 per cent per annum, the company's articles providing that the company in general meeting, on the director's recommendation, should declare the dividend to be paid. For the year 1906 a reduced dividend of 4 per cent was paid, and no further dividend was declared until 1915. On 29 November 1915, a dividend of 10 per cent was declared, "being 3 per cent in respect of arrears for the year ending September 1906, and 7 per cent in respect of arrears for the year 1907." In 1916 the dividend paid was 14 per cent, being 7 per cent for the years 1908 and 1909 respectively: *Held* the case was covered by the judgment in *Re Sale, Nisbet v Philp* (no 3543 ante), and the estate of testatrix, the tenant for life, was not entitled to the dividends on the preference shares declared since her death, except an apportioned part of the dividend declared in the year 1915 down to the date of her death.

Re Grundy, Grundy v Holme (1917) 117 LT 470

ANNOTATION **Apprvd** Re Wakley, Wakley v Vachell [1920] 2 Ch 205

3545 Temporary investment — Apportionment of loss

A sum of money appointed to be laid out in a purchase to the use of A for his life, remainder to his eldest son, subject to a charge for the provision of younger children; the money to be let out in any public fund, till a convenient purchase found: if a loss happens before the purchase, it must be borne in an average.

Chambers v Chambers (1730) Fitz-G 127; 1 Eq Cas Abr 115; Mos 333; 94 ER 684, LC

ANNOTATIONS **Expld** Oke v Heath (1748) 1 Ves Sen 135 **Consd** Booth v Allington (1856) 6 De GM&G 613

3546 Annuity charged on leaseholds — Compulsory sale — Apportionment of capital

A settlement was made in 1892 of (*inter alia*) an annuity of £300 charged on and payable out of certain leasehold properties. The settlement provided that the trustees should pay the annuity of £300 to one H during her life and after her death to her husband, and after the death of the survivor of those two to their three daughters during their lives with remainder to the daughters' children. H and her husband having died, their three daughters were entitled to the income, and the children of the daughters were entitled to the capital. The settlement also provided that if and when H, and her husband or the survivor of them should so require, and after the death of the survivor of them if and when the trustees or trustee should in their or his uncontrolled discretion think it expedient, the trustees or trustee should sell the annuity of £300 and invest the proceeds in a manner specified in the settlement. The annuities in question were in fact redeemed by the owner of the leasehold properties under the provisions of s 191 of the Law of Property Act 1925 (c 20) s 191: *Held* s 191 enabled a compulsory sale to be made, and the trustees could not be said to have exercised any discretion in the matter one way or the other. The capital money resulting from the compulsory sale must be treated as though the annuity were still subsisting so far as the relative rights of the tenants for life and the remaindermen were concerned. The trustees should sell in each year sufficient of the capital to produce with the income £300 a year, less income tax, which was to be paid to the tenants for life.

Re Carr's Settlement, Riddell v Carr [1933] Ch 928; [1933] All ER 844; 102 LJ Ch 327; 149 LT 601; 49 TLR 581

3547 Discretionary power of sale — Part of estate unproductive — Income until sale

(1) Testator devised estates in trust for his wife for life, and he gave the trustees a discretionary power of sale. Part of his estate consisted of unproductive building ground, which remained unsold for some years: *Held* the tenant for life was only entitled to the actual rents of the property until sold; but she would have been entitled to interest on the value, if the trust for sale had been absolute.

(2) The periodical payments of an annuity, for which testator was liable held payable by the tenant for life and remainderman under his will, in proportion to the value of their respective interests in the estate, the property having, for some years, been unproductive.

Yates v Yates (1860) 28 Beav 637; 29 LJ Ch 872; 3 LT 9; 6 Jur NS 1023; 54 ER 511

ANNOTATIONS As to (2) **Consd** Re Muffett, Jones v Mason (1888) 39 Ch D 534 **Folld** Re Dawson, Arathoon v Dawson [1906] 2 Ch 211. Generally **Consd** Re Parry, Brown v Parry [1946] 2 All ER 412

ii LOSSES ON AUTHORISED MORTGAGE INVESTMENTS

LAW See Halsbury's Laws (4th edn) vol 42 para 988

3548 Interest falling into arrear — Deficiency on realisation of security — Ratio of apportionment of proceeds

A sum of £8,000, held upon trust for A for life, with remainders over, was invested upon a mortgage. The investment proved unsatisfactory, and shortly after the death of A the mortgage was realised for £7,900 only. At A's death there was due to him £536 in respect of arrears of interest. It was proposed to ascertain what capital sum, if received at the date of the first default in payment of interest, would, with compound interest at 4 per cent per annum, have produced at the date of realisation of the mortgage the sum of £7,900, and that the capital sum so ascertained should be paid to the remaindermen as capital, and the residue of the £7,900 paid to A's estate in respect of his claim for interest: *Held* on the contrary, the £7,900 must be divided into two parts, in the proportion of £8,000 and £536, the former to be paid to the remaindermen, the latter to A's representatives.

Re Moore, Moore v Johnson (1885) 54 LJ Ch 432; 52 LT 510; 33 WR 447

ANNOTATIONS **Folld** Re Barker, Barker v Barker [1897] WN 154; Re Alston, Alston v Houston [1901] 2 Ch 584 **Distd** Re Bird, Re Evans, Dodd v Evans [1901] 1 Ch 916; Re Phillimore, Phillimore v Herbert [1903] 1 Ch 942 **Apprvd** Re Atkinson, Barber's Co v Grose-Smith [1904] 2 Ch 160

3549 Interest falling into arrear — Deficiency on realisation of security — Ratio of apportionment of proceeds

Re Barker, Barker v Barker [1897] WN 154

ANNOTATIONS **Consd** Re Alston, Alston v Houston [1901] 2 Ch 584 **Apprvd** Re Atkinson, Barbers' Co v Grose-Smith [1904] 2 Ch 160

3550 Interest falling into arrear — Deficiency on realisation of security — Ratio of apportionment of proceeds

Lyon v Mitchell [1899] WN 27

ANNOTATION **Apprvd** Re Atkinson, Barbers' Co v Grose-Smith [1904] 2 Ch 160

3551 Interest falling into arrear — Deficiency on realisation of security — Ratio of apportionment of proceeds

Funds subject to the trusts of a settlement comprised a mortgage security which, pursuant to the trusts, was transferred to the trustees. The interest was irregularly paid, and ultimately the security was realised at a considerable loss: *Held* the sum realised ought to be apportioned between the tenant for life and remaindermen under the settlement in proportion to the amounts due at the date when it was recovered in respect of arrears of interest and in respect of principal.

Re Alston, Alston v Houston [1901] 2 Ch 584; 70 LJ Ch 869

ANNOTATION **Apprvd** Re Atkinson, Barbers' Co v Grose-Smith [1904] 1 Ch 160

3552 Interest falling into arrear — Deficiency on realisation of security — Ratio of apportionment of proceeds

Where a fund is settled upon tenant for life and remaindermen, and is invested in accordance with the powers of the settlement upon a mortgage which proves to be insufficient for the payment of principal and interest in full, the sum realised by the security ought to be apportioned between the tenant for life and the remaindermen in the proportion which the amount due for arrears of interest bears to the amount due in respect of the capital debt.

Re Atkinson, Barbers' Co v Grose-Smith [1904] 2 Ch 160; 73 LJ Ch 585; 90 LT 825; 53 WR 7, CA

ANNOTATIONS **Apld** Re Pennington, Pennington v Pennington (1913) 109 LT 814 **Distd** Re Pennington, Pennington v Pennington [1914] Ch 203 **Consd** Re Horn's Estate, Public Trustee v Garnett [1924] 2 Ch 222 **Apld** Re Walker's Settlement Trusts, Watson v Walker [1936] Ch 280

3553 Interest falling into arrear — Deficiency on realisation of security — Ratio of apportionment of proceeds — Income received brought into hotchpot

Testator gave his residuary estate to trustees in trust for his widow for life, with remainder to certain persons absolutely. After his death the trustees invested £7,535, part of his residuary estate, on mortgage of freehold property at 5 per cent. The trustees afterwards entered into possession and paid the rents to the widow, the tenant for life, but such rents were insufficient to keep down the interest, the arrears of which amounted at her death to £3,400. Shortly after her death the trustees sold the mortgaged property; but it realised £7,005 only, that is, less than the principal of the mortgaged debt: *Held* the £7,005 should be apportioned between the executors of the tenant for life and the remaindermen, the residuary legatees, upon the basis of the following calculation; add to the £7,005 the amount of income actually received by the tenant for life, divide the total between the remaindermen and the executors of the tenant for life in the proportion which the original principal, £7,535, plus interest thereon at 5 per cent from the death of the tenant for life to date of sale, would bear to the aggregate amount of mortgage interest, less income tax, which the tenant for life would have received during her life had it been regularly paid, the executors of the tenant for life giving credit for the amount of income she actually received.

Re Foster, Lloyd v Carr (1890) 45 Ch D 629; 60 LJ Ch 175; 63 LT 443; 39 WR 31

ANNOTATIONS **Expld** Re Barker, Barker v Barker [1897] WN 154 **NF** Re Alston, Alston v Houston [1901] 2 Ch 584 **Apld** Re Bird, Re Evans, Dodd v Evans [1901] 1 Ch 916 **Consd** Re Phillimore, Phillimore v Herbert [1903] 1 Ch 942 **Overd** Re Atkinson, Barbers' Co v Grose-Smith [1904] 2 Ch 160

3554 Interest falling into arrear — Deficiency on realisation of security — Ratio of apportionment of proceeds — Income received brought into hotchpot

Where an authorised security becomes insufficient and there is a partial loss of capital and income, the account necessary to apportion the amount realised between life tenant and remainderman must be taken from the date when it was first ascertained that the security was insufficient up to the date of realisation, the life tenant bringing all income received during that period into hotchpot.

Re Phillimore, Phillimore v Herbert [1903] 1 Ch 942; 72 LJ Ch 591; 88 LT 765

ANNOTATION **Overd** Re Atkinson, Barbers Co v Grose-Smith [1904] 2 Ch 160

3555 Interest falling into arrear — Deficiency on realisation of security — Ratio of apportionment of proceeds — Income received brought into hotchpot

A trust legacy was invested on mortgage which proved to be insufficient, and at the death of the tenant for life there were large arrears of interest. By an order the rents were apportioned in the propor-

tion of the arrears due to the tenant for life at her death and the arrears since due to the remaindermen without prejudice to any re-adjustment when the security was realised. The security was subsequently realised, and the purchase-money was placed on deposit: *Held* the rents paid under the order must be brought into hotchpot, and the aggregate of those rents and the purchase-money should be distributed between the representatives of the tenant for life and the remaindermen in the proportion which the arrears of rent due at the death of the tenant for life bore to the aggregate of the principal money and arrears due to the remaindermen.

Re Southwell, Carter v Hungerford (1915) 85 LJ Ch 70; 113 LT 311

3556 Interest falling into arrear — Deficiency on realisation of security — Ratio of apportionment of proceeds — Clause disentitling life tenant to property not producing income

The will of testator contained the ordinary clause empowering his trustees to postpone the sale and conversion of his estate and declaring that the income thereof, previous to the conversion, should be applied as if it were income arising under investments authorised by the will. Then followed this proviso: "But no property not actually producing income which shall form part of my estate shall be treated as producing income or as entitling any party to the receipt of income." There was a debt, due to testator at the time of his death, which could not be got in, and the trustees took from debtor as security for it a third mortgage upon certain policies of insurance on his life. Debtor died in the lifetime of a lady who was tenant for life under the will, and the trustees who had received neither principal nor interest in respect of the debt, realised their security with the result that after payment of the prior charges, they received a sum which was less than the amount due by all the interest and some of the capital: *Held* (1) according to the rule of the court this sum represented the arrears of interest as well as the capital and; (2) it must be treated as property actually producing income within the meaning of the proviso and must be apportioned between the tenant for life and the remainderman in the proportion that the interest due from the date of the mortgage bore to the capital thereby secured.

Re Hubbuck, Hart v Stone [1896] 1 Ch 754; 65 LJ Ch 271; 73 LT 738; 44 WR 289; 40 Sol Jo 257, CA

3557 Interest falling into arrear — Deficiency on realisation of security — Ratio of apportionment of proceeds — Clause applying proceeds in payment of interest

Where on the realisation of certain debentures which formed part of the residuary estate of testator and were settled by his will upon tenants for life and remaindermen the proceeds proved to be insufficient for the payment of principal and interest in full, it was held that the same ought to be apportioned as between the tenants for life and remaindermen according to the principle enunciated in *Re Atkinson, Barbers' Co v Grose-Smith* (no 3552 ante), notwithstanding the provisions of a clause in the trust deed whereby the debentures were secured to the effect that the proceeds of realisation were to be applied first in satisfaction of all arrears of interest and next in satisfaction of principal.

Re Pennington, Pennington v Pennington (1913) 109 LT 814

3558 Interest falling into arrear — Deficiency on realisation of security — Ratio of apportionment of proceeds

A light railway company was promoted to serve the interests of an estate that formed part of a settled estate. It was incorporated under an order made by the Light Railway Commissioners and confirmed by the Minister of Transport. Clause 50 of the order provided: "The company may create and issue debenture stock. . . . The interest of all debenture stock and of all mortgages at any time created and issued or granted by the company under this Order or any subsequent Order or Act of Parliament shall, subject to the provisions of any subsequent Order or Act, rank *Pari passu* . . . and shall have priority over all principal money secured by such mortgages." Debenture stock to the amount of £8,000 was issued by the company and was registered in the names of the trustees of the settlement. On the winding up of the company the assets that came into the lands of the trustees were not sufficient to pay off the debenture stock and the arrears of interest thereon: *Held* the assets should be apportioned between capital and income in accordance with the principle laid down in *Re Atkinson, Barbers' Co v Grose-Smith* (no 3552 ante).

Re Walker's Settlement Trusts, Watson v Walker [1936] Ch 280; 105 LJ Ch 49; 154 LT 564; 52 TLR 118; [1934–5] B&C R 279

3559 Interest falling into arrear — Mortgagee in possession — Apportionment of receipts

On 10 December 1884, a mortgage of £18,000 on farm A was settled on successive trusts for two life tenants and a remainderman without making any provision for some three years' arrears of interest then owing to one settlor who became first life tenant thereunder. The first life tenant died on 8 July 1893, and the second life tenant on 22 January 1903. From 11 October 1881, to 11 October 1902, the mortgagor had worked farm A together with farm B under an arrangement by which he was to pay the net

incomes to mortgagees of farm A and farm B respectively to the extent of the interest due to them. The net incomes were not nearly sufficient to keep down the interest in either case, but owing to errors in the apportionment of working expenses during the joint working the mortgagees of farm B had altogether been paid £1,028 in excess of the income properly attributable to their farm. On 11 August 1905, the trustees recovered the £1,028, representing income earned from 11 October 1881, to 11 October 1902, from the mortgagees of farm B. From 11 October 1902, to 11 October 1906, the mortgagor continued to work farm A as manager to the trustees. On 11 October 1906, the trustees let farm A at a rent of £515, and on 29 November 1906, they received £2,368 in respect of the sale of farm stock provided out of and representing income earned from 11 October 1881, to 11 October 1906. The interest was now heavily in arrear, and the security was greatly depreciated. Foreclosure proceedings had been commenced, but no order had yet been made: *Held* the first life tenant's representative could not as against the other beneficiaries claim any arrears of interest owing at the date of the settlement, but subject to this exception the two sums of £1,028 and £2,368, and every sum of accruing rent received up to the time of foreclosure absolute, must be treated as a payment on account of all arrears of interest owing at the date of payment, and must be apportioned between the estates of the two life tenants and the remainderman in proportion to the amounts owing to them for arrears of interest at the date when the particular sum was received.

Re Broadwood's Settlements, Broadwood v Broadwood [1908] 1 Ch 115; 77 LJ Ch 18; 98 LT 217

ANNOTATION **Distd** Re Southwell, Carter v Hungerford (1915) 85 LJ Ch 70

3560 Interest falling into arrear — Mortgagee in possession — Apportionment of receipts

Testator gave his residuary real and personal estate to trustees upon trust to sell, with power to postpone, and to divide into shares, each share being settled. Testator's assets included several mortgage debts the interest on which was in arrear at his death. Testator had entered into and remained in receipt of the rents of the mortgaged properties up to his death and the trustees had continued in such receipt. The securities being deficient, the question arose between the tenants for life and the remaindermen as to the application of these rents: *Held* the trustees must first apply each instalment of rent received since testator's death from each mortgaged property in satisfaction of the arrears of interest which at testator's death were due in respect of the mortgage, and then distribute the balance as income up to but not exceeding the interest accrued since testator's death on the mortgage, and apply any excess as capital.

Re Coaks, Coaks v Bayley [1911] 1 Ch 171; 80 LJ Ch 136; 103 LT 799

ANNOTATION **Expld** Re Horn's Estate, Public Trustee v Garnett [1924] 2 Ch 222

3561 Mortgage deferring payment of interest

Testator by his will devised and bequeathed his residuary real and personal estate to trustees upon trust for sale and conversion and investment, and directed them to pay the income of the investments to his wife for life. The will empowered the trustees to postpone conversion, and provided that the income of unconverted estate should be applied as if it arose from converted estate, and that no property not actually producing income should be treated as producing income or as entitling any person to the receipt of income. Testator died in 1901. Amongst the securities forming part of his estate at his death was a mortgage which recited that the mortgagor was indebted to testator in a certain sum and that it had been agreed that the payment of his debt should be postponed, and the mortgagor thereby covenanted to pay the amount of the debt with simple interest at his death, and if the aggregate amount of such sum and interest was not then paid, to pay interest on such aggregate sum by equal half-yearly payments, the first of such payments to become due six months after his death. The mortgagor died in 1906, in the lifetime of testator's widow, the tenant for life. The widow died shortly afterwards: *Held* the interest on the mortgage attributable to the period between the death of testator and the death of the mortgagor belonged to the estate of the widow, and not to that of testator.

Re Lewis, Davies v Harrison [1907] 2 Ch 296; 76 LJ Ch 539; 97 LT 636; 51 Sol Jo 531

Scottish, Irish and Commonwealth Cases

3562 Interest falling into arrear — Deficiency on realisation of security — Ratio of apportionment of proceeds

Funds held under a will in trust for A for life, remainder for B for life, with remainder over for certain persons, were invested in 1875 on the security of a mortgage of real estate then of sufficient value. The interest due on the mortgage fell into arrear, and in 1880 a petition for sale and the appointment of a receiver was presented by the trustees of the will, and a receiver was appointed in the same year. In 1898 A, the first tenant for life, died. At her death considerable arrears of income were due to her, a portion of which was afterwards paid to her executors. In 1901 the lands subject to the mortgage were sold under Land Purchase Acts and did not realise the amount of the mortgage security. Prior to the sale nothing had been paid to B, the present tenant for life, in respect of interest: *Held* the date

of the sale of mortgaged lands must be taken to be the period at which the deficiency of the security was first ascertained; and the sum realised by the sale should be apportioned, in proportion to the amounts due at that date, between the executors of the first tenant for life, the present tenant for life, and the trustees of the will as representing the persons entitled to the *corpus* of the fund.
Stewart v Kingsale [1902] 1 IR 496 (IR)

3563 Interest falling into arrear — Deficiency on realisation of security — Ratio of apportionment of proceeds
Where a loss occurs under a mortgage of trust funds, the income of which is payable to a life tenant, the loss should be apportioned between the tenant for life and the remainderman by adding the amount actually realised from the security to the amount of interest theretofore received by the tenant for life and dividing the whole sum between the latter and the remainderman in the proportion in which they would have been entitled to share if the security had been paid in full, the tenant for life giving credit for the amounts already received.
Re Plumb (1896) 27 OR 601 (CAN)

3564 Interest falling into arrear — Mortgagee in possession — Apportionment of receiver
Money in settlement was invested by the trustees on a mortgage. The interest fell into arrear, and a receiver was appointed over the lands, pending sale. The security was likely to prove deficient. The tenant for life having died: *Held* the money brought in by the receiver should be apportioned between the representatives of the tenant for life of the settled money and the persons entitled in remainder, in the proportion which the arrears of interest, at the death of the tenant for life, and the amount due for principal and interest on the mortgage since his death bore to one another.
Re Ancketill's Estate, Ex p Scottish Provident Institution (1891) 27 LR Ir 331 (IR)

iii UNAUTHORISED AND RETAINED INVESTMENTS

LAW See Halsbury's Laws (4th edn) vol 42 paras 989, 990

CROSS REFERENCE See EQUITY vol 20(3) (2nd reissue) no 1285 et seq (effect of postponement of conversion)

3565 Deficiency on realisation — Calculation of sum to be treated as capital — Rate of interest
Part of testator's residuary estate consisted of a bond debt, which, owing to the insolvency of debtor's estate, was not recovered until many years after testator's death, when the gross sum recovered in respect of principal and interest did not equal the amount of the original debt: *Held* as between the tenant for life of the residue and those in remainder, the former was not entitled to receive what had actually been recovered in respect of interest, but only the amount of interest at 4 per cent on the sum which the bond would have realised if debtor's estate had been administered at the end of a year after testator's death.
Turner v Newport (1846) 2 Ph 14; 1 Coop temp Cott 147; 9 LTOS 213; 41 ER 846, LC

ANNOTATIONS **Consd** Maclaren v Stainton (1871) LR 11 Eq 382 **Folld** Re Cleveland's Estate, Hay v Wolmer [1895] 2 Ch 542 **Consd** Re Alston, Alston v Houston [1901] 2 Ch 584

3566 Deficiency on realisation — Calculation of sum to be treated as capital — Rate of interest
An obligor covenanted and became bound to pay, three months after his decease, a fund to trustees, upon trust for a tenant for life and remainderman, with interest from the date of his death until payment. Several years after the obligor's death assets were recovered, which were insufficient to fulfil the covenant and bond: *Held* a calculation must be made of what principal would, at 4 per cent interest from the obligor's death, amount to the sum recovered, and the difference paid to the tenant for life.
Cox v Cox (1869) LR 8 Eq 343; 38 LJ Ch 569; 17 WR 790

ANNOTATIONS **Consd** Maclaren v Stainton (1871) LR 11 Eq 382 **Apld** Re Bird, Re Evans, Dodd v Evans [1901] 1 Ch 916

3567 Deficiency on realisation — Calculation of sum to be treated as capital — Rate of interest
Testator gave his residue to trustees to convert, with power to postpone conversion, and to pay the income to tenants for life. Part of testator's estate at his death consisted of a mortgage debt secured on a colliery in his possession: interest was in arrear. After testator's death his trustees foreclosed. Proceeds of working the colliery come to the hands of a receiver in the foreclosure action were transferred to the credit of an action to administer testator's estate: *Held* the funds in court were apportionable between capital and income, on the principle that so much as would, if invested at testator's death at 4 per cent with annual rests, have amounted to the sum transferred at the date of transfer should be treated as capital and the rest as income.
Re Godden, Teague v Fox [1893] 1 Ch 292; 62 LJ Ch 469; 68 LT 116; 41 WR 282; 3 R 67

3568 Deficiency on realisation — Calculation of sum to be treated as capital — Rate of interest
A tenant for life was entitled to three-fifths of the income of testator's estate, and, under the powers of

the will, unauthorised securities, some productive, others non-productive, were retained for a favourable opportunity for realisation. A leasehold forming part of the estate was sub-let at an annual loss: *Held* (1) the unauthorised securities must be aggregated, and the income therefrom must be taken as being at the rate of 4 per cent on the aggregate estimated value; (2) the loss on the leasehold was an outgoing of the estate and chargeable against the income.
Re Owen, Slater v Owen [1912] 1 Ch 519; 81 LJ Ch 337; 106 LT 671; 56 Sol Jo 381

ANNOTATIONS As to (1) **Follld** Re Beech, Saint v Beech [1920] 1 Ch 40 **Consd** Re Parry, Brown v Parry [1946] 2 All ER 412. As to (2) **Distd** Re Shee, Taylor v Stoger [1934] Ch 345

3569 Deficiency on realisation — Calculation of sum to be treated as capital — Rate of interest — Deduction of income tax
Testator directed that the residue of his estates should be converted on a given day, or as soon after as conveniently might be, and that a share should be held upon trust for one for life with remainders over. When the day arrived, it appeared that a leasehold property forming part of the residue could not be advantageously sold, and that it would be for the benefit of all persons interested that it should be retained by the trustees of the will and managed by them, although at a probable annual loss: *Held* the annual loss or profit, if any, ought to be apportioned between capital and income by calculating the sum which, put out at interest at 4 per cent per annum on the given day a accumulating at compound interest at the like rate with yearly rests, would, together with such interest and accumulations, after deducting income tax, be equivalent at the end of each year to the amount of the loss or profit sustained or made during that year and then charging the sum so ascertained against, or crediting it to, capital, and charging the rest of the loss against, or crediting the rest of the profit to, income.
Re Hengler, Frowde v Hengler [1893] 1 Ch 586; 62 LJ Ch 383; 68 LT 84; 41 WR 491; 3 R 207

3570 Deficiency on realisation — Trustees selling authorised investment and investing in unauthorised one — Apportionment of amount realised
Where a trustee, without the knowledge of the tenant for life or remainderman, sells out an authorised investment and places the proceeds on an unauthorised investment which results in a partial loss of income and capital, the tenant for life is entitled to such a proportion of the amount realised by the unauthorised investment plus the income he received therefrom during its continuance, as the dividends he would have received from the authorised investment in the same period bear to the capital value of the authorised investment plus those dividends, the tenant for life being liable to bring into account all income he received from the unauthorised investment, although not liable to refund.
Re Bird, Re Evans, Dodd v Evans [1901] 1 Ch 916; 70 LJ Ch 514; 84 LT 294; 49 WR 599; 45 Sol Jo 327

3571 Money paid under order of court — Repaid on appeal without interest
Where money forming part of the residuary estate of testator was paid away under an erroneous order of the court, and subsequently, on the order being varied on appeal, was recovered, but without interest: *Held* (1) the money so recovered ought not to be treated as consisting of capital only, but a fair proportion of it ought to be paid to the tenant for life of the residue as income, according to the principle of *Turner v Newport* (no 3565 ante); (2) in applying that principle interest ought to be calculated at the rate of 3 per cent, instead of 4, as being more agreeable to the facts of present experience.
Re Cleveland's (Duke) Estate, Hay v Wolmer [1895] 2 Ch 542; 65 LJ Ch 29; 73 LT 313; 13 R 715

iv SETTLEMENT OF BUSINESS

LAW See Halsbury's Laws (4th edn) vol 42 para 991

3572 Business carried on by receiver — Loss during first life tenancy to be recouped out of subsequent profits — Not out of capital
In an action to execute the trusts of a settlement, by which (*inter alia*) a business was assigned to trustees on trust for successive tenants for life and remainderman, a receiver and manager was appointed to carry on the business. During the life of the first tenant for life the business was carried on by the receiver at a loss; during the life of the second tenant for life profits were earned: *Held* the loss must be made good out of the subsequent profits, and not out of capital.
Upton v Brown (1884) 26 Ch D 588; 54 LJ Ch 614; 51 LT 591; 32 WR 679

3573 Share in partnership business — Custom of firm to write off losses out of capital — Tenant for life not liable to recoup capital — Out of subsequent profits
Gow v Forster no 3234 ante

3574 Direction in will that losses should be defrayed out of estate — Loss borne by capital
A gave all his real and personal estate to trustees upon trust for sale, conversion, and investment, and to pay the income of one-fifth part to his wife for life, and subject thereto to divide the whole into four parts, and pay the income of one such part to each of his

four daughters for life, and after her death to hold such part in trust for her children equally; and he empowered his trustees to carry on any business carried on by him, and directed that the net profits of any business so carried on should, except such parts thereof as the trustees should in their discretion reserve for the purpose of increasing the capital in such business, be treated as income of his trust estate; and he directed that, should any losses, not being the result of neglect, fall on his trustees in consequence of his carrying on such business, the same should be defrayed out of his estate. Testator left property employed in business, and other property. The trustees carried on the business, and duly invested the other property. For some years the business was successful, and the profits were duly divided among the tenants for life. In a subsequent year losses were incurred, and the trustees claimed that they should be recouped out of the income of the trust estate generally: *Held* the losses must be borne by the capital of testator's estate, and not by the tenants for life.

Re Millichamp, Goodale & Bullock (1885) 52 LT 758

3575 Shares in ships — Losses on some ships and profits on others — Tenant for life entitled to net income — After setting off losses against profits

The rights of a tenant for life and remainderman adjusted where the owner of several ships or shares in ships had died and his business had been carried on under his will and profits had resulted from some of the ships and losses from others.

All losses incurred and all profits made prior to the death of testator must be borne by or belong to his general estate and all losses on the various steamers incurred after testator's death must be set off in account against the profits earned generally by the steamers since his death and the balance would be income belonging to widow as tenant for life (*Kay J*).

Re Clapham, Rutter v Clapham (1886) 2 TLR 424

5 Waste

i IN GENERAL

LAW See Halsbury's Laws (4th edn) vol 42 para 992 et seq

CROSS REFERENCES See BONDS vol 7(1) (2nd reissue) no 2865 (bond not to commit waste); LIMITATION OF ACTIONS vol 32(2) (2nd reissue) nos 2058 et seq, 2246 et seq (limitation of action)

3576 Tenant for life — Subsequent life estate with remainder in fee — Rights of remainderman in fee — Death of intermediate tenant for life

Tenant for life, remainder for life, remainder in fee, tenant for life commits waste, he in the remainder for life dies. The remainderman in fee may have an action of waste against the tenant for life.

So also if the remainderman for life, after the waste committed, had surrendered to him in the remainder in fee.

Paget's Case (1593) 5 Co Rep 76b; 77 ER 170

ANNOTATIONS **Consd** Bowles's Case (1615) 11 Co Rep 77b **Apld** Bray v Tracey (1624) W Jo 51 **Consd** Garth v Cotton (1753) 3 Atk 751

3577 Tenant for life — Subsequent life estate with remainder in fee — Rights of remainderman in fee — Death of intermediate tenant for life

Bray v Tracy (1624) W Jo 51; Cro Jac 688; 82 ER 28

3578 Tenant for life — Subsequent life estate with remainder in fee — Rights of remainderman in fee

Anon (1599) Moore KB 554; 72 ER 754

3579 Tenant for life — Subsequent life estate with remainder in fee — Rights of remainderman in fee

A remainderman in fee may have an injunction to stay waste in the first tenant for life notwithstanding an intermediate estate for life.

Farrant v Lovel (1750) 3 Atk 723; 26 ER 1214, LC

3580 Tenant for life — Property settled on married woman — For her separate use

Testator devised his real estate to trustees upon trust for one of his granddaughters, and directed that in the event of her marrying under twenty-one, which event happened, then they should assure same by deed to her for her life to her separate use, without power of anticipation, with remainder to her children as tenants in common in tail with remainders over, with power to the trustees to secure a life interest to the husband after the death of the granddaughter either with or without impeachment for waste: *Held* the life estate of the granddaughter must be subject to impeachment for waste.

Clive v Clive (1872) 7 Ch App 433; 41 LJ Ch 386; 26 LT 409; 20 WR 477, LJJ

ANNOTATION **Consd** Re Joel's Will Trusts, Rogerson v Brudenell-Bruce [1966] 2 All ER 482

3581 Tenant for life — Property settled on married woman — On widow "with full and absolute control"

By his will G, who died in 1884, devised an estate to his wife M for life with remainder to his brother F in fee. M was appointed sole executrix with full

and absolute control over all testator's property during her life. F died in 1892, having by his will settled the estate subject to the life interest on plaintiff in tail male with remainder over. M having cut and sold timber, including, oak, ash, and elm of twenty years of age and upwards, this action was brought claiming a declaration that this constituted waste and for an injunction: *Held* on the true construction of the will the words "with full and absolute power over all my property" did not render defendant dispunishable for waste, but merely conferred large powers of management.

Pardoe v Pardoe (1900) 82 LT 547; 16 TLR 373; 44 Sol Jo 449

3582 Tenant for life — Liability under separate instruments

Testator by his will devised all his estates to trustees and their heirs to the use of plaintiff for life without impeachment of waste, with remainder to his sons successively in tail male. By a codicil he revoked in part the disposition made by his will, and devised part of his estates to trustees, their executors, administrators and assigns during the life of defendant, a married woman, without impeachment of waste, upon trust to permit her to receive the rents, issues and profits for her life for her separate use with restraint upon anticipation, and divers remainders over. Subsequently testator conveyed the same hereditaments by deed to the use of a trustee during the life of defendant upon trust to permit her to receive the rents and profits for the life for her separate use without anticipation, with remainders over. Neither the trustee nor the lady herself was made by that instrument dispunishable for waste: *Held* the life estates given by the codicil were revoked by the settlement, and the life tenants were impeachable of waste under the latter instrument.

Lowndes v Norton (1864) 4 New Rep 452; 33 LJ Ch 583; 11 LT 290, LJJ

3583 Equitable tenant for life — Remedy of remainderman — Against incumbrances of life interest

Equitable tenant for life mortgaged his interest, and afterwards committed waste: *Held* as against the incumbrancers upon the life interest, the remaindermen had an equity to have the injury done to the inheritance made good, and had for that purpose a lien upon the rents in the hands of the trustees of the settlement accrued during the life interest.

Briggs v Oxford (Earl), Beavan v Oxford (Earl) (1855) 25 LTOS 265; 1 Jur NS 817; 3 WR 588; on appeal 4 WR 38, LJJ

3584 Amelioratory waste — Improvements effected exceeding waste committed

When it was shown that the tenant for life, being also ultimate remainderman in fee, had laid out sums in permanent improvements on the estate at least equal to the value of the amount realised by the acts of waste, which were themselves of trivial amount, the bill was dismissed; and where the executor of a deceased tenant for life, who was also ultimate remainderman in fee, admitted having received the proceeds of certain timber cut or ordered to be cut by his testator, he was allowed in the account to be taken against him, to take credit for the sums laid out by his testator in permanent improvements.

Birch-Wolfe v Birch (1870) LR 9 Eq 683; 39 LJ Ch 345; 23 LT 216; 18 WR 594

3585 Amelioratory waste — Improvements effected exceeding waste committed

Tenant for life permitted her tenants to dig turf from fen lands. The turf, when sold, realised a considerable sum. It being proved in evidence that such digging, though technically an act of waste, had considerably improved the lands for agricultural purposes: *Held* the tenant for life was not bound to account to the persons entitled in remainder for the value of the turf so removed.

Harris v Ekins (1872) 26 LT 827; 20 WR 999

3586 Remedy by injunction — Tenant in tail after possibility of issue extinct

Tenant [in tail] after possibility restrained from waste.

Abrahal or Abrahall or Abraham v Bubb (1679) 2 Show 69; Freem Ch 53; 2 Swan 172; 2 Eq Cases Abr 757; 89 ER 798, LC

ANNOTATIONS **Consd** Aston v Aston (1749) 1 Ves Sen 264; Williams v Williams (1808) 15 Ves 419

3587 Remedy by injunction — Tenant in possession

A-G v Ancaster (Duke) (1737) 1 Dick 68; 21 ER 193

3588 Remedy by injunction — Right of reversioner or remainderman to be joined

A is tenant for years, remainder to B for life, remainder to C in fee; A is doing waste; B though he cannot bring waste, as not having the inheritance, yet he is entitled to an injunction, but not unless the reversioner or remainderman in fee be made a party, who possibly may approve of the waste.

Mollineux v Powell (1730) 2 Eq Cas Abr 169; 3 P Wms 268n; 22 ER 144, LC

ANNOTATION **Apprvd** Doherty v Allman (1878) 3 App Cas 709

3589 Application of English law
All the niceties of the ancient learning as to waste which obtain in England are not to be transferred without discrimination to a new and comparatively unsettled country like Ontario.
Hixon v Reavely (1904) 25 CLT 14; 9 OLR 6; 4 OWR 437 (CAN)

3590 Remedy by injunction — Tenant in possession
Where the house and buildings were in need of repairs, and proper timber and shingles were obtainable from a dealer, whereas the timber on the place was unsuitable for the repairs needed, and the tenant for life proposed to sell a sufficient amount of timber off the place to pay for what was required, and for that purpose only, and an injunction was sought to restrain him: *Held* no case of waste was made out to justify an injunction, nor could damages be awarded if the timber was cut with due regard to the situation of the bush and the cleared land, and no unreasonable amount was taken off to recoup the cost of the timber used or to be used in the repairs.
Hixon v Reavely (1904) 25 CLT 14; 9 OLR 6; 4 OWR 437 (CAN)

3591 Remedy by injunction — Tenant in possession
Action by remainderman to restrain defendant from breaking up ancient pasture: *Held* the farm was an ancient pasture and it would be injurious and burdensome to the inheritance for defendant to break up an area exceeding 30 acres until an equivalent area had been restored to its original carrying power as pasture land.
Bobbett v Kennedy (1916) 50 ILT 171 (IR)

ii PRIVILEGE OF TENANT FOR LIFE UNIMPEACHABLE FOR WASTE

LAW See Halsbury's Laws (4th edn) vol 42 para 1000

CROSS REFERENCE See AGRICULTURE vol 2 (2nd reissue) no 1396 et seq (waste relating to trees and timber)

3592 Position of
Tenant for life without impeachment of waste, has as great power to do waste, and to convert it, at his own pleasure, as tenant in tail has. The privilege is annexed to the privity of estate; if one who has a particular estate without impeachment of waste, changes his estate, he loses his advantage.
Bowles's Case (1615) 11 Co Rep 79b; 77 ER 1252; sub nom
Bowles v Berrie (1615) 1 Roll Rep 177

ANNOTATIONS **Consd** Abraham v Bubb (1680) Freem Ch 53; Williams v Williams (1808) 15 Ves 419

3593 Privilege annexed to the estate
A feoffment was made unto A unto the use of him and his wife, dispunishable of waste during their lives; one died, and the survivor committed waste; it was the opinion of the whole court, that an action of waste should not lie by him in the reversion; for it is a privilege which is annexed to the estate, which shall continue as long as the estate doth continue.
Anon (1587) Godb 132; 78 ER 80

3594 What words confer the privilege — "In strict settlement" insufficient
Where an executory trust for the settlement of freehold estates "in strict settlement" directs, either expressly or by reference to the trusts of other property, that certain persons shall take life estates, the use of the words "in strict settlement" does not make the tenants for life dispunishable for waste.
Stanley v Coulthurst (1870) LR 10 Eq 259; 39 LJ Ch 650; 23 LT 761; 18 WR 969

3595 Extent of privilege — Woods and houses
King v Blundavile (1629) Toth 83; 21 ER 130

3596 Extent of privilege — Dilapidations
Demurrer to a bill against representative of deceased tenant for life for an account of equitable waste committed by him, and for relief, overruled.
Lansdowne (Marquis) v Lansdowne (Marchioness Dowager) (1815) 1 Madd 116; 56 ER 44

ANNOTATION **Consd** Phillips v Homfray (1883) 24 Ch D 439

3597 Liability for waste by lessee — At suit of remainderman
Reversioner in possession may maintain an action for waste committed during the life of the tenant for life, although there be an intermediate remainder without impeachment of waste.
Bray v Tracy (1624) Cro Jac 688; W Jo 51; 79 ER 597

3598 Right of reversioner to sell timber during life of tenant for life
A reversioner cannot sell the timber trees during the life of a tenant for life without impeachment of waste.
Waller and Petty v Sands (1632) Cro Car 274; 79 ER 839

3599 Effect of trust for payment out of rents and profits
Where an equitable tenant for life, unimpeachable of waste, was entitled to estate, subject to a trust for payment by the trustees out of the rents and profits, but not by sale or mortgage of such estates, of certain mortgages on the estates; and

timber had been cut on the estates by the direction of the court: *Held* the term "rent and profits" meant annual rents and profits, and the tenant for life in possession, though not in possession of the rents and profits of the estate, was entitled to all other rights incident to his estate, and, therefore, he was entitled to the proceeds of the timber which had been cut.

Lovat (Lord) v Leeds (Duchess) (No 2) (1862) 2 Drew&Sm 75; 6 LT 307; 10 WR 398

Scottish, Irish and Commonwealth Cases

3600 Position of

Currie v Currie (1910) 15 OWR 389; 20 OLR 375 (CAN)

3601 Extent of privilege

Annesley v Annesley (1918) 5 ILT 189 (IR)

iii EQUITABLE WASTE

LAW See Halsbury's Laws (4th edn) vol 42 para 1003

CROSS REFERENCES See no 3691 et seq post (what waste restrained: removal of fixtures); AGRICULTURE vol 2 (2nd reissue) no 1731 et seq; INJUNCTIONS vol 28(4) (2nd reissue) no 5840 et seq (injunction to restrain waste generally)

3602 Nature of equitable waste

(1) A tenant in fee simple subject to an executory devise over in case he should die without leaving issue, is dispunishable of legal, but not of equitable waste.

(2) Equitable waste intervenes between malicious waste and legal waste, and is that which a prudent man would not do in the management of his own property.

Turner v Wright (1860) 2 De GF&J 234; 29 LJ Ch 598; 2 LT 649; 6 Jur NS 809; 8 WR 675; 45 ER 612, LC

ANNOTATION As to (1) **Consd** Re Hanbury's SE [1913] 2 Ch 357

3603 Application of doctrine

The court, by applying the doctrine of equitable waste, controls and restrains the excessive use of the legal power incident to an estate unimpeachable of waste, but with reference only to the presumed will and intention of the party by whom the power was created.

Marker v Marker (1851) 9 Hare 1; 20 LJ Ch 246; 17 LTOS 176; 15 Jur 663; 68 ER 389

3604 Application of doctrine

Powys v Blagrave no 3631 post

3605 What waste restrained — Pulling down or defacing houses

Williams v Day (1680) 2 Cas in Ch 32; 22 ER 832, LC

3606 What waste restrained — Pulling down or defacing houses

A on marriage of his son, settles a messuage on himself for life, *sans* waste, remainder to his son. The father, though his estate for life be *sans* waste, cannot pull down the house, nor commit any voluntary waste therein: if he does, the court will grant an injunction to stay waste, and compel the father to put the messuage in as good repair as before the waste committed.

Vane v Barnard (Lord) (1716) 2 Vern 738; 1 Eq Cas Abr 399; 1 Salk 161; 23 ER 1082; sub nom *Bernard's (Lord) Case* (1716) Gilb Ch 127; Prec Ch 454, LC

ANNOTATIONS **Consd** Aston v Aston (1749) 1 Ves Sen 264 **Distd** Lempster v Pomfret (1752) Amb 154 **Consd** Pyne v Dor (1785) 1 Term Rep 55

3607 What waste restrained — Pulling down or defacing houses — Rebuilding better mansion with old materials

A tenant for life, without impeachment for waste, pulled down the mansion house and built a better in a more desirable situation upon another part of the settled estates. After his death the persons entitled in remainder filed a bill to obtained compensation for the pulling down the old house. It was proved that the bulk of the materials of the old house had been employed in building the new one, and there was no evidence that any part of the materials had been sold: *Held* the bill had rightly been dismissed.

Morris v Morris (1858) 3 De G&J 323; 28 LJ Ch 329; 32 LTOS 325; 5 Jur NS 229; 7 WR 249; 44 ER 1293, LJJ

3608 What waste restrained — Felling trees of ornament or shelter

Matthew v Crasse (1613) 2 Bulst 89; 80 ER 983

3609 What waste restrained — Felling trees of ornament or shelter

Vane v Barnard (Lord) (1710) Vern 738; 1 Eq Cas Abr 399; 1 Salk 161; 23 ER 1082, LC; sub nom *Bernard's (Lord) Case* (1710) Gilb Ch 127; Prec Ch 454

ANNOTATIONS **Consd** Aston v Aston (1749) 1 Ves Sen 264; **Distd** Lempster v Pomfret (1752) Amb 154 **Consd** Pyne v Dor (1785) 1 Term Rep 55

3610 What waste restrained — Felling trees of ornament or shelter

Castlemaine (Lord) v Craven (Lord) (1733) 2 Eq Cas Abr 758; 22 Vin Abr 523; 22 ER 644

ANNOTATIONS **Consd** Chamberlyne v Dummer (1792) 3 Bro CC 549; Barnes v Dowling (1881) 44 LT 809; Re Cartwright, Avis v Newman (1889) 60 LT 891

3611 What waste restrained — Felling trees of ornament or shelter

Charlton's Case (circa 1730) cited in 1 Ves Sen at p 265; sub nom

Charlton v Charlton (circa 1730) cited in 3 Atk at p 216, LC

ANNOTATIONS **Consd** Rolt v Somerville (1737) 2 Eq Cas Abr 759; Packington's Case (1744) 3 Atk 215; Aston v Aston (1749) 1 Ves Sen 264

3612 What waste restrained — Felling trees of ornament or shelter

R by his will devised to F and his assigns for his life, all his real estate in W, without impeachment of waste, except the timber growing in the park avenues, demesne lands, and woods adjoining to the capital messuage called Arbury; remainder in trust for C for life, remainder to his first and other sons in tail male: *Held* the restriction as to cutting timber was confined to the premises specified in the exception clause, and ought not to extend to the woods adjoining to the excepted parts, nor to the avenues made by testator in those woods; and no proceedings for equitable waste could be maintained as to trees planted, etc, for ornament, etc, as to a house which had formerly been a principal mansion, and having gone to decay had been restored by F, the tenant for life.

Newdigate v Newdigate (1834) 8 Bli NS 734; 2 Cl&Fin 601; 5 ER 1113, HL

3613 What waste restrained — Felling trees of ornament or shelter

(1) *Held* on demurrer, the Duke of Marlborough, for the time being, is, under Administration of Justice Act 1705 (c 3), bound to maintain Blenheim House, and is not therefore at liberty to cut trees, which are essential to its ornament or shelter.

(2) A tenant in tail, restrained by statute from barring issue and those in remainder, is not, for that reason, within the principle of equitable waste.

A-G v Marlborough (Duke) (1818) 3 Madd 498; 56 ER 588; subsequent proceedings (1820) 5 Madd 280

ANNOTATION **Consd** Turner v Wright (1860) 2 DGF&J 234

3614 What waste restrained — Felling trees of ornament or shelter — What is ornamental timber — Intention of settlor decisive

Stafford (Marquis) v Sutherland (Duke) (1892) 36 Sol Jo 381

3615 What waste restrained — Failing to keep up a herd of deer

Tame deer in a park are personal property, and the court will not interfere to retrain waste in not keeping up the herd.

Ford v Tynte (1861) 2 John&H 150; 31 LJ Ch 177; 26 JP 288; 70 ER 1008

ANNOTATION **Consd** White v Paine (1914) 83 LJKB 895

3616 Who may be restrained — Tenant for life unimpeachable for waste

Williams v Day (1680) 2 Cas in Ch 32; 22 ER 832, LC

3617 Who may be restrained — Tenant for life unimpeachable for waste

A tenant for life, remainder to B for life, remainder over. A though dispunishable of waste at law, by reason of the mesne remainder for life, yet shall be enjoined from committing waste in a court of equity.

Tracy v Tracy (1681) 1 Vern 23; 23 ER 278, LC

3618 Who may be restrained — Tenant for life unimpeachable for waste

Vane v Barnard (Lord) no 3606 ante

3619 Who may be restrained — Tenant for life unimpeachable for waste

Newdigate v Newdigate no 3612 ante

3620 Who may be restrained — Tenant for life after possibility of issue extinct

Williams v Day (1680) 2 Cas in Ch 32; 22 ER 832, LC

3621 Who may be restrained — Tenant for life after possibility of issue extinct

A-G v Marlborough (Duke) no 3613 ante

3622 Who may be restrained — Tenant in tail under statutory obligation to maintain estate

A-G v Marlborough (Duke) no 3613 ante

3623 Who may be restrained — Tenant in tail restrained from barring issue or remainderman

A-G v Marlborough (Duke) no 3613 ante

3624 Who may be restrained — Tenant in fee subject to executory devise over

Turner v Wright no 3602 ante

3625 Condition precedent to injunction — Positive evidence of title

Injunction to restrain waste not granted without positive evidence of title.

Davis v Leo (1802) 6 Ves 784; 31 ER 1307, LC

iv PERMISSIVE WASTE

1 In general

LAW See Halsbury's Laws (4th edn) vol 42 para 1001

CROSS REFERENCE See no 3657 et seq post (direction by settlor to repair)

3626 General rule — Tenant for life not liable
Turner v Buck (1715) 2 Eq Cas Abr 758; 22 ER 643, LC

ANNOTATION **Consd** Powys v Blagrave (1854) Kay 495

3627 General rule — Tenant for life not liable
Castlemaine (Lord) v Craven (Lord) (1733) 2 Eq Cas Abr 758; 22 Vin Abr 523; 22 ER 644

ANNOTATIONS **Apld** Powys v Blagrave (1854) 4 De GM&G 448; Barnes v Dowling (1881) 44 LT 809; Re Cartwright, Avis v Newman (1889) 60 LT 891

3628 General rule — Tenant for life not liable
Wood v Gaynon (1761) Amb 395; 27 ER 263

ANNOTATIONS **Apld** Powys v Blagrave (1854) 4 De GM&G 448; Barnes v Dowling (1881) 44 LT 809

3629 General rule — Tenant for life not liable
Gibson v Wells (1805) 1 Bos&PNR 290; 127 ER 473

ANNOTATIONS **Consd** Yellowly v Gower (1855) 11 Exch 274 **Apld** Re Cartwright, Avis v Newman (1889) 41 Ch D 532 **Consd** Blackmore v White [1899] 1 QB 293

3630 General rule — Tenant for life not liable
Lansdowne (Marquis) v Lansdowne (Marchioness Dowager) (1820) 1 Jac&W 522; 37 ER 467

ANNOTATIONS **Consd** Powys v Blagrave (1854) Kay 495; Phillips v Homfray (1833) 24 Ch D 439

3631 General rule — Tenant for life not liable
Equity will not interfere to make a tenant for life liable in respect of permissive waste.
Powys v Blagrave (1854) 4 De GM&G 448; 2 Eq Rep 1204; 24 LJ Ch 142; 24 LTOS 17; 2 WR 700; 43 ER 582, LC

ANNOTATIONS **Apld** Barnes v Dowling (1881) 44 LT 809 **Distd** Re Williames, Andrew v Williames (1884) 52 LT 41 **Apld** Re Hotchkys, Freke v Calmady (1886) 32 Ch D 408; Re Freman, Dimond v Newburn [1898] 1 Ch 28 **Consd** Blackmore v White [1899] 1 QB 293

3632 General rule — Tenant for life not liable
Warren v Rudall, Ex p Godfrey no 1923 ante

3633 General rule — Tenant for life not liable
An action for permissive waste will not lie against a tenant for life.
Barnes v Dowling (1881) 44 LT 809; 45 JP 767, DC

ANNOTATION **Distd** Davies v Davies (1888) 38 Ch D 499

3634 General rule — Tenant for life not liable
Testatrix devised all her land and hereditaments and bequeathed all her personal estate to trustees, upon trust at their discretion to sell and dispose of such part thereof as should not consist of money, and out of the produce of such sale should first pay her debts, and should then invest the residue as therein mentioned, and should stand possessed of such real and personal estates and securities, upon trust to pay the rents, dividends, and interest and annual produce thereof unto E for her life; and after her death testatrix gave, devised, and bequeathed her said real and personal estate and the securities upon which the sums might be invested unto and to the use of V, his heirs, executors, administrators, and assigns, according to the nature and quality thereof. Testatrix at her death was seised of two estates in fee simple, P and B; the latter was subject to certain mortgages, and the rents and profits of the estate were sufficient to pay the interest on the mortgages, but were not sufficient to pay for the necessary repairs: *Held* (1) there was one aggregate gift to E for life, and she could not take the rents and profits of the unincumbered estate and repudiate the incumbered estate, but the rents and profits of both estates were liable to keep down the interest on the incumbrances; (2) E was not liable for repairs or permissive waste, but there was an obligation on the trustees to see that the property did not fall into decay for want of necessary repairs, but such repairs ought to be provided for in such a way as to throw the burden equitably on the tenant for life and remainderman.
Re Hotchkys, Freke v Calmady (1886) 32 Ch D 408; 55 LJ Ch 546; 55 LT 110; 34 WR 569, CA

ANNOTATIONS As to (1) **Apld** Frewen v Law Life Assce Soc [1896] 2 Ch 511. As to (2) **Consd** Re Montagu, Derbishire v Montagu [1897] 1 Ch 685; Re Joel, Rogerson v Joel [1943] Ch 311 **Apld** Re Freman, Dimond v Newburn [1898] 1 Ch 28; Re McClure's Trusts, Carr v Commercial Union Insce (1906) 76 LJ Ch 52; Re Robins, Holland v Gillam [1928] Ch 721 **Distd** Re Gray, Public Trustee v Woodhouse [1927] 1 Ch 242

3635 General rule — Tenant for life not liable
The estate of a legal tenant for life is not liable for permissive waste.

A legal tenant for life of land, upon whom no express duty to repair was imposed by the will under which her estate was derived, died leaving the buildings upon the land in a dilapidated condition. In the administration of her estate the remainderman in fee claimed from her executor compensation by way of damages for permissive waste: *Held* the claim could not be sustained.
Re Cartwright, Avis v Newman (1889) 41 Ch D 532; 58 LJ Ch 590; 60 LT 891; 37 WR 612; 5 TLR 482

ANNOTATIONS **Apld** Re Freman, Dimond v Newburn [1898] 1 Ch 28; Re Parry & Hopkin [1900] 1 Ch 160

3636 General rule — Tenant for life not liable
Re Parry & Hopkin no 3671 post

3637 General rule — Tenant for life not liable — Effect of Law of Property Act 1925 (c 20) s 28(2)

By virtue of above section the operation of which is not limited to the period of a minority, trustees for sale have in relation to the land the powers of management conferred by Settled Land Act 1925 (c 18) s 102, including the power to repair mentioned in subs (2)(*b*) and by virtue of subs (3), power to pay the expenses incurred in management or in the exercise of any of the powers conferred by that section out of the income of the land.

Since January 1926, it has become the duty of trustees for sale of settled land to execute the statutory powers so conferred upon them, so far as may be necessary for the performance of their trust; and it is no longer necessary for them to apply the equitable principles of apportioning the expenses between income and capital as explained in *Re Hotchkys, Freke v Calmady* (no 3634 ante).

Therefore, where, in the absence of any express powers or provisions in the settlement relating to repairs, a block of freehold flats, settled in favour of a tenant for life with beneficial remainders over and held upon trust for sale, had not been kept in a proper state of repair for a period of several years, with the result that a considerable sum was required to defray the expenses of substantial structural repairs so rendered necessary: *Held* (1) those repairs were repairs authorised by Settled Land Act 1925 (c 18) s 102(3)(*b*), and the expenses thereof were properly incurred by the trustee and payable out of the income of the settled land; (2) even if, upon the proper construction of above section, those statutory powers were only exercisable during a minority, the expenses incurred by the trustee would, by virtue of above section, subs (2), nevertheless, still be payable out of the income of the land, as the expression "repairs" in that sub-section bears the same wide meaning as the word "repair" in Settled Land Act 1925 (c 18) s 102(*b*).

Re Gray, Public Trustee v Woodhouse [1927] 1 Ch 242; 96 LJ Ch 159; 136 LT 401; 70 Sol Jo 112

ANNOTATIONS As to (2) **Distd** Re Robins, Holland v Gillam [1928] Ch 721 **Expld** Re Conquest, Royal Exchange Assurance v Conquest [1929] 2 Ch 353 **Consd** Re Smith, Vincent v Smith [1930] 1 Ch 88

3638 General rule — Tenant for life not liable — Effect of Law of Property Act 1925 (c 20) s 28(2)

Testator, who died in 1871, devised his real estate to his trustees upon trust to divide the income during a long period, namely during the joint lives and the life of the survivor of a large class of persons, amongst another class of persons, their respective executors, administrators and assigns; and declared that, on cesser of the period, the land should be sold, and the net proceeds of sale divided amongst a third class of persons only then ascertainable, and he gave his trustees a power of sale until the trust for sale arose. Immediately before the commencement of Law of Property Act 1925 (c 20), all the *cestuis que vie* were dead except one, and all the original participants in income were also dead except one, and the income for many years had been distributed amongst their respective estates or assigns: *Held* (1) the land was held in undivided shares within Law of Property Act 1925 Sch 1 Pt IV para 1.

The trustees having received, through their surveyor, a notice from the local authority that certain premises, forming part of the trust estate, were in a defective condition, carried out the necessary repairs, and temporarily paid the cost thereof out of the rents of the trust estate: (2) the trustees having asked the court for directions, the court was free to determine how the expenses ought to be borne; (3) the expenses should be borne by capital.

Re Robins, Holland v Gillam [1928] Ch 721; [1928] All ER 360; 97 LJ Ch 417; 139 LT 393

ANNOTATIONS As to (1) **Apld** Re House, Westminster Bank v Everett [1929] 2 Ch 166. As to (3) **Folld** Re Smith, Vincent v Smith [1930] 1 Ch 88

3639 General rule — Tenant for life not liable — Effect of Law of Property Act 1925 (c 20) s 28(2)

Law of Property Act 1925 (c 20) s 28(2) has not deprived the court of its inherent jurisdiction to decide, in a proper case, that the cost of certain repairs to settled land ought to be borne by capital.

The intestate died possessed of an estate which included freehold cottages in a bad state of repair. After the death the local authority served notices to carry out repairs, including re-roofing and pointing of chimney stacks. Some of these repairs, in view of the state of the property at the intestate's death, would have amounted to "permanent improvements", and this summons, issued upon the application of the administrator of the estate, raised questions as to the incidence of their cost: *Held* (1) the cost of repairs which are "improvements" within Settled Land Act 1925 (c 18) Sch 3 Pts I, II, may properly and *primâ facie* ought to be borne by capital; (2) works not being "improvements" within these parts of that Schedule may properly be so borne if they are shown to be works in the nature of permanent improvements; (3) ordinary current repairs and "casual repairs," *ie*, those carried out in the ordinary course, generally at the cost of the tenant for life, cannot be treated as being "permanent improvements"; (4) Law of Property Act 1925 (c 20) s 28(2)

does not compel Settled Land Act trustees to pay the costs of all repairs out of income, and does not deprive them of their discretion under Settled Land Act 1925 (c 18) s 102.

Re Smith, Vincent v Smith [1930] 1 Ch 88; 99 LJ Ch 27; 142 LT 178

3640 General rule — Tenant for life not liable — Effect of Law of Property Act 1925 (c 20) s 28(1)

The effect of above sub-section is (*a*) to give to trustees for sale powers of management of land, including the repair and rebuilding of houses, the cost of which, by virtue of subs (3) of Settled Land Act 1925 (c 18) s 102, is payable out of income, and (*b*) to give power to trustees to make improvements which, under Settled Land Act 1925 (c 18) s 84, coupled with the provisions of Sch 3 thereto, can be paid for out of capital. Therefore where trustees have a choice of powers under above sub-section, they should be guided in their choice by the equitable principles laid down and applied in *Re Hotchkys, Freke v Calmady* (no 3634 ante) and the language of the judgment in *Re Gray, Public Trustee v Woodhouse* (no 3637 ante) is not to be construed as an authority for the contrary proposition.

Re Conquest, Royal Exchange Assce v Conquest [1929] 2 Ch 353; 98 LJ Ch 441; 141 LT 685

3641 Application of rule — Liability of assignee of tenant for life

A and his wife being seised of a messuage for their joint lives and the life of the survivor, all the estate and interest of A became vested in defendant, who permitted waste during A's lifetime: *Held* the wife, who survived her husband, could not maintain an action on the case against defendant in respect of such waste.

Bacon v Smith (1841) 1 QB 345; Arn&H 280; 4 Per&Dav 651; 10 LJQB 119; 5 Jur 549; 113 ER 1164

3642 Application of rule — Estate purchased under power in settlement

Necessary repairs on real estate purchased in accordance with a power in a testamentary settlement of personalty, by the direction or with the consent of the tenant for life, to invest in (*inter alia*) land to be held as personal estate: *Held* chargeable to capital.

Re Freman, Dimond v Newburn [1898] 1 Ch 28; 77 LT 460; sub nom

Re Freeman, Dimond v Newburn (1898) 67 LJ Ch 14

3643 Exceptions to rule — Liability for repair of tenants' houses

A tenant for life, though without impeachment of waste, shall be obliged to keep tenants' houses in repair.

Parteriche v Powlet (1742) 2 Atk 383; 26 ER 632, LC

3644 Exceptions to rule — Covenant to repair by reversioner — Construed as covenant on behalf of tenant for life

The reversioner of leaseholds, with the privity of the tenant for life, renewed the lease in his own name, and covenanted to repair the premises: *Held* he was to be considered as having entered into the covenant on behalf of the tenant for life, and that the latter's estate was liable for dilapidations occasioned by his neglecting to repair.

Marsh v Wells (1824) 2 Sm&St 87; 2 LJOS Ch 191; 57 ER 278

ANNOTATION **Distd** Powys v Blagrave (1854) Kay 495

3645 Exceptions to rule — Tenant for life with power to direct trustees to repair

A married woman, tenant for life, without power of anticipation, had power to direct trustees to do repairs and charges the estate. She employed a builder to do repairs: *Held* he was entitled to be paid by having the amount raised by a charge on the estate.

Skinner v Todd (1881) 51 LJ Ch 198; 46 LT 131; 30 WR 267

3646 Exceptions to rule — Permanent structural repairs

Dangerous structure notices were served by a local authority on trustees in respect of houses forming part of a trust estate. The necessary work involved pulling down, rebuilding, and reinstatement of the houses: *Held* the work involved structural reconstruction of a permanent nature, and that therefore the cost was to be provided for out of capital.

Re Whitaker, Rooke v Whitaker [1929] 1 Ch 662; 98 LJ Ch 312; 141 LT 28

ANNOTATIONS **Apld** Re Conquest, Royal Exchange Assce v Conquest [1929] 2 Ch 353 **Consd** Re Smith, Vincent v Smith [1930] 1 Ch 88

3647 Exceptions to rule — Permanent structural repairs

Re Smith, Vincent v Smith no 3639 ante

3648 Exceptions to rule — Permanent structural repairs — Ancient buildings

Re Battle Abbey Settled Estate, Webster v Troubridge [1933] WN 215; sub nom

Re Webster, Webster v Troubridge (1933) 176 LT Jo 143

3649 Duty of trustees — To prevent premises falling into disrepair — Distribution of burden equitably between tenant for life and remainderman

Re Hotchkys, Freke v Calmady no 3634 ante

3650 Action for damage for waste — Nature of action

The limitations imposed by CLP Act 1833 (c 42) s 2 (repealed) were not applicable to an action by remaindermen against the executors of a deceased tenant for life in respect of damage to the estate during his lifetime by reason of his failure to fulfil his obligation to repair. Such an action is not based on tort, but on the equitable principle that where a person accepts a benefit under a will on condition that he shall discharge a certain liability, he takes the benefit *cum onere*, and a court of equity would not apply to the equitable remedy the limitation contained in CLP Act 1833 (c 42) s 2 (repealed), as to the time within which the action must be brought.

Jay v Jay [1924] 1 KB 826; 93 LJKB 280; 130 LT 667, DC

ANNOTATION **Apld** Re Field, Sanderson v Young [1825] 1 Ch 636

3651 Action for damage for waste — Limitation of time — Whether applicable

Jay v Jay no 3650 ante

Scottish, Irish and Commonwealth Cases

3652 General rule — Tenant for life not liable

Zimmerman v O'Reilly (1868) 14 Gr 646 (CAN)

3653 General rule — Tenant for life not liable

The tenant for life of settled land is not answerable for permissive waste.

Re Hudson, Cooper v Hudson (1906) 25 NZLR 626 (NZ)

3654 Duty of trustees — To prevent premises falling into disrepair

Where property is held by a trustee in trust for a life tenant and remaindermen, and the trustee has active duties to perform, the trustee may make such repairs as are necessary to keep the property in a good state of preservation for the remainderman.

Roberts v Roberts (1915) 16 SR NSW 6; 32 NSWWN 161 (AUS)

3655 Duty of trustees — To prevent premises falling into disrepair — Ordinary repairs payable out of income by tenant for life

Re Dwyer [1930] 2 DLR 897 (CAN)

3656 Extent of rule — Corpus liable only for repairs necessary to keep estate in saleable condition

Wilson v Whelpley (1929) 1 MPR 196 (CAN)

2 Direction by settlor to repair

3657 Tenant for life liable for repairs

Caldwall v Baylis (1817) 2 Mer 408; 35 ER 996

ANNOTATION **Distd** Powys v Blagrave (1854) 4 De GM&G 448

3658 Tenant for life liable for repairs

A devise of premises for life provided that the tenant for life should keep the premises in repair. The tenant for life entered upon and enjoyed the premises during her lifetime, but left them at her death out of repair. The remainderman in fee brought an action against the executor of the tenant for life in respect of the non-repair of the premises within the period of limitation prescribed by CLP Act 1833 (c 42) s 2 (repealed), which gives a right of action against the executor of a person deceased in respect of wrongs committed by testator to another in respect of his property: *Held* an action of tort in respect of the permissive waste by non-repair of the premises would have lain at common law against the tenant for life in her lifetime, and lay under CLP Act 1833 (c 42), against her executor after her death.

Woodhouse v Walker (1880) 5 QBD 404; 49 LJQB 609; 42 LT 770; 44 JP 666; 28 WR 765, DC

ANNOTATIONS **Folld** Re Williames, Andrew v Williames (1884) 52 LT 41 **Apld** Batthyany v Walford (1886) 33 Ch D 624; Re Bradbrook, Lock v Willis (1887) 56 LT 106 **Expld** Davies v Davies (1888) 38 Ch D 499 **Apld** Jenks v Clifden [1897] 1 Ch 694 **Consd** Blackmore v White [1899] 1 QB 293; Jay v Jay [1924] 1 KB 826

3659 Tenant for life liable for repairs — Destruction of premises by fire

A, being devisee for life of premises, with a condition against committing any manner of waste and for keeping same in good and tenantable repair, became lunatic, and the premises were subsequently destroyed by accidental fire. A petition was then presented by the committee of the person who was also remainderman, praying a declaration that the premises ought to be rebuilt at the expense of the lunatic's estate, and a reference as to the amount of such expense, and out of what fund it ought to be defayed. The Lord Chancellor made an order for the reference, holding that the words of the will created an obligation upon the tenant for life to rebuild the premises, and that the question of such liability was rightly brought before the court on the petition.

Re Skingley (1851) 3 Mac&G 221; 20 LJ Ch 142; 16 LTOS 405; 15 Jur 958; 42 ER 246, LC

ANNOTATIONS **Distd** Powys v Blagrave (1854) 4 De GM&G 448 **Folld** Gregg v Coates, Hodgson v Coates (1856) 23 Beav 33 **Distd** Micklethwait v Micklethwait (1857) 1 De G&J 504

3660 Tenant for life liable for repairs — Destruction of premises by fire

Devise to A and others on trust to apply the rents in payment of certain debts, then to apply them for the benefit of A for life with remainders over, with a direction that A should be allowed to occupy the premises, keeping them in repair, and paying £100

per annum, or such other rent as the trustees should think reasonable. A was the only acting trustee. He continued to occupy the premises after testator's death. They were afterwards burnt down: *Held* A was bound to reinstate the premises, and to pay £100 a year during the occupation after the fire.
Gregg v Coates, Hodgson v Coates (1856) 23 Beav 33; 2 Jur NS 964; 4 WR 735; 53 ER 13

ANNOTATIONS **Apld** Re Willames, Andrew v Willames (1885) 54 LT 105; Re Bradbrook, Lock v Willis (1887) 56 LT 106

3661 Tenant for life liable for repairs — Repairs payable out of income — Ordinary repairs only
Testator gave his freehold, copyhold and leasehold estates, and all his stocks, shares and personal estate, to trustees, in trust to receive the "rents," issues and profits, and thereout to keep the houses, etc in good, substantial and tenantable repair, and renew his leaseholds, etc, and then to pay "the net income arising from the residuary real and personal estate" to his wife for life: *Held* (1) the wife was entitled to the enjoyment *in specie*; (2) all ordinary repairs were to be paid out of the income, but not such extraordinary repairs as would amount to rebuilding the houses.
Crowe v Crisford (1853) 17 Beav 507; 2 WR 45; 51 ER 1130

ANNOTATIONS As to (1) **Consd** Re Game, Game v Young [1897] 1 Ch 881 **Overd** Re Wareham, Wareham v Brewin [1912] 2 Ch 312

3662 Tenant for life liable for repairs — Repairs payable out of income
Lands were devised in 1861 to trustees during the lives of certain tenants for life, in trust to receive the rents and manage the estate with the powers of absolute owners. An annuity was directed to be paid to the tenant for life in possession out of the rents, and the surplus rents were to be laid out in the purchase of real estates or accumulated for a period of twenty-one years from testator's death, and the income of the accumulations paid to the tenant for life. From the expiration of that period the whole of the surplus rents yearly accruing to be paid to the tenant for life in possession, and also the income of the accumulated surplus. The period of twenty-one years from testator's death expired in January 1885. The trustees named in the will disclaimed, and the property had since been managed by a receiver appointed by the court. The surplus rents accumulated during the twenty-one years amounted to £37,000. Repairs and improvements amounting to between £4,000 and £5,000 were required to be made on the settled property: *Held* such of the proposed works as were in the nature of improvements within the description contained in Settled Land Act 1882 (c 38) s 25 (repealed), should be provided for out of the £37,000, which was capital money within the Act; and those which were merely repairs must be paid for out of the income of the property.
Clarke v Thornton (1887) 35 Ch D 307; 56 LJ Ch 302; 56 LT 294; 35 WR 603; 3 TLR 299

ANNOTATIONS **Apld** Re Stamford's Estate (1887) 56 LT 484 **Folld** Re Stamford's SE (1889) 43 Ch D 84 **Distd** Cardigan v Curzon-Howe (1893) 9 TLR 244 **Apld** Re Gee, Pearson Gee v Pearson (1895) 64 LJ Ch 606 **Distd** Re Partington, Reigh v Kane [1902] 1 Ch 711 **Expld** Re Keck's Settlmt [1904] 2 Ch 22 **Folld** Re Stamford & Warrington, Payne v Grey [1916] 1 Ch 404

3663 Tenant for life liable for repairs — Repairs payable out of income
Testator gave all the residue of his leasehold and other property to trustees upon trust to receive the rents and profits thereof, and, in the first place to pay thereout all the costs, charges, and expenses of the trust, and out of the balance thereafter remaining to pay certain legacies and annuities which latter were to abate *pro rata* in case of the balance being insufficient to pay all in full. The trustee, after notice from the lessors, repaired part of the leasehold estate at an expense greater than the value of the remainder of the term of the lease: *Held* the cost of these repairs was payable out of income, and not out of *corpus*.
Debney v Eckett (1894) 71 LT 659; 43 WR 54; 39 Sol Jo 44; 13 R 207

3664 Tenant for life liable for repairs — Repairs payable out of special fund
Cardigan (Countess) v Curzon-Howe (1893) 9 TLR 244

ANNOTATION **Folld** Re Partington, Reigh v Kane [1902] 1 Ch 711

3665 Estate of deceased tenant for life liable
Woodhouse v Walker no 3658 ante

3666 Estate of deceased tenant for life liable
Testator gave his real estate to trustees upon trust for his widow for life, with remainder over, in events which happened, to A for life, and in events which happened to B for life, with remainders to his children, if any, in tail, with remainders over. The will contained a direction that each tenant for life or in tail of any of the hereditaments should, during her or his estate keep the buildings thereon in substantial repair; and if any such person should neglect to effect such repairs within six months after being thereunto requested by the trustees, the trustees should be at liberty to effect such repairs. The widow of testator was in possession of the hereditaments until her death in June 1883. Her will was proved in February 1884. She had omitted to repair the buildings. More than six months after her death, but within six months

after probate of her will, a claim was carried in against her estate, in an administration action, in respect of the omission to repair, claimants being the trustees of the will and the then equitable tenant for life: *Held* the estate of deceased tenant for life was liable for such omission to repair.

Re Williames, Andrew v Williames (1885) 54 LT 105, CA

ANNOTATIONS **Consd** Blackburn v White [1899] 1 QB 293; Jay v Jay [1924] 1 KB 826

3667 Estate of deceased tenant for life liable

Testator devised to his wife for life two freehold houses with the buildings, land, and appurtenances thereto belonging, "she keeping same in good and tenantable repair." Testator directed for property to be sold by his trustees after the death of his wife, the proceeds to be held upon the trusts mentioned in his will. After the death of testator his widow entered into possession of the property and continued therein until the date of her own death. It was then discovered that the property was in a dilapidated condition, and particularly the outbuildings adjoining one of the houses, consisting of greenhouses and conservatories formerly used in the business of a fruit grower, in whose possession such house was before testator purchased it. An originating summons was accordingly taken out by the trustees of the will, asking that what sum the representative of testator's widow was liable to pay by reason of the property not having been kept by her in good and tenantable repair might be determined. Evidence was adduced to show that the greenhouses were wholly neglected and in complete disrepair at the time testator purchased; that he never intended to put same into repair, but had thought of having them pulled down. It was, therefore, contended that the estate of testator's widow was not liable in respect of the repairs required to such greenhouses: *Held* the fact that testator did not himself keep the greenhouses in good and tenantable repair could not be regarded as an excuse for his widow not doing so, having regard to the express direction contained in the will; and her estate was liable for the amount of the repairs required.

Re Bradbrook, Lock v Willis (1887) 56 LT 106

3668 Extent of liability — Habitable repair

A direction to keep buildings in good repair means, not the state of repair in which they were at testator's death, but in habitable repair: "farming buildings" includes "farmhouses."

Cooke v Cholmondeley (1858) 4 Drew 326; 27 LJ Ch 826; 32 LTOS 59; 4 Jur NS 827; 6 WR 862; 62 ER 126

3669 Extent of liability — Tenantable repair — Premises not in such repair at commencement of settlement — Settlor tenant for life

By a settlement by way, of compromise of pending question in March 1912, defendant S conveyed a residential country house and estate, farm buildings, and stables to trustees upon trust for defendant for life, and after his decease for plaintiff E in fee simple, and it was agreed and declared that S should keep the settled mesuages and buildings in good and tenantable repair, and would keep the grounds in a proper state and insure the messuages, buildings, and furniture against loss or damage by fire. Plaintiff and trustees of the settlement claimed performance of the covenants. Defendant alleged that the settled houses and buildings were old, and that he had fulfilled his covenants. A reference for inquiry and report on the matters in dispute had been agreed upon: *Held* the reference ought to be framed on the footing that the tenant for life's obligation to keep in good and tenantable repair rendered him liable to put the premises into such repair although they were not in good and tenantable repair when he took them.

Evans v Shotton (1918) 87 LJ Ch 527; 119 LT 233; 62 Sol Jo 603

3670 Extent of liability — Specific sum appropriated — No liability beyond such sum

Re Jervis, Turner v Jervis (1919) 146 LT Jo 215

3 Settled leaseholds

3671 Whether tenant for life liable

A tenant for life of leaseholds is not liable to the remainderman for permissive waste.

The estate of a tenant for life of leaseholds held not liable to the remainderman for repairs made necessary by the non-fulfilment, during the life tenancy, of covenants to repair.

Re Parry & Hopkin [1900] 1 Ch 160; 69 LJ Ch 190; 81 LT 807; 64 JP 137; 48 WR 345

3672 Whether tenant for life liable — Lease containing covenant to repair

Testator gave leaseholds, some of which were held on short terms, to two trustees, one of whom was his wife, upon trust for her for life, and after her death upon trust that the whole should be sold, and the proceeds divided between four persons, and he authorised his trustees, provided they should deem it advisable to sell his short leaseholds and invest the proceeds and allow his wife to receive the income during her life. The leaseholds were in a bad state of repair at the death of testator; the widow kept them up in the same state of repair, but declined to do more than this. The remaindermen applied for an order to oblige the tenant for life to maintain the

leaseholds in such a state of repair as to satisfy the covenants in the leases so as to avoid a forfeiture, or else to concur in selling the short leaseholds: *Held* there was no obligation on the tenant for life to put the premises in such a state of repair as to comply with the terms of the leases.

Re Courtier, Coles v Courtier, Courtier v Coles (1886) 34 Ch D 136; 56 LJ Ch 350; 55 LT 574; 51 JP 117; 35 WR 85, CA

ANNOTATIONS **Follď** Re Baring, Jeune v Baring [1893] 1 Ch 61 **Consd** Re Redding, Thompson v Redding [1897] 1 Ch 876 **Follď** Re Tomlinson, Tomlinson v Andrew [1898] 1 Ch 232 **Consd** Re Betty, Betty v A-G [1899] 1 Ch 821 **NF** Re Gjers, Cooper v Gjers [1899] 2 Ch 54

3673 Whether tenant for life liable — Lease containing covenant to repair

Testator, being possessed of a leasehold house held by him for a term of sixty-one years, renewable every fourteen years on fines for renewal, and under covenants to pay the rent, repairs and insure, bequeathed the house to trustees, in trust for his widow for life, with remainder in trust for his son for life, with remainders over; and he bequeathed his residuary estate to his trustees upon trust out of the income to pay all the costs, charges, and expenses of carrying into execution the trusts of his will, and, subject thereto, to hold such residuary estate upon trusts for his children in settled shares: *Held* neither tenant for life was under any obligation to pay the rent, repair, or insure, or to pay the fines or expenses of renewal; the rent and the expenses of repair and insurance, during the respective lives of the tenants for life, were payable out of the income of the residuary estate; and the fines and expenses of renewal were distributable among the beneficiaries of the house according to their enjoyment, such enjoyment to be ascertained by actuarial valuation.

Re Baring, Jeune v Baring [1893] 1 Ch 61; 62 LJ Ch 50; 67 LT 702; 41 WR 87; 9 TLR 7; 3 R 37

ANNOTATIONS **Apld** Debney v Eckett (1894) 71 LT 659 **Consd** Re Redding, Thompson v Redding [1897] 1 Ch 876; Re Tomlinson, Tomlinson v Andrew [1898] 1 Ch 232; Re Gjers, Cooper v Gjers [1899] 2 Ch 54

3674 Whether tenant for life liable — Lease containing covenant to repair

Testator, who died possessed of a leasehold house held by him on a repairing lease bequeathed it directly, without the intervention of trustees, to his niece for life, and after her death to other person absolutely, and appointed executors: *Held* the niece, the tenant for life, was not bound to perform any of the covenants in the lease.

Re Tomlinson, Tomlinson v Andrew [1898] 1 Ch 232; 67 LJ Ch 97; 78 LT 12; 46 WR 299; 42 Sol Jo 114

ANNOTATIONS **Consd** Re Betty, Betty v A-G [1899] 1 Ch 821 **NF** Re Gjers, Cooper v Gjers [1899] 2 Ch 54

3675 Whether tenant for life liable — Lease containing covenant to repair

Testator directed his executors and trustees to arrange his affairs and manage his estate and to retain certain leaseholds and let them on lease at fair rentals and pay the income derived therefrom to his wife for life for the benefit of herself and her children and after her decease to divide the whole of his estate equally between his children: *Held* on the construction of the will, the "income derived" from the leaseholds meant the net income *ie*, the amount of the rents after deducting all property outgoings, and consequently ground rents, current repairs and other outgoings in respect of the leaseholds must be borne by the tenant for life.

Re Redding, Thompson v Redding [1897] 1 Ch 876; 66 LJ Ch 460; 76 LT 339; sub nom

Re Ridding, Thompson v Ridding (1897) 45 WR 457; 41 Sol Jo 405

ANNOTATIONS **Consd** Re Tomlinson, Tomlinson v Andrew [1898] 1 Ch 232; Re Betty, Betty v A-G [1899] 1 Ch 821

3676 Whether tenant for life liable — Lease containing covenant to repair

Testator bequeathed a leasehold house with the furniture and household effects to trustees upon trust for his adopted daughter for life, and after her death upon trust for sale and to hold the proceeds as part of his residuary estate which he gave upon trust for a charity to bc controlled by a trustee, who declined to act. The daughter alone proved the will, the other executors renouncing probate, and took out an originating summons for the administration of testator's estate, defendant being the Attorney-General. The lease under which the house was held was for a long term at an annual ground rent, and contained a covenant to pay rent, and to repair, and insure the property. Upon the further consideration of the action the question was raised whether the daughter, or testator's estate, was liable for the ground rent, cost of repairs, and insurance premiums during her life: *Held* in the absence of a provision to the contrary in the will, the daughter must take the estate *cum onere*, and was therefore bound to pay the rent and perform the tenant's obligations to repair and insure during her tenancy; but testator's estate was liable in respect of any breaches of covenant by him.

Re Betty, Betty v A-G [1899] 1 Ch 821; 68 LJ Ch 435; 80 LT 675

ANNOTATION **Follď** Re Gjers, Cooper v Gjers [1899] 2 Ch 54

3677 Whether tenant for life liable — Lease containing covenant to repair

A tenant for life of leaseholds, specifically bequeathed by the will of testator who was assignee of the lease under which the property is held, is bound, during the continuance of her interest, as between herself and testator's estate to pay the rent reserved by the lease, and perform the covenants and conditions contained in it.

Re Gjers, Cooper v Gjers [1899] 2 Ch 54; 68 LJ Ch 442; 80 LT 689; 47 WR 535; 43 Sol Jo 497

3678 Whether tenant for life liable — Liability for repairs necessary at commencement of interest

Testator gave all his freehold, copyhold, and leasehold hereditaments to one for life, with remainder over in fee; and he gave all the residue of his personal estate upon trust to pay debts, etc, and to keep his leasehold property in repair, and renew the leaseholds at the accustomed times, and subject thereto to pay to or permit the tenant for life to receive the annual proceeds, etc. Testator at the time of his death was under liability under covenants in leases to repair, and a sum of £91 6*s* 8*d* was found due from him in respect of dilapidations: *Held* the tenant for life was not bound to pay that sum out of her income, but it was payable out of the *corpus* of the residuary personal estate.

Pinfold v Shillingford (1877) 46 LJ Ch 491; 25 WR 425

3679 Whether tenant for life liable — Liability for repairs necessary at commencement of interest

Re Betty, Betty v A-G no 3676 ante

3680 Whether tenant for life liable — To make good testator's deficiencies

Re Courtier, Coles v Courtier, Courtier v Coles no 3672 ante

3681 Whether tenant for life liable — To make good testator's deficiencies

Re Betty, Betty v A-G no 3676 ante

3682 Whether tenant for life liable — To make good testator's deficiencies

Testator by his will declared that his trustees might permit his widow to reside in his leasehold house as long as she might desire, "she paying the rent and all rates, taxes, outgoing and repairs in connection therewith, and my trustees shall not be concerned to see to the upkeep of, or be responsible for, the said premises in any way during such time as my wife shall reside in the said premises": *Held* the widow was not liable to pay for dilapidations existing prior to testator's death.

Re Smith, Bull v Smith (1901) 84 LT 835; 17 TLR 588; 45 Sol Jo 596

3683 Whether tenant for life liable — To make good testator's deficiencies

The tenant for life is only liable to keep leasehold properties in such a state of repair as they were in when she became tenant for life on the death of the settlor, and accordingly the trustees of the property should at the date of the death of the settlor, do all repairs necessary to put the property in a proper state of repair to satisfy the covenants in the leases and pay the same out of the *corpus* of the estate. Repairs to freeholds must be borne by the *corpus*.

Re Sutton, Sutton v Sutton (1912) 56 Sol Jo 650

3684 Whether tenant for life liable — Tenant only entitled to improved ground rent

There is no distinction in the position of an equitable tenant for life of leaseholds where the property is sub-let at a rack rent, and where it is sub-let at an improved ground rent.

Re Copland's Settlement, Johns v Carden [1900] 1 Ch 326; 69 LJ Ch 240; 82 LT 194

3685 Whether tenant for life liable — Failure to keep in repair — Appointment of receiver of rents — To enforce repair

When leasehold houses are vested in trustees on behalf of a tenant for life and remaindermen, it is the duty of the trustees to keep the property free from the risk of forfeiture by a breach of the covenants of the lease, and they are entitled to have the rents applied in keeping the houses in a proper state of repair. The trustees are not bound to be content with the setting apart of a sum of money in the joint names of themselves and the tenant for life as an indemnity against the consequences of a breach of the covenants of the lease, but are entitled to require the covenants to be specifically performed. When a tenant for life of leasehold houses is allowed by the trustees to receive the rents and the houses are not kept in a proper state of repair according to the covenants of the lease the court will, at the instance of one of the trustees, appoint a receiver of the rents for the purpose of enforcing the proper repair, of the houses.

Re Fowler, Fowler v Odell (1881) 16 Ch D 723; 44 LT 99; 29 WR 891

ANNOTATIONS **Distd** Re Courtier, Coles v Courtier, Courtier v Coles (1886) 34 Ch D 136 **Consd** Re Baring, Jeune v Baring [1893] 1 Ch 61

3686 Liability of estate of tenant for life

Re Parry & Hopkins no 3671 ante

3687 Tenant for life also trustee — Limitation of liability — To period of enjoyment

By deed poll, in 1878, R, in exercise of a power conferred upon her by the will of her father JF, deceased, appointed that the trustees of his will should, after her death, stand possessed of certain leasehold houses upon trust, after payment of the rents reserved by the leases under which the same were respectively held and costs of insurance and the performance of the covenants, which included covenants to repair, in the said leases, to pay to Y or otherwise permit her to receive the rents and profits of the leasehold houses during her life, and, after her decease, the same were directed to be held upon trust, in the event which happened, for Y's daughters in equal shares.

R died on 15 August 1882, and after the death, in 1909, of the last surviving trustee of the will, whose personal representatives declined to intermeddle in the trusts thereof or to appoint new trustees, Y entered into the receipt of the rents of the leasehold houses and continued therein down to her death in 1922. In an action by the daughters of Y against her personal representatives for damages out of her estate by reason of Y's failure, while tenant for life in possession of the leasehold houses, to keep the same in repair in accordance with the covenants in the leases: *Held* upon entering into the receipt of the rents of the leasehold houses under the appointment in her favour with knowledge of the primary trust for the application of the same, Y assumed the duties of the trustees and became herself directly liable to perform that trust as a condition precedent to her taking the benefit of the appointment; but her liability must be limited to the period during which she was in actual receipt thereof namely, from 27 March 1909, to her death in 1922, and also to the amount of the rents which she received during that period an inquiry being directed as to the amount of damages plaintiffs were entitled to recover.

Re Field, Sanderson v Young [1925] Ch 636; [1925] All ER 712; 94 LJ Ch 322; 133 LT 463; 69 Sol Jo 661

3688 Duty of trustees — To keep property in repair

Re Fowler, Fowler v Odell no 3685 ante

Scottish, Irish and Commonwealth Cases

3689 Whether tenant for life liable — Lease containing covenant to repair

As between the equitable tenant for life of leaseholds and the remainderman, the tenant for life is liable for breaches of covenant to repair committed during the existence of the life estate, and the liability for such breaches cannot be thrown by the tenant for life upon the *corpus* of the estate.

Re Waldron & Bogue's Contract [1904] 1 IR 240 (IR)

3690 Whether tenant for life liable — To make good testator's deficiencies

As between tenant for life of a leasehold, specifically bequeathed, and the general assets of a testator there is no equity of the latter to throw on the former the obligation of putting into repair the leasehold premises which were dilapidated at the time of the testator's death.

Brereton v Day [1895] 1 IR 518 (IR)

v FIXTURES

1 General principles

LAW See Halsbury's Laws (4th edn) vol 42 para 1003

CROSS REFERENCE See LANDLORD & TENANT vol 31(1) (2nd reissue) no 2769 et seq

3691 Annexation to freehold — Relaxation of common law rule

(1) A fire engine set up for the benefit of a colliery by a tenant for life, shall be considered as part of his personal estate, and go to the executor, for the increase of assets in favour of creditors.

(2) The old cases go a great way upon the annexation to the freehold; but courts of late have relaxed this strict construction of law, to encourage tenants for life to do what is advantageous to the estate during their term.

(3) To remove wainscot fixed only by screws, and marble chimney pieces is not waste.

Lawton v Lawton (1743) 3 Atk 13; 26 ER 811, LC

ANNOTATIONS As to (1) **Apld** Dudley v Warde (1751) Amb 113 **Consd** Elwes v Maw (1802) 3 East 38 **Apld** Trappes v Harter (1833) 2 Cr&M 153. As to (3) **Consd** Re De Falbe, Ward v Taylor [1901] 1 Ch 523

3692 Annexation to freehold — Relaxation of common law rule

Questions respecting the right to what are ordinarily called fixtures, principally arise between three classes of persons. First between different descriptions of representatives of the same owner of the inheritance; *viz*, between his heir and executor. In this first case, *ie*, as the rule obtains with the most rigour in favour of the inheritance, and against the right to disannex therefrom, and to consider as a personal chattel, anything which has been affixed thereto. Secondly, between the executors of tenant for life or in tail, and the remainderman or reversioner; in which case the right to fixtures is considered more favourably for executors than in the preceding case between heir and executor (*Lord Ellenborough CJ*).

Elwes v Maw (1802) 3 East 38; [1775–1802] All ER 320; 102 ER 510

ANNOTATIONS **Consd** Buckland v Butterfield (1820) 2 Brod&Bing 54; Re Gye & Hughes, Ex p Reynal (1841) 2 Mont D&De G 443

3693 Annexation to freehold — Relaxation of common law rule

As between landlord and tenant, the claim of the tenant to remove fixtures set up by himself is the most favoured; and between tenant for life and remainderman, the claim of the tenant for life to remove fixtures set up by himself is less favoured (*Chitty J*).

Norton v Dashwood [1896] 2 Ch 497; 65 LJ Ch 737; 75 LT 205; 44 WR 680; 12 TLR 512; 40 Sol Jo 635

ANNOTATION **Distd** Re De Falbe, Ward v Taylor [1901] 1 Ch 523

3694 Annexation to freehold — Question of fact in each case

Bulkeley v Lyne Stephens, Re Lyne Stephens, Lyne Stephens v Lubbock (1895) 11 TLR 564

3695 Annexation to freehold — Question of fact in each case

Whether a chattel is so annexed to the freehold as to be intended as an improvement to it, and to pass with it, or is annexed only for the purpose of temporary use or ornament, so as to be removable, is a question to be decided upon the facts of the case.

Valuable tapestries belonging to a tenant for life were fastened to the walls of the drawingroom in a mansion house by fixing small strips of wood by means of nails and screws to the wood with which the walls were lined; canvas was then stretched over the strips of wood and nailed to them, and the tapestries were fastened to the canvas by very small tacks. Mouldings were fixed round the strip of wood by thin nails and screws, some of which penetrated the face of the wall. The tapestries were an essential feature of the general scheme of decoration of the room: *Held* the tapestries were fixed for the purposes of ornament in the only way in which it was possible to use and enjoy them, and did not pass to the remainderman on the death of the tenant for life, but were removable by her executors.

Leigh v Taylor [1902] AC 157; 71 LJ Ch 272; 86 LT 239; 50 WR 623; 18 TLR 293; 46 Sol Jo 264, HL; affg SC sub nom

Re De Falbe, Ward v Taylor [1901] 1 Ch 523, CA

ANNOTATIONS **Apld** Re Hulse, Beattie v Hulse [1905] 1 Ch 406 **Distd** Re Whaley, Whaley v Roehrich [1908] 1 Ch 615 **Consd** Horwich v Symond (1914) 110 LT 1016 **Apld** Spyer v Phillipson [1931] Ch 183; (dictum Rigby LJ) Mancetter Developments Ltd v Garmanson Ltd [1986] 1 All ER 449

3696 Annexation to freehold — Intention of person by whom chattels attached

A tenant for life of settled estates granted a lease or twenty-one years of a steam mill and machinery. The lessee covenanted that he would at the end of the tenancy sell to the lessor all machinery then on the premises other than the demised machinery; and the lessor covenanted that he would pay for it. The tenant brought additional machinery into and affixed it to the mill. On the expiration of the tenancy the tenant for life bought this machinery under the provisions of the lease. He died, and his executrix claimed the machinery thus bought: *Held* (1) as between tenant for life and remainderman, chattels affixed to the soil by the tenant for life for purposes of trade did not become part of the freehold, and might be removed by him; (2) the question must be determined by the intention of the person by whom the chattels were attached; and in the absence of evidence to show that the tenant for life intended to make a present to the remainderman, his executrix was entitled to the machinery.

Re Hulse, Beattie v Hulse [1905] 1 Ch 406; 74 LJ Ch 246; 92 LT 232

3697 Essential part of house — Or architectural design

Testator, who was tenant for life of settled estates, on which he had erected, fitted up, and furnished a mansion house, an old one having fallen into decay, bequeathed all the tapestry, marbles, statues, pictures with their frames and glasses, which should be in or about the house at the time of his death, and of which he had power to dispose, to be enjoyed as heirlooms by the persons who, under the limitations in his will, would be entitled to his own estates thereby devised in strict settlement, being the same as those entitled to the settled estates, subject to a condition, with a shifting clause in case the condition were not fulfilled. After testator's death, A became tenant for life of both the settled and devised estates and on his death the settled estates devolved on B; but, as the condition was not fulfilled, C became entitled to the devised estates and to the heirlooms under the shifting clause in testator's will. The question arose, as between B and C which of the articles passed under the will: *Held* (1) tapestry, pictures in panels, frames filled with satin and attached to the walls, and also statues, figures, vases and stone garden seats, purchased and placed by the testator, which were essentially part of the house, or of the architectural design of the building or grounds, however fastened, were fixtures, and could not be removed; but glasses and pictures not in panels, not being part of the building passed under testator's will; (2) articles

purchased by testator but fixed by A after his death, were not fixtures, and passed under the will to C.
D'Eyncourt v Gregory (1866) LR 3 Eq 382; 36 LJ Ch 107; 15 WR 186

ANNOTATIONS As to (1) **Consd** Bulkeley v Lyne Stephens, Re Lyne Stephens, Lyne Stephens v Lubbock (1895) 11 TLR 564 **Apld** Norton v Dashwood [1896] 2 Ch 497 **Distd** Hill v Bullock [1897] 2 Ch 482 **Expld** Re De Falbe, Ward v Taylor [1901] 1 Ch 523 **Consd** Monti v Barnes [1901] 1 KB 205

3698 Things forming part of inheritance
Whatever once becomes part of the inheritance cannot be severed by a limited owner whether he be owner for life or for years without the commission of . . . waste (*Lord Cairns C*).
Bain v Brand (1876) 1 App Cas 762, HL

ANNOTATION **Apld** Re Chesterfield's SE [1911] 1 Ch 237

3699 Things forming part of inheritance
A tenant for life of real estate, who was entitled to hold and enjoy the working stock and plant of certain iron mines and collieries situate on the estate, and carry on such from mines and collieries, erected on the estate, machinery, etc, blast furnaces, and a railway of considerable length connecting the mines and collieries. On his death the question arose whether, in an account between his executors and the remainderman, the former should be credited with the value of the machinery, etc, or whether the same passed to the remainderman as things annexed to the soil: *Held* the machinery annexed to the soil for the purpose of rendering the minerals merchantable, if such machinery was capable of being removed therefrom by disturbing the soil without destroying the land, was machinery which could not be said to be so attached to the land as to become part of it and belong to the owner of the land, but was to be deemed to be trade fixtures which passed to the executor as personalty.
Ward v Dudley (Countess) (1887) 57 LT 20; 3 TLR 576

3700 Things forming part of inheritance
The executor of a deceased owner in fee has no right to remove from the inheritance more than that which really and properly considered is never fixed to it in a definite way.

By the will of the ninth Earl of C the HL estates of which he was the absolute owner, were settled to certain uses in strict settlement under which the present earl was tenant for life with remainder to his issue in tail made, with divers remainders over. Testator also bequeathed certain chattels to go as heirlooms, and gave to the present earl absolutely all his plate, except such as he had before given to his wife, books, pictures, and other works of art or curiosity, except the heirlooms, china, glass, furniture, carriages, horses, wines, and, generally, all goods, effects, and live and dead stock which at his decease might be in or about his mansion house of HL. At the death of testator there were in the mansion house certain ornamental wood carvings by Grinling Gibbons. These carvings were affixed to the walls of various rooms therein by means of nails or pegs driven through them into stiles built into the walls. Testator died in 1887. In 1909 the present earl sold portion of the settled estates including the mansion house, expressly reserving the carvings. He subsequently removed the carvings from the mansion house and sold a portion of them, claiming to be absolutely entitled to the proceeds of sale thereof. Upon the application by summons of the trustees: *Held* the carvings did not pass by the bequest of chattels, but, being fixed in a definite way to the inheritance so as to form part of the house, the proceeds of sale of such as had been sold must be treated as capital money subject to the trusts of the settlement.
Re Chesterfield's (Lord) Settled Estates [1911] 1 Ch 237; 80 LJ Ch 186; 103 LT 823

ANNOTATIONS **Consd** Re Scott, Scott v Scott (1914) 30 TLR 345 **Apld** Corthorn Land & Timber Co Ltd v Minister of Housing & Local Govt (1965) 63 LGR 490

3701 Articles fixed after death of tenant for life
D'Eyncourt v Gregory no 3697 ante

2 Particular instances

LAW See Halsbury's Laws (4th edn) vol 42 para 1003

3702 Blast furnaces
Ward v Dudley (Countess) no 3699 ante

3703 Carvings
Re Chesterfield's (Lord) Settled Estates no 3700 ante

3704 Chimney piece — Marble
Lawton v Lawton no 3691 ante

3705 Garden seats — Stone
D'Eyncourt v Gregory no 3697 ante

3706 Machinery — Colliery
Lawton v Lawton no 3691 ante

3707 Machinery — Colliery
Tenant for life, or in tail, erects a fire engine to work a colliery. It shall on his death be considered as part of his personal estate, and not go with the estate to remainderman.
Dudley (Lord) v Warde (Lord) (1751) Amb 113; 27 ER 73, LC

ANNOTATIONS **Consd** Elwes v Maw (1802) 3 East 38; Hubbard v Bagshaw (1831) 4 Sim 326; Re De Falbe, Ward

v Taylor [1901] 1 Ch 523; Re Hulse, Beattie v Hulse [1905] 1 Ch 406

3708 Machinery — Mill
Re Hulse, Beattie v Hulse no 3696 ante

3709 Machinery — Mine
Ward v Dudley (Countess) no 3699 ante

3710 Pictures
D'Eyncourt v Gregory no 3697 ante

3711 Statues
D'Eyncourt v Gregory no 3697 ante

3712 Statues
Bulkeley v Lyne Stephens, Re Lyne Stephens, Lyne Stephens v Lubbock (1895) 11 TLR 564

ANNOTATION **Distd** Hill v Bullock [1897] 2 Ch 55

3713 Stuffed-bird collection
A bird gallery in a settled mansion house contained a valuable collection, commenced over sixty years ago, of stuffed birds, which were attached to movable wooden trays placed in iron glass-fronted cases affixed to the walls of the gallery. In an action between the present tenant for life of the mansion house and the trustee in bankruptcy of the late tenant for life: *Held* the contents of the cases were not to be treated as annexed to the freehold, but were movable personal chattels, and as such belonged to the trustees of the late tenant for life.
Hill (Viscount) v Bullock [1897] 2 Ch 482; 66 LJ Ch 705; 77 LT 240; 46 WR 84; 13 TLR 554; 41 Sol Jo 696, CA

3714 Tapestry
D'Eyncourt v Gregory no 3697 ante

3715 Tapestry
Leigh v Taylor no 3695 ante

3716 Vases
D'Eyncourt v Gregory no 3697 ante

3717 Vases
Bulkeley v Lyne Stephens, Re Lyne Stephens, Lyne Stephens v Lubbock no 3712 ante

3718 Wainscot
Lawton v Lawton no 3691 ante

vi TIMBER

CROSS REFERENCES See AGRICULTURE vol 2 (2nd reissue) no 1193 et seq (timber generally), nos 618 et seq, 852 et seq (waste as regards trees)

vii MINES

CROSS REFERENCES See MINES vol 34 (reissue) nos 1983 et seq, 1346 et seq

3719 Railway — Mine
Ward v Dudley (Countess) no 3699 ante

REFERENCE ADAPTOR

The following adaptor is provided for use where reference by number to cases in the title SETTLEMENTS in Reissue Volume 41 is made in other volumes of The Digest, or in publications issued before this 2nd Reissue Volume 41. The case numbers in Reissue Volume 41 are shown parallel to those in the present 2nd Reissue volume so that a case may be easily traced. In future publications the present 2nd Reissue volume will be distinguished from the Reissue volume by the insertion of "2nd Reissue" in brackets in the citation.

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1144	38	1204	98	1264	158	1324	218	1384	278	1444	338
1145	39	1205	99	1265	159	1325	219	1385	279	1445	339
1146	40	1206	100	1266	160	1326	220	1386	280	1446	340
1147	41	1207	101	1267	161	1327	221	1387	281	1447	341
1148	42	1208	102	1268	162	1328	222	1388	282	1448	342
1149	43	1209	103	1269	163	1329	223	1389	283	1449	343
1150	44	1210	104	1270	164	1330	224	1390	284	1450	344
1151	45	1211	105	1271	165	1331	225	1391	285	1451	345
1152	46	1212	106	1272	166	1332	226	1392	286	1452	346
1153	47	1213	107	1273	167	1333	227	1393	287	1453	347
1154	48	1214	108	1274	168	1334	228	1394	288	1454	348
1155	49	1215	109	1275	169	1335	229	1395	289	1455	349
1156	50	1216	110	1276	170	1336	230	1396	290	1456	350
1157	51	1217	111	1277	171	1337	231	1397	291	1457	351
1158	52	1218	112	1278	172	1338	232	1398	292	1458	352
1159	53	1219	113	1279	173	1339	233	1399	293	1459	353
1160	54	1220	114	1280	174	1340	234	1400	294	1460	354
1161	55	1221	115	1281	175	1341	235	1401	295	1461	355
1162	56	1222	116	1282	176	1342	236	1402	296	1462	356
1163	57	1223	117	1283	177	1343	237	1403	297	1463	357
1164	58	1224	118	1284	178	1344	238	1404	298	1464	358
1165	59	1225	119	1285	179	1345	239	1405	299	1465	359
1166	60	1226	120	1286	180	1346	240	1406	300	1466	360
1167	61	1227	121	1287	181	1347	241	1407	301	1467	361
1168	62	1228	122	1288	182	1348	242	1408	302	1468	362
1169	63	1229	123	1289	183	1349	243	1409	303	1469	363
1170	64	1230	124	1290	184	1350	244	1410	304	1470	364
1171	65	1231	125	1291	185	1351	245	1411	305	1471	365
1172	66	1232	126	1292	186	1352	246	1412	306	1472	366
1173	67	1233	127	1293	187	1353	247	1413	307	1473	367
1174	68	1234	128	1294	188	1354	248	1414	308	1474	368

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Reissue	2nd Reissue	Reissue	2nd Reissue	Reissue	2nd Reissue	Reissue	2nd Reissue	Reissue	2nd Reissue	Reissue	2nd Reissue
1475	369	1542	436	1609	651	1676	718	1743	785	1810	852
1476	370	1543	437	1610	652	1677	719	1744	786	1811	853
1477	371	1544	438	1611	653	1678	720	1745	787	1812	854
1478	372	1545	439	1612	654	1679	721	1746	788	1813	855
1479	373	1546	440	1613	655	1680	722	1747	789	1814	856
1480	374	1547	441	1614	656	1681	723	1748	790	1815	857
1481	375	1548	442	1615	657	1682	724	1749	791	1816	858
1482	376	1549	443	1616	658	1683	725	1750	792	1817	859
1483	377	1550	444	1617	659	1684	726	1751	793	1818	860
1484	378	1551	445	1618	660	1685	727	1752	794	1819	861
1485	379	1552	446	1619	661	1686	728	1753	795	1820	862
1486	380	1553	447	1620	662	1687	729	1754	796	1821	863
1487	381	1554	448	1621	663	1688	730	1755	797	1822	864
1488	382	1555	449	1622	664	1689	731	1756	798	1823	865
1489	383	1556	450	1623	665	1690	732	1757	799	1824	866
1490	384	1557	451	1624	666	1691	733	1758	800	1825	867
1491	385	1558	452	1625	667	1692	734	1759	801	1826	868
1492	386	1559	453	1626	668	1693	735	1760	802	1827	869
1493	387	1560	454	1627	669	1694	736	1761	803	1828	870
1494	388	1561	455	1628	670	1695	737	1762	804	1829	871
1495	389	1562	456	1629	671	1696	738	1763	805	1830	872
1496	390	1563	457	1630	672	1697	739	1764	806	1831	873
1497	391	1564	458	1631	673	1698	740	1765	807	1832	880
1498	392	1565	459	1632	674	1699	741	1766	808	1833	881
1499	393	1566	460	1633	675	1700	742	1767	809	1834	882
1500	394	1567	461	1634	676	1701	743	1768	810	1835	883
1501	395	1568	462	1635	677	1702	744	1769	811	1836	884
1502	396	1569	463	1636	678	1703	745	1770	812	1837	885
1503	397	1570	464	1637	679	1704	746	1771	813	1838	886
1504	398	1571	613	1638	680	1705	747	1772	814	1839	887
1505	399	1572	614	1639	681	1706	748	1773	815	1840	888
1506	400	1573	615	1640	682	1707	749	1774	816	1841	889
1507	401	1574	616	1641	683	1708	750	1775	817	1842	890
1508	402	1575	617	1642	684	1709	751	1776	818	1843	891
1509	403	1576	618	1643	685	1710	752	1777	819	1844	892
1510	404	1577	619	1644	686	1711	753	1778	820	1845	893
1511	405	1578	620	1645	687	1712	754	1779	821	1846	894
1512	406	1579	621	1646	688	1713	755	1780	822	1847	874
1513	407	1580	622	1647	689	1714	756	1781	823	1848	875
1514	408	1581	623	1648	690	1715	757	1782	824	1849	876
1515	409	1582	624	1649	691	1716	758	1783	825	1850	877
1516	410	1583	625	1650	692	1717	759	1784	826	1851	878
1517	411	1584	626	1651	693	1718	760	1785	827	1852	879
1518	412	1585	627	1652	694	1719	761	1786	828	1853	895
1519	413	1586	628	1653	695	1720	762	1787	829	1854	896
1520	414	1587	629	1654	696	1721	763	1788	830	1855	897
1521	415	1588	630	1655	697	1722	764	1789	831	1856	898
1522	416	1589	631	1656	698	1723	765	1790	832	1857	899
1523	417	1590	632	1657	699	1724	766	1791	833	1858	900
1524	418	1591	633	1658	700	1725	767	1792	834	1859	901
1525	419	1592	634	1659	701	1726	768	1793	835	1860	902
1526	420	1593	635	1660	702	1727	769	1794	836	1861	903
1527	421	1594	636	1661	703	1728	770	1795	837	1862	904
1528	422	1595	637	1662	704	1729	771	1796	838	1863	905
1529	423	1596	638	1663	705	1730	772	1797	839	1864	906
1530	424	1597	639	1664	706	1731	773	1798	840	1865	907
1531	425	1598	640	1665	707	1732	774	1799	841	1866	908
1532	426	1599	641	1666	708	1733	775	1800	842	1867	909
1533	427	1600	642	1667	709	1734	776	1801	843	1868	910
1534	428	1601	643	1668	710	1735	777	1802	844	1869	911
1535	429	1602	644	1669	711	1736	778	1803	845	1870	912
1536	430	1603	645	1670	712	1737	779	1804	846	1871	913
1537	431	1604	646	1671	713	1738	780	1805	847	1872	914
1538	432	1605	647	1672	714	1739	781	1806	848	1873	915
1539	433	1606	648	1673	715	1740	782	1807	849	1874	916
1540	434	1607	649	1674	716	1741	783	1808	850	1875	917
1541	435	1608	650	1675	717	1742	784	1809	851	1876	918

Reissue	2nd Reissue	Reissue	2nd Reissue	Reissue	2nd Reissue	Reissue	2nd Reissue	Reissue	2nd Reissue	Reissue	2nd Reissue
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1878	920	1945	987	2012	520	2079	587	2146	1041	2213	1998
1879	921	1946	988	2013	521	2080	588	2147	1042	2214	1999
1880	922	1947	989	2014	522	2081	589	2148	1043	2215	2000
1881	923	1948	990	2015	523	2082	590	2149	1044	2216	2001
1882	924	1949	991	2016	524	2083	591	2150	1045	2217	2002
1883	925	1950	992	2017	525	2084	592	2151	1046	2218	2003
1884	926	1951	993	2018	526	2085	593	2152	1047	2219	2004
1885	927	1952	994	2019	527	2086	594	2153	1048	2220	2005
1886	928	1953	995	2020	528	2087	595	2154	1049	2221	2006
1887	929	1954	996	2021	529	2088	596	2155	1050	2222	2007
1888	930	1955	997	2022	530	2089	597	2156	1051	2223	2008
1889	931	1956	998	2023	531	2090	598	2157	1052	2224	2009
1890	932	1957	465	2024	532	2091	599	2158	1053	2225	2010
1891	933	1958	466	2025	533	2092	600	2159	1054	2226	2011
1892	934	1959	467	2026	534	2093	601	2160	1055	2227	2012
1893	935	1960	468	2027	535	2094	602	2161	1056	2228	2013
1894	936	1961	469	2028	536	2095	603	2162	1057	2229	2014
1895	937	1962	470	2029	537	2096	604	2163	1058	2230	2015
1896	938	1963	471	2030	538	2097	605	2164	1059	2231	2016
1897	939	1964	472	2031	539	2098	606	2165	1060	2232	2017
1898	940	1965	473	2032	540	2099	607	2166	1061	2233	2018
1899	941	1966	474	2033	541	2100	608	2167	1062	2234	2019
1900	942	1967	475	2034	542	2101	609	2168	1063	2235	2020
1901	943	1968	476	2035	543	2102	610	2169	1064	2236	2021
1902	944	1969	477	2036	544	2103	611	2170	1065	2237	2022
1903	945	1970	478	2037	545	2104	612	2171	1066	2238	2023
1904	946	1971	479	2038	546	2105	1000	2172	1067	2239	2024
1905	947	1972	480	2039	547	2106	1001	2173	1068	2240	2025
1906	948	1973	481	2040	548	2107	1002	2174	1069	2241	2026
1907	949	1974	482	2041	549	2108	1003	2175	1070	2242	2027
1908	950	1975	483	2042	550	2109	1004	2176	1071	2243	2028
1909	951	1976	484	2043	551	2110	1005	2177	1072	2244	2029
1910	952	1977	485	2044	552	2111	1006	2178	1073	2245	2030
1911	953	1978	486	2045	553	2112	1007	2179	1074	2246	2031
1912	954	1979	487	2046	554	2113	1008	2180	1075	2247	2032
1913	955	1980	488	2047	555	2114	1009	2181	1076	2248	2033
1914	956	1981	489	2048	556	2115	1010	2182	1077	2249	2034
1915	957	1982	490	2049	557	2116	1011	2183	1078	2250	2035
1916	958	1983	491	2050	558	2117	1012	2184	1079	2251	2036
1917	959	1984	492	2051	559	2118	1013	2185	1080	2252	2037
1918	960	1985	493	2052	560	2119	1014	2186	1081	2253	2038
1919	961	1986	494	2053	561	2120	1015	2187	1082	2254	1086
1920	962	1987	495	2054	562	2121	1016	2188	1083	2255	1087
1921	963	1988	496	2055	563	2122	1017	2189	1084	2256	1088
1922	964	1989	497	2056	564	2123	1018	2190	1085	2257	1089
1923	965	1990	498	2057	565	2124	1019	2191	1973	2258	1090
1924	966	1991	499	2058	566	2125	1020	2192	1974	2259	1091
1925	967	1992	500	2059	567	2126	1021	2193	1975	2260	1092
1926	968	1993	501	2060	568	2127	1022	2194	1976	2261	1093
1927	969	1994	502	2061	569	2128	1023	2195	1977	2262	1094
1928	970	1995	503	2062	570	2129	1024	2196	1978	2263	1095
1929	971	1996	504	2063	571	2130	1025	2197	1979	2264	1096
1930	972	1997	505	2064	572	2131	1026	2198	1980	2265	1098
1931	973	1998	506	2065	573	2132	1027	2199	1981	2266	1099
1932	974	1999	507	2066	574	2133	1028	2200	1982	2267	1100
1933	975	2000	508	2067	575	2134	1029	2201	1983	2268	1101
1934	976	2001	509	2068	576	2135	1030	2202	1984	2269	1102
1935	977	2002	510	2069	577	2136	1031	2203	1985	2270	1103
1936	978	2003	511	2070	578	2137	1032	2204	1986	2271	1104
1937	979	2004	512	2071	579	2138	1033	2205	1987	2272	1105
1938	980	2005	513	2072	580	2139	1034	2206	1988	2273	1106
1939	981	2006	514	2073	581	2140	1035	2207	1989	2274	1107
1940	982	2007	515	2074	582	2141	1036	2208	1993	2275	1108
1941	983	2008	516	2075	583	2142	1037	2209	1994	2276	1109
1942	984	2009	517	2076	584	2143	1038	2210	1995	2277	1110
1943	985	2010	518	2077	585	2144	1039	2211	1996	2278	1111

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Reissue	2nd Reissue	Reissue	2nd Reissue	Reissue	2nd Reissue	Reissue	2nd Reissue	Reissue	2nd Reissue	Reissue	2nd Reissue
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2281	1114	2348	1181	2415	1248	2482	1315	2549	1382	2616	1449
2282	1115	2349	1182	2416	1249	2483	1316	2550	1383	2617	1450
2283	1116	2350	1183	2417	1250	2484	1317	2551	1384	2618	1451
2284	1117	2351	1184	2418	1251	2485	1318	2552	1385	2619	1452
2285	1118	2352	1185	2419	1252	2486	1319	2553	1386	2620	1453
2286	1119	2353	1186	2420	1253	2487	1320	2554	1387	2621	1454
2287	1120	2354	1187	2421	1254	2488	1321	2555	1388	2622	1455
2288	1121	2355	1188	2422	1255	2489	1322	2556	1389	2623	1456
2289	1122	2356	1189	2423	1256	2490	1323	2557	1390	2624	1457
2290	1123	2357	1190	2424	1257	2491	1324	2558	1391	2625	1458
2291	1124	2358	1191	2425	1258	2492	1325	2559	1392	2626	1459
2292	1125	2359	1192	2426	1259	2493	1326	2560	1393	2627	1460
2293	1126	2360	1193	2427	1260	2494	1327	2561	1394	2628	1461
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2295	1128	2362	1195	2429	1262	2496	1329	2563	1396	2630	1463
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Reissue	2nd Reissue	Reissue	2nd Reissue	Reissue	2nd Reissue	Reissue	2nd Reissue	Reissue	2nd Reissue	Reissue	2nd Reissue
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2684	1517	2751	1584	2818	1651	2885	1718	2952	1785	3019	1853
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2732	1565	2799	1632	2866	1699	2933	1766	3000	1834	3067	1901
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2742	1575	2809	1642	2876	1709	2943	1776	3010	1844	3077	1911
2743	1576	2810	1643	2877	1710	2944	1777	3011	1845	3078	1912
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2745	1578	2812	1645	2879	1712	2946	1779	3013	1847	3080	1914
2746	1579	2813	1646	2880	1713	2947	1780	3014	1848	3081	1915
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References are to case numbers

Reissue	2nd Reissue	Reissue	2nd Reissue	Reissue	2nd Reissue	Reissue	2nd Reissue	Reissue	2nd Reissue	Reissue	2nd Reissue
3083	1917	3150	2047	3217	2115	3284	2182	3351	2249	3418	2316
3084	1918	3151	2048	3218	2116	3285	2183	3352	2250	3419	2317
3085	1919	3152	2049	3219	2117	3286	2184	3353	2251	3420	2318
3086	1920	3153	2050	3220	2118	3287	2185	3354	2252	3421	2319
3087	1921	3154	2051	3221	2119	3288	2186	3355	2253	3422	2320
3088	1922	3155	2052	3222	2120	3289	2187	3356	2254	3423	2321
3089	1923	3156	2053	3223	2121	3290	2188	3357	2255	3424	2322
3090	1924	3157	2054	3224	2122	3291	2189	3358	2256	3425	2323
3091	1925	3158	2055	3225	2123	3292	2190	3359	2257	3426	2324
3092	1926	3159	2056	3226	2124	3293	2191	3360	2258	3427	2325
3093	1927	3160	2057	3227	2125	3294	2192	3361	2259	3428	2326
3094	1928	3161	2058	3228	2126	3295	2193	3362	2260	3429	2327
3095	1929	3162	2059	3229	2127	3296	2194	3363	2261	3430	2328
3096	1930	3163	2060	3230	2128	3297	2195	3364	2262	3431	2329
3097	1931	3164	2061	3231	2129	3298	2196	3365	2263	3432	2330
3098	1932	3165	2062	3232	2130	3299	2197	3366	2264	3433	2331
3099	1933	3166	2064	3233	2131	3300	2198	3367	2265	3434	2332
3100	1934	3167	2065	3234	2132	3301	2199	3368	2266	3435	2333
3101	1935	3168	2066	3235	2133	3302	2200	3369	2267	3436	2334
3102	1936	3169	2067	3236	2134	3303	2201	3370	2268	3437	2335
3103	1937	3170	2068	3237	2135	3304	2202	3371	2269	3438	2336
3104	1938	3171	2069	3238	2136	3305	2203	3372	2270	3439	2337
3105	1939	3172	2070	3239	2137	3306	2204	3373	2271	3440	2338
3106	1940	3173	2071	3240	2138	3307	2205	3374	2272	3441	2339
3107	1941	3174	2072	3241	2139	3308	2206	3375	2273	3442	2340
3108	1942	3175	2073	3242	2140	3309	2207	3376	2274	3443	2341
3109	1943	3176	2074	3243	2141	3310	2208	3377	2275	3444	2342
3110	1944	3177	2075	3244	2142	3311	2209	3378	2276	3445	2343
3111	1945	3178	2076	3245	2143	3312	2210	3379	2277	3446	2344
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3114	1948	3181	2079	3248	2146	3315	2213	3382	2280	3449	2347
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3116	1950	3183	2081	3250	2148	3317	2215	3384	2282	3451	2349
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3118	1952	3185	2083	3252	2150	3319	2217	3386	2284	3453	2351
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3120	1954	3187	2085	3254	2152	3321	2219	3388	2286	3455	2353
3121	1955	3188	2086	3255	2153	3322	2220	3389	2287	3456	2354
3122	1956	3189	2087	3256	2154	3323	2221	3390	2288	3457	2355
3123	1957	3190	2088	3257	2155	3324	2222	3391	2289	3458	2356
3124	1958	3191	2089	3258	2156	3325	2223	3392	2290	3459	2357
3125	1959	3192	2090	3259	2157	3326	2224	3393	2291	3460	2358
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3128	1962	3195	2093	3262	2160	3329	2227	3396	2294	3463	2361
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3130	1964	3197	2095	3264	2162	3331	2229	3398	2296	3465	2363
3131	1965	3198	2096	3265	2163	3332	2230	3399	2297	3466	2364
3132	1966	3199	2097	3266	2164	3333	2231	3400	2298	3467	2365
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3134	1968	3201	2099	3268	2166	3335	2233	3402	2300	3469	2367
3135	1969	3202	2100	3269	2167	3336	2234	3403	2301	3470	2368
3136	1970	3203	2101	3270	2168	3337	2235	3404	2302	3471	2369
3137	1971	3204	2102	3271	2169	3338	2236	3405	2303	3472	2370
3138	1972	3205	2103	3272	2170	3339	2237	3406	2304	3473	2371
3139	1990	3206	2104	3273	2171	3340	2238	3407	2305	3474	2372
3140	1991	3207	2105	3274	2172	3341	2239	3408	2306	3475	2373
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3142	2039	3209	2107	3276	2174	3343	2241	3410	2308	3477	2375
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Reissue	2nd Reissue	Reissue	2nd Reissue	Reissue	2nd Reissue	Reissue	2nd Reissue	Reissue	2nd Reissue	Reissue	2nd Reissue
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Reissue	2nd Reissue	Reissue	2nd Reissue	Reissue	2nd Reissue	Reissue	2nd Reissue	Reissue	2nd Reissue	Reissue	2nd Reissue
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3898	2796	3965	2865	4032	2932	4099	2999	4166	3066	4233	3133
3899	2797	3966	2866	4033	2933	4100	3000	4167	3067	4234	3134
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3901	2799	3968	2868	4035	2935	4102	3002	4169	3069	4236	3136
3902	2800	3969	2869	4036	2936	4103	3003	4170	3070	4237	3137
3903	2802	3970	2870	4037	2937	4104	3004	4171	3071	4238	3138
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3905	2805	3972	2872	4039	2939	4106	3006	4173	3073	4240	3140
3906	2806	3973	2873	4040	2940	4107	3007	4174	3074	4241	3141
3907	2807	3974	2874	4041	2941	4108	3008	4175	3075	4242	3142
3908	2808	3975	2875	4042	2942	4109	3009	4176	3076	4243	3143
3909	2809	3976	2876	4043	2943	4110	3010	4177	3077	4244	3144
3910	2810	3977	2877	4044	2944	4111	3011	4178	3078	4245	3145
3911	2811	3978	2878	4045	2945	4112	3012	4179	3079	4246	3146
3912	2812	3979	2879	4046	2946	4113	3013	4180	3080	4247	3147
3913	2813	3980	2880	4047	2947	4114	3014	4181	3081	4248	3148
3914	2814	3981	2881	4048	2948	4115	3015	4182	3082	4249	3149
3915	2815	3982	2882	4049	2949	4116	3016	4183	3083	4250	3150
3916	2816	3983	2883	4050	2950	4117	3017	4184	3084	4251	3151
3917	2817	3984	2884	4051	2951	4118	3018	4185	3085	4252	3152
3918	2818	3985	2885	4052	2952	4119	3019	4186	3086	4253	3153
3919	2819	3986	2886	4053	2953	4120	3020	4187	3087	4254	3154
3920	2820	3987	2887	4054	2954	4121	3021	4188	3088	4255	3155
3921	2821	3988	2888	4055	2955	4122	3022	4189	3089	4256	3156
3922	2822	3989	2889	4056	2956	4123	3023	4190	3090	4257	3157
3923	2823	3990	2890	4057	2957	4124	3024	4191	3091	4258	3158
3924	2824	3991	2891	4058	2958	4125	3025	4192	3092	4259	3159
3925	2825	3992	2892	4059	2959	4126	3026	4193	3093	4260	3160
3926	2826	3993	2893	4060	2960	4127	3027	4194	3094	4261	3161
3927	2827	3994	2894	4061	2961	4128	3028	4195	3095	4262	3162
3928	2828	3995	2895	4062	2962	4129	3029	4196	3096	4263	3163
3929	2829	3996	2896	4063	2963	4130	3030	4197	3097	4264	3164
3930	2830	3997	2897	4064	2964	4131	3031	4198	3098	4265	3165
3931	2831	3998	2898	4065	2965	4132	3032	4199	3099	4266	3166
3932	2832	3999	2899	4066	2966	4133	3033	4200	3100	4267	3167
3933	2833	4000	2900	4067	2967	4134	3034	4201	3101	4268	3168
3934	2834	4001	2901	4068	2968	4135	3035	4202	3102	4269	3169
3935	2835	4002	2902	4069	2969	4136	3036	4203	3103	4270	3170
3936	2836	4003	2903	4070	2970	4137	3037	4204	3104	4271	3171
3937	2837	4004	2904	4071	2971	4138	3038	4205	3105	4272	3172
3938	2838	4005	2905	4072	2972	4139	3039	4206	3106	4273	3173
3939	2839	4006	2906	4073	2973	4140	3040	4207	3107	4274	3174
3940	2840	4007	2907	4074	2974	4141	3041	4208	3108	4275	3175
3941	2841	4008	2908	4075	2975	4142	3042	4209	3109	4276	3176
3942	2842	4009	2909	4076	2976	4143	3043	4210	3110	4277	3177
3943	2843	4010	2910	4077	2977	4144	3044	4211	3111	4278	3178
3944	2844	4011	2911	4078	2978	4145	3045	4212	3112	4279	3179
3945	2845	4012	2912	4079	2979	4146	3046	4213	3113	4280	3180
3946	2846	4013	2913	4080	2980	4147	3047	4214	3114	4281	3181
3947	2847	4014	2914	4081	2981	4148	3048	4215	3115	4282	3182
3948	2848	4015	2915	4082	2982	4149	3049	4216	3116	4283	3183
3949	2849	4016	2916	4083	2983	4150	3050	4217	3117	4284	3184
3950	2850	4017	2917	4084	2984	4151	3051	4218	3118	4285	3185
3951	2851	4018	2918	4085	2985	4152	3052	4219	3119	4286	3186
3952	2852	4019	2919	4086	2986	4153	3053	4220	3120	4287	3187
3953	2853	4020	2920	4087	2987	4154	3054	4221	3121	4288	3188

Reissue	2nd Reissue	Reissue	2nd Reissue	Reissue	2nd Reissue	Reissue	2nd Reissue	Reissue	2nd Reissue	Reissue	2nd Reissue
4289	3189	4356	3256	4423	3323	4490	3390	4557	3457	4624	3524
4290	3190	4357	3257	4424	3324	4491	3391	4558	3458	4625	3525
4291	3191	4358	3258	4425	3325	4492	3392	4559	3459	4626	3526
4292	3192	4359	3259	4426	3326	4493	3393	4560	3460	4627	3527
4293	3193	4360	3260	4427	3327	4494	3394	4561	3461	4628	3528
4294	3194	4361	3261	4428	3328	4495	3395	4562	3462	4629	3529
4295	3195	4362	3262	4429	3329	4496	3396	4563	3463	4630	3530
4296	3196	4363	3263	4430	3330	4497	3397	4564	3464	4631	3531
4297	3197	4364	3264	4431	3331	4498	3398	4565	3465	4632	3532
4298	3198	4365	3265	4432	3332	4499	3399	4566	3466	4633	3533
4299	3199	4366	3266	4433	3333	4500	3400	4567	3467	4634	3534
4300	3200	4367	3267	4434	3334	4501	3401	4568	3468	4635	3535
4301	3201	4368	3268	4435	3335	4502	3402	4569	3469	4636	3536
4302	3202	4369	3269	4436	3336	4503	3403	4570	3470	4637	3537
4303	3203	4370	3270	4437	3337	4504	3404	4571	3471	4638	3538
4304	3204	4371	3271	4438	3338	4505	3405	4572	3472	4639	3539
4305	3205	4372	3272	4439	3339	4506	3406	4573	3473	4640	3540
4306	3206	4373	3273	4440	3340	4507	3407	4574	3474	4641	3541
4307	3207	4374	3274	4441	3341	4508	3408	4575	3475	4642	3542
4308	3208	4375	3275	4442	3342	4509	3409	4576	3476	4643	3543
4309	3209	4376	3276	4443	3343	4510	3410	4577	3477	4644	3544
4310	3210	4377	3277	4444	3344	4511	3411	4578	3478	4645	3545
4311	3211	4378	3278	4445	3345	4512	3412	4579	3479	4646	3546
4312	3212	4379	3279	4446	3346	4513	3413	4580	3480	4647	3547
4313	3213	4380	3280	4447	3347	4514	3414	4581	3481	4648	3548
4314	3214	4381	3281	4448	3348	4515	3415	4582	3482	4649	3549
4315	3215	4382	3282	4449	3349	4516	3416	4583	3483	4650	3550
4316	3216	4383	3283	4450	3350	4517	3417	4584	3484	4651	3551
4317	3217	4384	3284	4451	3351	4518	3418	4585	3485	4652	3552
4318	3218	4385	3285	4452	3352	4519	3419	4586	3486	4653	3553
4319	3219	4386	3286	4453	3353	4520	3420	4587	3487	4654	3554
4320	3220	4387	3287	4454	3354	4521	3421	4588	3488	4655	3555
4321	3221	4388	3288	4455	3355	4522	3422	4589	3489	4656	3556
4322	3222	4389	3289	4456	3356	4523	3423	4590	3490	4657	3557
4323	3223	4390	3290	4457	3357	4524	3424	4591	3491	4658	3558
4324	3224	4391	3291	4458	3358	4525	3425	4592	3492	4659	3559
4325	3225	4392	3292	4459	3359	4526	3426	4593	3493	4660	3560
4326	3226	4393	3293	4460	3360	4527	3427	4594	3494	4661	3561
4327	3227	4394	3294	4461	3361	4528	3428	4595	3495	4662	3562
4328	3228	4395	3295	4462	3362	4529	3429	4596	3496	4663	3563
4329	3229	4396	3296	4463	3363	4530	3430	4597	3497	4664	3564
4330	3230	4397	3297	4464	3364	4531	3431	4598	3498	4665	3565
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4332	3232	4399	3299	4466	3366	4533	3433	4600	3500	4667	3567
4333	3233	4400	3300	4467	3367	4534	3434	4601	3501	4668	3568
4334	3234	4401	3301	4468	3368	4535	3435	4602	3502	4669	3569
4335	3235	4402	3302	4469	3369	4536	3436	4603	3503	4670	3570
4336	3236	4403	3303	4470	3370	4537	3437	4604	3504	4671	3571
4337	3237	4404	3304	4471	3371	4538	3438	4605	3505	4672	3572
4338	3238	4405	3305	4472	3372	4539	3439	4606	3506	4673	3573
4339	3239	4406	3306	4473	3373	4540	3440	4607	3507	4674	3574
4340	3240	4407	3307	4474	3374	4541	3441	4608	3508	4675	3575
4341	3241	4408	3308	4475	3375	4542	3442	4609	3509	4676	3576
4342	3242	4409	3309	4476	3376	4543	3443	4610	3510	4677	3577
4343	3243	4410	3310	4477	3377	4544	3444	4611	3511	4678	3578
4344	3244	4411	3311	4478	3378	4545	3445	4612	3512	4679	3579
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4346	3246	4413	3313	4480	3380	4547	3447	4614	3514	4681	3581
4347	3247	4414	3314	4481	3381	4548	3448	4615	3515	4682	3582
4348	3248	4415	3315	4482	3382	4549	3449	4616	3516	4683	3583
4349	3249	4416	3316	4483	3383	4550	3450	4617	3517	4684	3584
4350	3250	4417	3317	4484	3384	4551	3451	4618	3518	4685	3585
4351	3251	4418	3318	4485	3385	4552	3452	4619	3519	4686	3586
4352	3252	4419	3319	4486	3386	4553	3453	4620	3520	4687	3587
4353	3253	4420	3320	4487	3387	4554	3454	4621	3521	4688	3588
4354	3254	4421	3321	4488	3388	4555	3455	4622	3522	4689	3589
4355	3255	4422	3322	4489	3389	4556	3456	4623	3523	4690	3590

References are to case numbers

Reissue	2nd Reissue	Reissue	2nd Reissue	Reissue	2nd Reissue	Reissue	2nd Reissue	Reissue	2nd Reissue	Reissue	2nd Reissue
4691	3591	4713	3613	4735	3635	4757	3657	4779	3679	4801	3701
4692	3592	4714	3614	4736	3636	4758	3658	4780	3680	4802	3702
4693	3593	4715	3615	4737	3637	4759	3659	4781	3681	4803	3703
4694	3594	4716	3616	4738	3638	4760	3660	4782	3682	4804	3704
4695	3595	4717	3617	4739	3639	4761	3661	4783	3683	4805	3705
4696	3596	4718	3618	4740	3640	4762	3662	4784	3684	4806	3706
4697	3597	4719	3619	4741	3641	4763	3663	4785	3685	4807	3707
4698	3598	4720	3620	4742	3642	4764	3664	4786	3686	4808	3708
4699	3599	4721	3621	4743	3643	4765	3665	4787	3687	4809	3709
4700	3600	4722	3622	4744	3644	4766	3666	4788	3688	4810	3710
4701	3601	4723	3623	4745	3645	4767	3667	4789	3689	4811	3719
4702	3602	4724	3624	4746	3646	4768	3668	4790	3690	4812	3711
4703	3603	4725	3625	4747	3647	4769	3669	4791	3691	4813	3712
4704	3604	4726	3626	4748	3648	4770	3670	4792	3692	4814	3713
4705	3605	4727	3627	4749	3649	4771	3671	4793	3693	4815	3714
4706	3606	4728	3628	4750	3650	4772	3672	4794	3694	4816	3715
4707	3607	4729	3629	4751	3651	4773	3673	4795	3695	4817	3716
4708	3608	4730	3630	4752	3652	4774	3674	4796	3696	4818	3717
4709	3609	4731	3631	4753	3653	4775	3675	4797	3697	4819	3718
4710	3610	4732	3632	4754	3654	4776	3676	4798	3698		
4711	3611	4733	3633	4755	3655	4777	3677	4799	3699		
4712	3612	4734	3634	4756	3656	4778	3678	4800	3700		